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The Color of Police Action in these United States

Case Study

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This case is designed to familiarize students with a major, ongoing controversy in the United States: the killing of unarmed, black men at the hands of law enforcement across the country. Thematically, the case has two parts:

The first part offers an account of the deaths of two African Americans, Michael Brown and Eric Garner, at the hands of police officers in Ferguson, Missouri, and Staten Island, New York, respectively. It studies the decisions reached by the Grand Jury, in each case, with respect to whether or not the officers involved in the killings should be indicted on criminal charges. It also describes the nationwide protest movement which emerged in response to these events, bringing with it a murky legacy of promise, ambiguity, and violence.

The second part presents a pair of overarching and often ideologically tinged interpretations of these events, both of which have found significant purchase in the public imagination.

A Lethal Afternoon in Ferguson

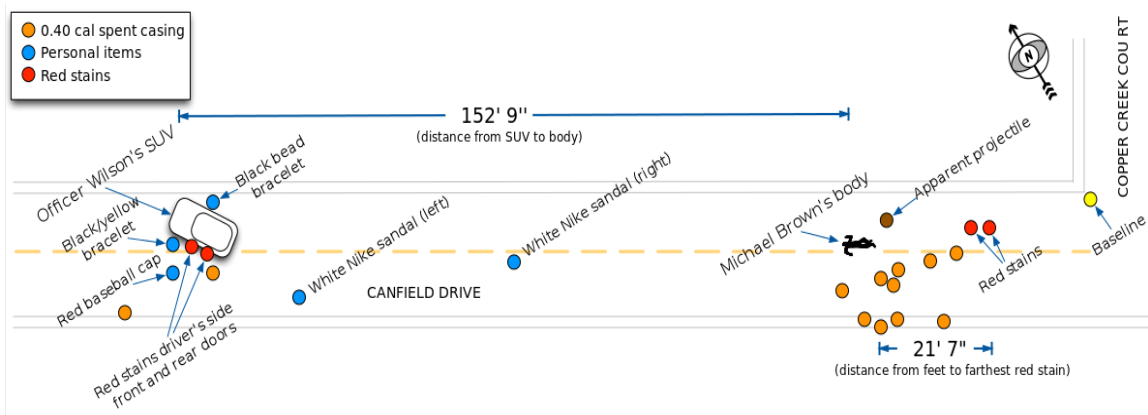
Minutes before noon on August 9, 2014, Officer Darren Wilson was on patrol in his vehicle, when he received a dispatch, radio transmission of a robbery in progress at a nearby convenience store. Soon after, he encountered Michael Brown and a friend walking down the middle of the street and asked them to use the sidewalk instead. Based on the description of the robbers conveyed over radio Wilson suspected that Brown and his friend may have been involved in the crime. He called for assistance and, pulling up ahead of them, blocked the street with his car (as shown on the left side of the diagram below). From this point on, the narrative skews in various directions based on conflicting witness testimony, lack of corroborating evidence, and conflicts between witness testimony and forensic analysis of the scene. The official narrative now established by the Department of Justice (DOJ) Report on the incident (hereafter “Brown DOJ Report”),¹ reconciles these conflicting narratives by favoring the results of forensic analysis and parsing through the witness testimony to find details that fit this scientific evidence.² While the DOJ report ignited

¹ Given the many diverging accounts surrounding the incident, this case will rely on the (now generally accepted) United States Department of Justice Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson (March 4, 2015), hereinafter “Brown DOJ Report.” For a summary of the US DOJ’s findings and conclusions, see Appendix I. The full report is available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

² This methodology is recounted throughout the Brown DOJ Report in explaining the investigators decision to prefer one narrative over another. See, e.g., Brown DOJ Report at 5-8, noting that despite the absence of reliable witness testimony describing the altercation inside Wilson’s car, the bruises on Wilson’s face, the nature of the wound on Brown’s hand including embedded gunpowder residue, bullet trajectory analysis, Brown’s DNA on Wilson’s collar, and the spent bullet shell-casing being found inside Wilson’s car, all corroborate Wilson’s account of the altercation.

emotional furor for its exoneration of Wilson, its evidentiary basis has, for the most part, been uncontroversial.³

According to the Brown DOJ Report, Wilson attempted to exit the vehicle, but his car door collided with Brown, who then proceeded to reach into the vehicle through the open window and assault Wilson including punching him in the face. Unable to access any other nonlethal weapons, Wilson pulled his primary weapon, the gun holstered at his waist, and struggled with Brown to gain control over it. During this altercation, Wilson fired the gun twice from inside the vehicle, and hit Brown in the hand at close range. Injured, Brown fled the scene, heading southeast down Canfield Drive. Autopsy results, finding no entry wounds in Brown's back, have discounted the popular narrative that Wilson shot Brown in the back as he ran.¹ Brown is reported to have run some 180 feet from the police vehicle, dropping his sandals, cap, and bracelets along the way. He then stopped and turned to advance aggressively back toward Wilson. Wilson, who had followed behind Brown, fired his gun ten times in three interrupted volleys. Wilson testified that he was fearful that Brown was reaching into his waistband to withdraw a gun. He struck Brown between six and eight times including the initial wound to the hand. One of these bullets hit Brown in the head causing him to collapse some 21.6 feet away from the point at which he turned back in direction of Officer Wilson. Eyewitness testimony corroborates that Wilson had cause to fear for his safety, and crime scene photographs taken soon after the encounter show that Brown collapsed facing Wilson's vehicle, with his left, uninjured hand, by his waistband. Witnesses and cell phone videos of the aftermath establish that Wilson did attempt to move or otherwise interfere with Brown's body following the shooting. The encounter lasted all of two minutes.



