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The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force

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I. INTRODUCTION

The use of force by police officers has traditionally been analyzed through the lens of Fourth Amendment reasonableness.[1] The Supreme Court has decided that the proper question regarding the excessiveness of police force is whether the police officer acted as a *reasonable* law enforcement officer.[2] When that police force is fatal – what this Article deems the death penalty on the streets – the legal question is the same, leaving us with an analysis that requires a heavy reliance on the officer's version of events and a host of disagreement on what constitutes appropriate police action.[3] Reasonable minds can, and do, disagree on what constitutes reasonable police action because the reasonableness standard is divorced from any notion of what procedures police ought to follow before turning to deadly force. The August

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[*] Jelani Jefferson Exum is a Professor at the University of Toledo College of Law. This Article was inspired by the author's TEDxToledo talk. Jelani Jefferson Exum, *The Death Penalty on the Street*, YOUTUBE (Oct. 10, 2014), https://www.youtube.com/watch?v=sq7eAEjJm6U. Professor Jefferson Exum wishes to thank Will Lucas for inviting her to participate in TEDxToledo for a second year and for his encouragement as she prepared for the event. She would also like to extend a special thank you to Lowen Exum for his contribution to the title of her talk and her paper, and for his continual support. Further, Professor Jefferson Exum would like to express appreciation to Professor Jalila Jefferson-Bullock, Professor Jamila Jefferson-Jones, Nailah Jefferson, Dr. Akilah Jefferson, and Dr. Andrea Jefferson for their assistance as she developed this idea. Professor Jefferson Exum also appreciates the comments that she received on this Article from the participants of the 2015 *Missouri Law Review* Symposium, "Policing, Protesting, and Perceptions: A Critical Examination of the Events in Ferguson" – especially Professors Frank Bowman, Seth Stoughton, and Wesley Oliver.

1. Graham v. Connor, 490 U.S. 386, 386 (1989).

2. *Id.* at 397.

3. The author recognizes that the death penalty in the court system is rife with problems, from racial disparity to wrongful convictions. *See Race and the Death Penalty*, ACLU, https://www.aclu.org/race-and-death-penalty (last visited Oct. 9, 2015); *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes-wrongful-conviction (last visited Oct. 9, 2015). This Article, however, uses the death penalty context to show that, at least when there is a proclaimed value for human dignity, the result is the development of procedures meant to spare human life. It is this focus on saving lives that is what the author believes can be learned from the death penalty and hopes will be integrated into the police use of force jurisprudence.

9, 2014 killing of Michael Brown in Ferguson, Missouri, and countless unarmed others before and since him who have lost their lives at the hands of police, brings this unsatisfactory analysis to the forefront.[4] The lack of clarity in the use of force reasonableness standard often leads to reasonableness being the default legal conclusion in cases brought against police officers, leaving victims of deadly police force without justice.

This Article offers punishment as another lens through which to view police force. The Supreme Court has consistently rejected arguments that the Eighth Amendment is the appropriate vehicle for dealing with excessive police force claims.[5] However, reconceptualizing the use of deadly force by police officers as punishment provides a new understanding of the gravity of deadly police force and adds necessary substance to the reasonableness analysis. When police force is likened to punishment, the use of fatal force by police officers can be considered the administration of the death penalty on the streets, absent the procedural protections and focus on human dignity given in the criminal justice system through the Eighth Amendment.[6] When considered in the context of punishment, the reasonableness analysis can be transformed to incorporate the value of human dignity and focus on protections against fatal police force that ought to be in place to protect the lives of all individuals.

This Article argues that the reasonableness standard applied to deadly police force must ask whether a police officer was able to, and did, use nonfatal force before turning to deadly force. It is with an eye to this more reasoned approach to reasonableness that this Article builds a case for incorporating Eighth Amendment values into the Fourth Amendment reasonableness analysis of excessive police force. Part II of this Article criticizes the traditional Fourth Amendment reasonableness analysis and argues that, rather than assessing how a reasonable officer would handle a situation, we can redefine the focus of the inquiry to the types of methods employed to avoid the loss of life. In Part II, the stories of Michael Brown and others are explored in order to show the unreasonableness of the current reasonableness standard for claims of excessive police force. Part III of the Article compares police force to punishment and explains that, by applying an Eighth Amendment "respect for human dignity" standard to analyze the use of fatal force by police officers, we can avoid some of the pitfalls of the current excessiveness analysis. As Part IV explains, the Supreme Court goes to great lengths to spare the lives of even our criminals. Part IV also discusses the protections given defendants in the death penalty context in order to show that the death penalty

4. For a non-exhaustive list of just seventy-six of those who fell victim to deadly police force, see Rich Juzwiak & Aleksander Chan, *Unarmed People of Color Killed By Police, 1999–2004*, GAWKER (Dec. 8, 2014, 2:15 PM), http://gawker.com/unarmed-people-of-color-killed-by-police-1999-2014-1666672349.

5. *See Graham*, 490 U.S. at 398–99 (citing Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977)).

6. Furman v. Georgia, 408 U.S. 238, 270 (1972) ("A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity.").

procedures developed by the Supreme Court are based upon its view that the Eighth Amendment requires a respect for human dignity, which is in stark contrast to the death penalty on the streets. When the government is permitted to take an individual's life, it must do so in a manner that respects that life. Finally, this Article concludes by positing that procedures and guidelines regarding non-fatal uses of force must be followed before an officer can reasonably take the life of an individual. In this way, the death penalty on the streets will be a form of punishment that is narrowly applied and respectful of the lives of all people, no matter their behavior.