Michael Brown shooting scene, based on St. Louis County Police exhibits and other sources²

³ This case has been scrutinized by both liberal and conservative commentators in the United States. For a rough survey, see E. Eckholm, M. Apuzzo, "Darren Wilson Is Cleared Of Rights Violations in Ferguson Shooting," *NY Times*, March 4, 2015, accessed July 8, 2015, <http://www.nytimes.com/2015/03/05/us/darren-wilson-is-cleared-of-rights-violations-in-ferguson-shooting.html>; C. Friedersdorf, "Conservatives Should Start to Take the Ferguson DOJ Report Seriously," *Atlantic*, March 16, 2015, accessed July 8, 2015, <http://www.theatlantic.com/politics/archive/2015/03/conservatives-start-to-take-the-ferguson-report-seriously/387835/>. The non-legal, non-official fallout from the shooting is addressed later in the case.

Following an intense investigation of the shooting, the prosecutor for St. Louis County, Missouri, convened a grand jury that roughly represented the racial demographics of St. Louis County.³ In such proceedings the prosecutor usually presents evidence (as necessary for the jurors to understand the facts leading up to the alleged crime), and then recommends an indictment. In this case, however, the grand jury was supplied with an extensive variety of evidence, including, three different autopsy reports, thousands of pages of witness accounts, an expansive array of physical evidence, and the live testimony of witnesses deemed to offer credible knowledge regarding the shooting.⁴ In November 2014, the grand jury voted not to indict Darren Wilson for the shooting. The DOJ conducted its own investigation, but concluded that there was not sufficient evidence to pursue a federal criminal case against Wilson.⁴

The Fallout

The shooting ignited large-scale public outcry in the city of Ferguson, whose population of 67% African Americans is governed by a police department where 50 of 53 acting officers (including the Chief of Police) are Caucasian.⁵ The core of the upheaval was a sense that the police consciously and overwhelmingly targeted African-American residents with surveillance, profiling, discrimination, harassment, and unnecessary force.

Protests in Ferguson started the day after Brown's death, beginning with a prayer vigil and quickly escalating into looting and property damage. But as police attempted to restore order, public demonstrations quickly turned violent. In the days and weeks following the shooting of Brown and again after the St. Louis grand jury's refusal to indict Darren Wilson, the county of St. Louis deployed its SWAT (Special Weapons and Tactics) team which patrolled the streets in army fatigues, body armor, and gas masks, carrying riot gear and assault rifles and even driving armored trucks. The heightened tension morphed a moment of anger and constitutional protest into a zone of high conflict with the police deploying tear gas, rubber bullets, and acoustic weapons designed to inflict intense aural pain on protestors from a distance.⁶ The unexpected scale and intensity of militarized peacekeeping in an American city during peacetime inspired nationwide uproar and prompted Attorney General Eric Holder to issue a statement condemning the police tactics:

At a time when we must seek to rebuild trust between law enforcement and the local community, I am deeply concerned that the deployment of military equipment and vehicles sends a conflicting message...The law enforcement response to these demonstrations must seek to reduce tensions, not heighten them.⁷

In an interview with *USA Today* Senator Claire McCaskill voiced the concerns of many watching the events unfold in Ferguson, noting that the militarized police response to public protests was a big “part of the problem as opposed to being part of the solution.”⁸

⁴ For a summary of the DOJ reasoning, see Appendix I.

For their part, police officials insisted that their actions began with restraint and focused on dispersing people with verbal warnings and nonlethal physical contact until the crowds grew unruly and officers had to adapt to continue protecting people and property without endangering themselves. National Police Union official Chuck Canterbury defended the police department's response noting that the so-called militarization was a "perception" and not reality. Challenging popular assertions that in the wake of 9/11 the goals, protocols, and equipment of local law enforcement had expanded to include a homeland security mandate (dedicated to large-scale threats of terrorism), Canterbury distinguished between military and police action, explaining: "The military is trained to engage and law enforcement is trained to defuse."⁹ However, this bright-line distinction was dulled by the revelation that the Ferguson Police Department was a part of the US Department of Defense's 1033 program designed to supply community police departments with surplus military-grade weapons, armored vehicles (MRAPS) and equipment; from August 2010 to February 2013, law enforcement agencies in St. Louis County, including the Ferguson Police Department, received 125 56mm rifles, and six .45 caliber pistols.¹⁰

In the specific context of the protests in Ferguson following Brown's death, a number of veterans and serving military officials observing the scene have interpreted the police action as coercive and heavy-handed, noting, in one instance:

You see the police are standing online with bulletproof vests and rifles pointed at people's chests...that's not controlling the crowd, that's intimidating them.¹¹

Others have described the tactics as reflecting poor leadership and social awareness:

The first thing that went wrong was when the police showed up with K-9 units...The dogs played on racist imagery...it played the situation up and [the department] wasn't cognizant of the imagery.¹²

Against this backdrop of escalating racial tensions on the streets of Ferguson, the St. Louis grand jury, upon weighing the evidence, voted against indicting Wilson for the shooting of Michael Brown.

The St. Louis prosecutor, Robert McCulloch, has been criticized for using the grand jury system to shield his office's unwillingness to prosecute Wilson. Critics have pointed out that McCulloch could have cited the lack of evidence to explain his refusal to indict Wilson. In the alternative, he could have recommended that the grand jury indict Wilson, a recommendation, usually bolstered by the presentation of carefully selected evidence and testimony, that is generally followed by grand juries;¹³ in fact, prosecutors hold such power over grand jury findings that a former judge of the New York Court of Appeals is believed to have quipped that a prosecutor could get the grand jury to "indict a ham sandwich" if necessary.¹⁴ To the contrary, in the case of Darren Wilson, the prosecutor not only turned the case over to the grand jury but also opted to supply them with every bit of evidence related

to the case, thereby giving the impression that neutral, average citizens were making the decision without governmental interference. However, the office of the prosecutor still remained in charge of the entire grand jury deliberation process, including establishing the standard of proof necessary to indict, and ultimately justifying the jury's decision to the media by selectively showcasing materials that would support the decision not to indict.

For supporters of Michael Brown's cause, the structure and process of grand jury determinations—usually occurring behind closed doors, and entirely devoid of any adversarial mechanism to question the prosecutor's opinions and emphasis or lack thereof—made it an inappropriate forum for conducting a mini trial on the truth of the shooting.¹⁵ Critics have also interpreted the prosecutor's unusual decision to submit all relevant materials to the grand jury instead of advocating for an indictment (as is usually the norm), as evidence of process rigged in favor of the police. One commentator captures the resulting imbalance in writing: "Buried underneath every scrap of evidence McCulloch could find, the grand jury threw up its hands and said that a crime could not be proved." Commentators have also noted that prosecutors handled Darren Wilson's testimony, early into the grand jury process, with soft hands and few challenging questions. This treatment stood in sharp contrast to the intensity with which prosecutors questioned eye witnesses who contradicted Officer Wilson's account.¹⁶ Members of the Brown family's legal team publicly criticized the grand jury evaluation process, summarizing the public's outrage:

This grand jury decision we feel is a direct reflection of the sentiments of those who presented the evidence... If you present evidence to indict, you get an indictment. If you present evidence not to indict, you don't get an indictment.¹⁷

[Video: Looting in Ferguson following the Grand Jury's decision](#)

[Video: Civilian/police clashes in Ferguson following the Grand Jury's decision](#)

The Ambiguous Legacy of "Hands Up, Don't Shoot"

Following the grand jury's decision not to indict Darren Wilson, protests chiding police brutality against young African Americans grew even more violent within Ferguson¹⁸ and sparked a nationwide protest movement that found its tempo around "Hands Up, Don't Shoot," a phrase derived from rumors that, moments before his death, Michael Brown was approaching Wilson with his hands raised in surrender, appealing to the policeman to hold his fire. The phrase quickly went viral over social media and was prominently featured at legislatures, universities, and entertainment and sporting events as students, athletes, celebrities, and citizens nationwide organized protests and shared images of people holding their hands up in surrender.⁵

⁵ For an elaboration of the spread of this movement, see MYH Lee, "'Hands up, don't shoot' did not happen in Ferguson," *Washington Post*, March 19 2015, accessed July 8, 2015,



“Hands Up, Don’t Shoot” in Congress

Source: L. Larson, “Four Members of Congress do ‘Hands Up’ gesture on House floor,” *New York Daily News*, December 2, 2014, accessed July 8, 2015, <http://www.nydailynews.com/news/politics/member-s-congress-hands-gesture-house-floor-article-1.2030010>.

In early March 2015, however, the United States Department of Justice (DOJ) released its report on the shooting of Michael Brown, effectively exonerating Darren Wilson of any impropriety. The report explained that of the individuals who had initially claimed to witness Brown holding his hands up in surrender, several offered testimonials that failed to match the narrative established by the forensic evidence. Other accounts changed over time, while still others recanted their claims altogether, admitting they had not actually witnessed the shooting.¹⁹ By contrast, the DOJ investigation found that “multiple credible witnesses corroborate virtually every material aspect of Wilson’s account and are consistent with the physical evidence.”²⁰ Most pointedly, the report noted:

The media has widely reported that there is witness testimony that Brown said “don’t shoot” as he held his hands above his head. In fact, our investigation did not reveal any eyewitness who stated that Brown said “don’t shoot.”²¹

This has led former proponents of the “Hands Up, Don’t Shoot” movement, including noted Washington Post Columnist, Johnathan Capehart (himself an African American), to face the difficult truths that: “Brown never surrendered with his hands up, and Wilson was justified in shooting Brown.”²² But whereas Capehart and others continued to support the larger cause despite their disappointment that it was built on the back of rumor,²³ observers less sympathetic to Brown’s case have marshaled the DOJ report’s revelations to criticize the wider claim that police unfairly and disproportionately target black American men.²⁴ In response, supporters of the movement have reasoned that the DOJ’s challenge to the “Hands Up” narrative is irrelevant to the larger political movement, for while the facts in the Brown-Wilson instance may not be representative, there is no dearth of evidence that young,

<http://www.washingtonpost.com/blogs/fact-checker/wp/2015/03/19/hands-up-dont-shoot-did-not-happen-in-ferguson/>.

unarmed black men are regularly subjected to violent police action often with little or no cause.²⁵

[Video: Police shootings of unarmed black men across America](#)
[\(Please note that the media on this link may be disturbing to some viewers\)](#)

And even if the DOJ's findings on Brown show him to be, after Capehart, an "inappropriate symbol" for the ongoing critique of police practices in the context of racial tension, the DOJ's other report, scrutinizing the structure and workings of the Ferguson Police Department, tells a (102-page) long and damning story.

Things are Not Alright in Ferguson, and Beyond

On March 4, 2015, the same day it released the report exonerating Darren Wilson, the DOJ also released its report on the Ferguson Police Department, following an investigation "under the pattern-or-practice provision of the Violent Crime Control and Law Enforcement Act of 1994... the Omnibus Crime Control and Safe Streets Act of 1968... and Title VI of the Civil Rights Act of 1964."²⁶ The investigation "revealed a pattern or practice of unlawful conduct within the Ferguson Police Department that violates the First, Fourth, and Fourteenth Amendments to the United States Constitution, and federal statutory law."²⁷

More specifically, the report concluded that:

Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson's police department, contributing to a pattern of unconstitutional policing, and has also shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community. Further, Ferguson's police and municipal court practices both reflect and exacerbate existing racial bias, including racial stereotypes. Ferguson's own data establish clear racial disparities that adversely impact African Americans. The evidence shows that discriminatory intent is part of the reason for these disparities. Over time, Ferguson's police and municipal court practices have sown deep mistrust between parts of the community and the police department, undermining law enforcement legitimacy among African Americans in particular.²⁸

To this extent, the report not only accuses the Ferguson Police Department of malicious motivations and institutional corruption, but also offers a narrative to explain the rage that erupted on the streets of the city following the shooting of Brown and subsequent grand jury decision to exonerate Wilson. In Attorney General Eric Holder's words:

Seen in this context — amid a highly toxic environment, defined by mistrust and resentment, stoked by years of bad feelings, and spurred by illegal and

misguided practices — it is not difficult to imagine how a single tragic incident set off the city of Ferguson like a powder keg.²⁹

With respect to racial bias the report noted:

Ferguson’s approach to law enforcement both reflects and reinforces racial bias, including stereotyping. The harms of Ferguson’s police and court practices are borne disproportionately by African Americans, and there is evidence that this is due in part to intentional discrimination on the basis of race....

In a revealing snapshot of the culture animating the legal and administrative infrastructure of Ferguson, the investigation found that:³⁰

- From 2012 to 2014, African Americans in Ferguson accounted for
 - 85% of vehicle stops;
 - 90% of citations; and
 - 93% of arrests
- In this small working class city, African Americans “are more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race based variables such as the reason the vehicle stop was initiated, but are found in possession of contraband 26% less often than white drivers...”
- African Americans are also “more likely to be cited and arrested following a stop regardless of why the stop was initiated and are more likely to receive multiple citations during a single incident.”
 - Data pertaining to incidents between 2012 and 2014 showed that the city’s police department “issued four or more citations to African Americans on 73 occasions, but issued four or more citations to non-African Americans only twice.”
 - In the two years preceding this period (i.e., 2011-2013), “African Americans accounted for 95% of Manner of Walking in Roadway charges, and 94% of all Failure to Comply charges....”
- With respect to the use of force by police officers: Almost 90% of documented incidents involved police action against African Americans residents, and “in every canine bite incident for which racial information is available, the person bitten was African American.”
- Before municipal courts, similarly, African Americans were found to be “68% less likely than others to have their cases dismissed,” and “more likely to have their cases last longer and result in more required court encounters.”

- African Americans were also “at least 50% more likely to have their cases lead to an arrest warrant, and accounted for 92% of cases in which an arrest warrant was issued by the Ferguson Municipal Court in 2013.”
- And of people arrested “because of an outstanding municipal warrant,” 96% were African American.

Accordingly, the DOJ concluded that:

This disproportionate burden on African Americans cannot be explained by any difference in the rate at which people of different races violate the law. Rather...these disparities occur, at least in part, because of unlawful bias against and stereotypes about African Americans. We have found substantial evidence of racial bias among police and court staff in Ferguson. For example, we discovered emails circulated by police supervisors and court staff that stereotype racial minorities as criminals, including one email that joked about an abortion by an African-American woman being a means of crime control.³¹

[Analysis: NY Times breaks down DOJ report on Ferguson by the numbers](#)

But the problem of racism within law enforcement institutions is neither recent nor limited to Ferguson and greater St. Louis. It has long been acknowledged as a historical and national challenge.³² It is also a problem well known to law enforcement officers. In the wake of the unrest in Ferguson, for instance, one former officer with the St. Louis police department shared his experience, telling the *Huffington Post*:

when you see [African-American] communities erupt across the country, it is based on the reality that there are officers who will knowingly and willingly and maliciously violate your human rights, your civil liberties, and your civil rights.³³

While acknowledging the dangers that policemen face on the street, he questioned the popular defense from within law enforcement that it is unfair for civilians to judge the day-to-day decisions of officers:

Because the police like to say, “Well, man, you don’t know what I have to deal with. You don’t know what my training is. You don’t know what I’ve faced in a given moment,” ...I’ve been shot at enforcing laws in this state. I sat next to you in the academy class. I know that you don’t police in this community the same way you can police in other communities.³⁴

Clearly what was a two-minute chance encounter between Michael Brown and Darren Wilson has revealed far deeper and more enduring crisis nationwide.

From “I’m tired of it. It stops today” to “I can’t breathe” — The Tragic Final Minutes of Eric Garner

Less than a week after the Missouri grand jury refused to indict Darren Wilson for shooting Michael Brown, a 43-year-old African-American named Eric Garner stood on a Staten Island street corner selling untaxed, loose cigarettes or “loosies” for 75 cents apiece. He was confronted by Officer Daniel Pantaleo and another policeman, ostensibly in furtherance of a “quality of life” mandate from the Chief of Police to crack down on the sale of loosies, marijuana, and alcohol in open containers.³⁵ Pantaleo is Caucasian and was, at the time of the incident, an eight-year veteran of the New York City Police Department. Eric Garner had just broken up a street fight when he was accosted by Pantaleo about his involvement in the sale of loose cigarettes. Garner had a history of arrests related to unsanctioned cigarette sales and marijuana possession, and was out on bail at the time of this final confrontation with the police.³⁶

What transpired next was captured on video by Ramsey Orta, an acquaintance of Eric Garner’s, who had recorded another instance of violent police action against another African-American man (repeatedly hit with a baton), at the same location on Staten Island a week earlier.³⁷ Mr. Orta has since been indicted on charges of weapons possession unrelated to the Garner tragedy.³⁸

[Video: Time interview with Ramsey Orta interspersed with clips of Garner incident](#)

[\(Please note that the media on this link may be disturbing to some viewers\)](#)

Following his collapse, Garner can be heard desperately repeating: “I can’t breathe.” He was dead within the hour, en route to the hospital.

The central controversy surrounding Garner’s death involves Officer Pantaleo’s use of a controversial “chokehold” maneuver that was banned by the NYPD as far back as 1991. Pantaleo’s supporters deny that the video shows him applying a chokehold,³⁹ while others think the video leaves little room for doubt that he did.⁴⁰ On the one hand, the presence of video footage showing the events surrounding Garner’s collapse promises to make his a very different story than the shooting of Michael Brown, where the facts remained difficult to judge despite overlapping investigations at the local and federal level. But while videos often inspire a rush to judgment (based on the notion that they capture all of the relevant realities surrounding an event), the 1991 controversy surrounding the beating of Rodney King by officers of the Los Angeles Police Department offers sufficient reason to pause.

In that infamous instance, which eventually enflamed one of the worst riots in recent American history, Rodney King, an African-American man on parole from an earlier conviction, led the LAPD on high-speed car chase across Los Angeles freeways. The chase culminated in a physical confrontation when an intoxicated King continued to behave erratically and refused to surrender following verbal warnings by LAPD officers. Four

policemen then attempted to subdue King, first with a taser and then, when he rushed one of the officers (whether in panic or intentionally), by using a “swarm” technique, not unlike the manner in which Eric Garner was eventually subdued. At some point during this stage of the conflict, an amateur cameraman living across the street began filming 81 seconds of footage that showed four white LAPD officers standing over a collapsed King, stomping on him and repeatedly hitting him with batons as he tries to stand up. The cameraman sold the footage to local news studio, which edited it down to a crisp 68 seconds, removing blurry footage including the bits that showed King charging one of the officers.⁴¹ This clip played on a seemingly endless loop until most viewers could see but a single narrative involving a helpless black man being mercilessly beaten by a group of white policemen. The officers were later acquitted when a Simi Valley jury viewed the uncut footage. But the acquittals ignited the infamous 1992 LA riots that continue to feature in civil rights conversations in America. It has never been established if the beating was motivated or even colored by racial prejudice. King’s case is no doubt a tragic instance of police action, but it is not devoid of its own backstory.

Closer in time to the Garner tragedy was a March 2014 video taken off of the helmet camera of an Albuquerque police officer showing James Boyd, a homeless man living in a makeshift camp at the foothills of the Sandia Mountains, being shot dead by members of local law enforcement. The officers involved claimed that Boyd was threatening them with knives, but the district attorney is pursuing murder charges based in part on the video evidence which showed Boyd turning away from the officers. The fatal bullet was found to have entered through his lower back, throwing further suspicion on the police department’s account of the shooting.⁴²

There are, of course, many granular differences between the cases of Rodney King, James Boyd and Eric Garner, but if the Boyd and Garner videos appear to tell a complete truth, King’s case is an enduring reminder of the quality and magnitude of influence that little frames of video can have on the public imagination.

In July of 2014, the New York City medical examiner’s autopsy concluded that Garner died as a result of the “compression of neck (chokehold), compression of chest and prone positioning during physical restraint by police,”⁴³ adding that Garner’s pre-existing health issues—including his weight (300 pounds), diabetes, and asthma—may also have contributed to his sudden and tragic end.⁴⁴ The medical examiner ruled Garner’s death a “homicide,” but that designation only confirmed that his death had been caused by others and not that it amounted to a crime.

Following an investigation the case was submitted before a Staten Island grand jury. Daniel Pantaleo testified that he had applied something akin to a wrestling maneuver and not a chokehold. Eyewitnesses disagreed, insisting they saw Pantaleo use a chokehold. After three months of considering the evidence the grand jury decided that there was not enough evidence to commence legal proceedings against Daniel Pantaleo.⁴⁵ The same day Attorney

General Eric Holder announced that the Justice Department would initiate a federal civil rights investigation of the shooting. Following up on the findings of the DOJ investigation in Ferguson, Mr. Holder confirmed his sense that the incident was part of a larger problem:

Mr. Garner’s death is one of several recent incidents across the country that have tested the sense of trust that must exist between law enforcement and the communities they are charged to serve and protect. This is not a New York issue or a Ferguson issue alone. Those who have protested peacefully across our great nation following the grand jury’s decision in Ferguson have made that clear.⁴⁶

Protestors in New York and across the country quickly appropriated Mr. Garner’s parting words, “I can’t breathe,” into a rallying cry against police brutality, a trend that many insist reflects a systemic problem of institutionalized racial prejudice and resulting inequality across the United States. Viewed along these lines, however, it may be Garner’s instinctive retort—“Every time you see me, you want to mess with me. I’m tired of it. It stops today”—that offers a more powerful narrative.

Ways of Seeing

While there are myriad nuances that distinguish instances of police action against young African-American men, the controversy described here is commonly approached in one of two ways that sometimes overlap.

The Structural Inequity and Systemic Racism Approach

No two deaths are the same, least of all so when they occur from violence. But the legacy of Michael Brown, Eric Garner, James Boyd, Tamir Rice,⁴⁷ Henry Davis,⁴⁸ Michael Stewart,⁴⁹ and numerous others⁵⁰ begs the question: *coincidence?* Or, are these deaths markers on a larger map of oppressive historical and social mechanisms constantly reinforced by fictitious legal categories such as “excessive force,” that often struggle to explain the chaos and trauma of real world violence.

A commentator on NPR, for instance, has described the multiple levels at which racism plays in America society, noting:

Talking about how you can’t get a cab is not the same thing as talking about how you live in an impoverished neighborhood or go to a failing school. It sort of makes the way racism works in America seem sort of quaint, people are being mean to you, as opposed to things that are consequential and things that are systemic.⁵¹

Cornell Williams, president of the National Association for the Advancement of Colored People (NAACP) has explicitly made the point that even minor offenses by black men are often met with lethal force, summarizing, “We need not look for individual racists to say that we have a culture of policing that is really rubbing salt into longstanding racial wounds...”⁵²

Such characterizations of the problem have gained significant credibility owing to cell phone and Internet technology allowing for a deeper, if inadvertent, scrutiny of law enforcement activities nationwide, showing that the problem is not limited to Ferguson. In Florida, for instance, four police officers shared a film-trailer like video donning Ku Klux Klan apparel, and making racist chants against President Obama in particular, and black, Hispanic, and gays more generally.⁵³ The officers also engaged in lengthy text-message conversations not only criticizing the appearance, grammar, and efficiency of their black coworkers, but also writing: “I had a wet dream that you two found those niggers in the VW and gave them the death penalty right there on the spot,” and “We are coming and drinking all your beer and killing niggers.”⁵⁴ The Fort Lauderdale police department that employs these officers has drawn a fine distinction in its statement to the press, noting that

There was no criminal behavior detected during this investigation, however, the four officers’ conduct was inexcusable and there is zero tolerance for this kind of behavior in the Fort Lauderdale Police Department.⁵⁵

All four officers patrolled predominantly African-American neighborhoods, bringing significant credibility to the concern that racially motivated shooting by police is indeed a systemic problem in American society. For instance, across the country in Oakland, California, out of the 45 police shootings taking place from 2004 to 2008, 37 involved black victims. For a third of the 45 shot, the encounter proved lethal. None of the victims were white. None of the shooting resulted in criminal charges against the officers involved.⁵⁶ Data from other major American cities showcases an eerily similar pattern of violent police action against blacks and Hispanics across variations in socioeconomic class and geographical location.⁵⁷

The systemic problem approach has received considerable support from leaders of African-American communities as well as citizens nationwide gradually learning about the ongoing spate of police shooting. Even President Obama, who was wary of taking a strong position on racial conflicts during his first term in the White House (noting, at one point, “I’m not the President of Black America”), has, in his second term, spoken out against the killings of black men such as Brown and Garner, describing racism as “embedded deeply in society.”⁵⁸ In addition to promoting initiatives like Bill Clinton’s “conversation on race,” Obama’s White House seems focused on reforming policing practices by creating a task force and welcoming the idea of requiring all police officers to wear body cameras. Explaining his administration’s motivations, Obama has said:

The task force that I formed is supposed to report back to me in 90 days — not with a bunch of abstract musings about race relations, but some really concrete, practical things that police departments and law enforcement agencies can begin implementing right now to rebuild trust between communities of color and the police.⁵⁹

In September 2014, the White House also established the “My Brother’s Keeper” initiative, encouraging civic communities across the country to implement “a coherent cradle-to-

college-and-career strategy for improving the life outcomes of all young people to ensure that they can reach their full potential, regardless of who they are, where they come from, or the circumstances into which they are born.”⁶⁰

Thus far some 200 mayors, tribal leaders, and other civic administration executives across the country have shown their support for the initiative. Supplementing these efforts the Legal Fund of the NAACP is pressuring the DOJ to require police departments receiving federal funding to implement racial bias training for their officers.

In the meantime, the racially charged atmosphere across America has led to increased instances of violence against police officers: two unidentified officers nearly died from gunshots sustained during the Ferguson riots⁶¹ while another pair, NYPD Officers Rafael Ramos and Wenjian Liu, were recently shot dead inside their vehicle outside a housing project in Brooklyn. Their killer, Ismaiyil Brinsley, committed suicide soon after, leaving behind a trail of social media messages explaining his anger at outcome of the Michael Brown and Eric Garner cases.⁶²

The faith in law enforcement approach

The other major approach to the controversy calls for sensitivity to, and a better understanding of, the dangers and demands of a life in law enforcement. In the wake of the Staten Island grand jury’s decision in favor of Officer Pantaleo, Peter King, Republican representative from New York, called for calm, reminding New Yorkers “that no organization has done more to safeguard the lives of young African Americans in New York City than the NYPD.” Proponents of this position find it difficult if not downright unfair for the public at large to second-guess the decisions of law enforcement officers, particularly when there is any ambiguity as to the factual circumstances.

One version of the faith in law enforcement approach frequently fissures into a scrutiny of how the alleged victims of police action may have contributed to their fate. Perhaps the most shocking instance in recent memory revolves around the death of 12-year-old Tamir Rice shot to death in a Cleveland park near his home where the boy was playing with a toy gun. Responding to a 911 call, police officers sped onto the scene and killed Rice within two seconds of their arrival. In the ensuing federal lawsuit by Rice’s family, city officials defended the actions of the accused officer (who had been discharged from a previous security-related job for being emotionally unstable) by accusing the victim of “failure... to exercise due care to avoid injury.” Others such as Steve Loomis, the president of the Cleveland Police Patrolman’s Association, tried to explain the officer’s reaction by distorting Rice’s physical appearance stating: “He’s menacing. He’s 5-feet-7, 191 pounds. He wasn’t that little kid you’re seeing in pictures. He’s a 12-year-old in an adult body.”⁶³

In the case of Eric Garner, Representative King has argued that “if [Garner] had not had asthma and a heart condition and was so obese, almost definitely he would not have died for this.”⁶⁴ His opinion is mirrored in another oft-heard skepticism that had Garner “not resisted

the lawful order of the police officers placing him under arrest, this tragedy would not have occurred.”⁶⁵ Of course a tragedy like Eric Garner’s which began as an instance of preventive, “quality-of-life”-focused policing, raises the question of how such critics might weigh the deeper concern that poverty, poor health, lack of education, resentment of and instinctive frustration with police scrutiny, when visible nationwide, must be understood as symptoms of a deeper “quality of life” malady as much as they may be chided as causes of social unrest.

Speaking against such structural interpretations of the controversy, Rudy Giuliani, former mayor of New York City and a prominent defender of law enforcement action, has argued that “93 percent of blacks in America are killed by other blacks,” and that this uncomfortable reality justifies the volume of white police presence in neighborhoods predominantly populated by African Americans.⁶⁶ However, as noted by a fellow panelist in response to Mr. Giuliani’s analysis:

most black people who commit crimes against other black people go to jail... they are not sworn by the police department as an agent of the state to uphold the law. So in both cases, that’s a false equivalency...⁶⁷

But Giuliani is certainly not alone in his assessment: a more guarded but undoubtedly related narrative emerged during the DOJ’s investigation of law enforcement in Ferguson when city officials defended the city’s governance culture as a response to “a pervasive lack of ‘personal responsibility’ among ‘certain segments’ of the community.”⁶⁸ In the case of Ferguson, however, the DOJ’s investigation found that “the practices about which area residents have complained are in fact unconstitutional and unduly harsh.”⁶⁹ On this basis, the report reasoned that

the City’s personal-responsibility refrain is telling: it reflects many of the same racial stereotypes found in the emails between police and court supervisors. This evidence of bias and stereotyping, together with evidence that Ferguson has long recognized but failed to correct the consistent racial disparities caused by its police and court practices, demonstrates that the discriminatory effects of Ferguson’s conduct are driven at least in part by discriminatory intent in violation of the Fourteenth Amendment.⁷⁰

The DOJ’s findings have not been the last word on this enormously complex conflict. A broader and, arguably, more cautious perspective has recently been offered by James Comey, the current director of the FBI, in a well-received speech that Ron Hosko, president of the Law Enforcement Defense Fund, evaluated as “more balanced” because it examined “all the sociological pieces” instead of simply being “heavy-handed on the cops.”⁷¹ Comey, whose grandfather was a police chief, and who himself once served as a prosecutor, is part of the American law enforcement machinery, but these same credentials also made his surprisingly direct and evenhanded analysis of the controversy appealing. For instance, Comey acknowledged the ubiquity of harmful stereotypes across racial and ethnic lines that often inform everyday law enforcement judgments, and noted that “at many points in American history, law enforcement enforced the status quo, a status quo that was often

brutally unfair to disfavored groups.”⁷² At the same time, he raised the structural issue that in high-crime neighborhoods African Americans grow up “in environments lacking role models, adequate education, and decent employment,”⁷³ which often inspires a turn to criminal activity.

But inscribed in Comey’s thoughtful account is a paradox that speaks to the heart of the ongoing conflict: on the one hand, he offered the eloquent message that “it is hard to hate up close,” and insisted that police officers get to know and empathize with the people they both surveil and protect. On the other hand, Comey acknowledged the importance of gathering statistical data aggregating and categorizing myriad instances of conflict between law enforcement and civilians, a methodology that has a long history of dehumanizing governance by replacing the nuances of personal stories with the anonymizing shine of big data. The extent to which such recommendations can be reconciled may ultimately depend on the success of the democratic process in its quest to rein in and shape government action.

[Video: FBI Director’s Speech at Georgetown University](#)

Finally, given the importance of the democratic (electoral) process in determining the course of such controversies, it is worth noting that, in terms of aggregated opinions, there is evidence that Americans relate to this controversy surrounding the relationship between law enforcement agencies and African Americans more strongly in terms of their political (party) affiliations than their own racial background. So, for instance, a 2013 Gallup survey found that “Republicans rate the honesty and ethical standards of police officers, clergy, military officers, and pharmacists higher than Democrats do. In turn, Democrats are more positive about judges and TV reporters.”⁷⁴ Another poll finds that when asked if Darren Wilson should have been indicted for shooting Michael Brown, more Caucasians than African Americans responded negatively; Republican voters, however, were invested in Wilson’s exoneration even more than white respondents generally.⁷⁵ A similar statistical spread presented on the question of whether participants in the poll approved of the police department’s handling of the protests in Ferguson.⁷⁶ These measures need to be weighed against wider electoral trends that find white citizens increasingly voting Republican,⁷⁷ while a majority of African Americans eligible to vote continue to identify as Democrats.

Coda

The rioting in Ferguson has ceased. Wilson has resigned, Daniel Pantaleo faces a slew of civil (wrongful death) suits, and the Ferguson law enforcement apparatus may be substantially restructured. But the protest movement that is the legacy of Rice, Brown, Garner, and so many others continues to force a reckoning with one of the most uncomfortable subjects in everyday American life. And it’s a good thing too, because, as of this writing, *it’s happened again*: on April 7, 2015, the New York Times published a video showing Michael Slager, a white South Carolina police officer, kill Walter Scott, a middle-aged black man, by shooting him in the back as he was running away.⁷⁸ Slager has claimed that Scott grabbed his stun gun

thereby escalating a conflict that began as a mere traffic stop. However, the video shows that Scott had already been shot with the taser when he began to flee. It also shows an unknown object drop to the ground during the initial scuffle between the two men. Moments after Scott was shot and fell to the ground, Officer Slager returned to the site of the initial scuffle, recovered something from the scene and then deposited an unknown object near Scott's corpse. Beyond this, the details remain opaque, and there are already a number of theories as to what the video doesn't show.⁷⁹

The South Carolina Law Enforcement Division, the FBI and the DOJ have all initiated inquiries, and the mayor of North Charleston recently announced that Slager will be charged with murder.

APPENDIX I: The DOJ's assessment and conclusions regarding the shooting of Michael Brown

Based on its factual narrative, the United States Department of Justice decided to not pursue a legal indictment against Wilson, explaining:

Even if federal prosecutors determined there were sufficient evidence to convince twelve jurors beyond a reasonable doubt that Wilson used unreasonable force, federal law requires that the government must also prove that the officer acted willfully, that is, with the purpose to violate the law.⁸⁰

Specifically, the United States Attorneys' Manual (USAM) requires the commission of a "federal offense"⁸¹ and an expectation that the "admissible evidence will probably be sufficient to sustain a conviction."⁸² In the case of the shooting of Michael Brown, on the first issue, the DOJ concluded that Wilson had not committed a federal offense within the meaning of the federal criminal procedure statute.⁸³ Instead, his actions fell squarely within the realm of "well-established Fourth Amendment [legal] precedent," which establishes that "it is not objectively unreasonable for a law enforcement officer to use deadly force in response to being physically assaulted by a subject who attempts to take his firearm."⁸⁴ Accordingly, on the related issue of sufficient evidence, the DOJ Report concluded:

Darren Wilson's actions do not constitute prosecutable violations under the applicable federal criminal civil rights statute... which prohibits uses of deadly force that are "objectively unreasonable," as defined by the United States Supreme Court. The evidence, when viewed as a whole, does not support the conclusion that Wilson's uses of deadly force were "objectively unreasonable" under the Supreme Court's definition. Accordingly... it is not appropriate to present this matter to a federal grand jury for indictment, and it should therefore be closed without prosecution.⁸⁵

¹ United States Department of Justice Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson (March 4, 2015), accessed July 8, 2015, http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf, at 7. Hereinafter “Brown DOJ Report.”

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