II. THE UNREASONABLE REASONABLENESS ANALYSIS

The Supreme Court has made it clear that claims of excessive police force will be analyzed under the Fourth Amendment's protection against unreasonable seizures.[7] This inattention to the actual consequences of deadly police force indicates the Supreme Court's lack of awareness of the true nature of fatal police force – that it is more akin to punishment than to a simple seizure. While it may be that police officers have seized a person when they use force against that person,[8] by limiting police force cases to the traditional Fourth Amendment analysis, the Supreme Court has left us with situations in which unarmed individuals have been killed by police officers with no finding of excessive force. A closer look at the reasonableness standard reveals its shortcomings.

A. The Traditional Fourth Amendment Reasonable Force Standard

The Supreme Court has acknowledged that "the two primary sources of constitutional protection against physically abusive governmental conduct" are the Fourth and Eighth Amendments.[9] However, in the 1989 case, *Graham v. Connor*, the Court explicitly held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard[.]"[10] Therefore, when a party claims excessive police force, determining the reasonableness of the police action will "be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[11] The Court has elaborated that this reasonableness inquiry "is an objective one: the question is whether the officers' actions are 'objectively

7. *See Graham*, 490 U.S. 386.

8. A Fourth Amendment seizure occurs when an officer restrains the freedom of a person to walk away. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (citing Terry v. Ohio, 392 U.S. 1, 16 (1968)).

9. *Graham*, 490 U.S. at 394.

10. *Id.* at 395.

11. *Id.* at 396 (citing *Terry*, 392 U.S. at 20–22).

reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[12] Ultimately, then, the reasonableness of police force will turn on the point of view of the particular officers involved, judged against the actions of a "reasonable officer" – an officer who does not act with excessive force.

Of course, a reasonable police officer does not use deadly force in every encounter with an unruly suspect. The National Institute of Justice explains police force options in this manner:

> Law enforcement officers should use only the amount of force necessary to mitigate an incident, make an arrest, or protect themselves or others from harm. The levels, or continuum, of force police use include basic verbal and physical restraint, less-lethal force, and lethal force.[13]

Even with this array of options available to officers, the traditional Fourth Amendment reasonableness standard leaves open the possibility of the legal use of deadly force by police officers in certain situations. Five years before the Supreme Court decided *Graham*, it had already tackled the deadly force issue under a Fourth Amendment analysis. In *Tennessee v. Garner*, the Court considered "the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon."[14] In that case, two police officers were dispatched to investigate an ongoing home invasion.[15] One of the officers spotted the suspect fleeing across the backyard of the targeted home.[16] Although the officer was "reasonably sure" that the suspect, Edward Garner, did not have a weapon, the officer shot Garner in the back of the head as he began to climb over a fence.[17] The officer explained that he felt convinced that if he did not shoot Garner, he would escape.[18] Garner died at the hospital.[19] The Court, analyzing the claim of excessive force using the Fourth Amendment, held that deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to be-

12. *Id.* at 397 (citing Scott v. United States, 437 U.S. 128, 137–39 (1978); *Terry*, 392 U.S. at 21).

13. *Police Use of Force*, NAT'L INST. JUST., http://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx (last modified Apr. 13, 2015).

14. Tennessee v. Garner, 471 U.S. 1, 3 (1985).

15. *Id.*

16. *Id.* at 4.

17. *Id.* at 3–4 ("In using deadly force to prevent the escape, [the officer] was acting under the authority of a Tennessee statute and pursuant to Police Department policy. The statute provides that '[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.'").

18. *Id.* at 4.

19. *Id.*

lieve that the suspect poses a significant threat of death or serious physical injury to the officer or others."[20] In this particular case, the Court determined that deadly force was unreasonable because the officer did not have probable cause to believe that the unarmed Garner posed any danger to officers or the public.[21] The Court did not, however, condemn the use of deadly force altogether.

In explaining its conclusion, the *Garner* Court made several observations about the use of deadly force by police officers. On the nature of deadly force, the Court explained:

> [N]otwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. *The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment*.[22]

Thus, the Court recognized the severity of deadly force and the narrow circumstances in which killing a suspect is reasonable. The Supreme Court, in *Garner*, also discussed the limited effectiveness of deadly force to accomplish criminal justice goals:

> [W]e are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion.[23]

Despite seemingly recognizing the gravity of deadly force, and the fact that killing a suspect robs that suspect and society of the opportunity to have the criminal justice system do its job, the Supreme Court, by applying a traditional Fourth Amendment reasonableness analysis to excessive force claims, has not effectively protected the individual's "fundamental interest" in their own lives. Instead, it has left us with a standard that leads to inconsistent, and often disappointing, outcomes. It only takes a survey of recent reports of killings by police officers for that failed protection to become apparent.

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20. *Id.* at 3.
21. *Id.* at 21.
22. *Id.* at 9 (emphasis added).
23. *Id.* at 10 (citation omitted).

B. Reasonableness as an Unsatisfying Standard

In *Garner*, the Court admitted that the criminal justice mechanism does not get the chance to operate when a suspect is killed by a police officer. This death penalty on the streets – when police officers kill individuals as punishment for that person's objectionable behavior – operates outside of the procedural safeguards of the criminal justice system. When the only constitutional standard regulating use of force by police is a reasonableness standard that is informed by the judgment of police officers, the result is limited justice. This is especially true for those who have lost their lives in police encounters when that loss of life could have been safely avoided by the use of non-fatal police tactics. The tragedies of Michael Brown, and other unarmed individuals who have been killed by police officers who were not punished for their actions, demonstrate the incompleteness of the reasonableness standard.

1. Michael Brown: A Reasonable End?

The story of Michael Brown illustrates the consequences of a traditional Fourth Amendment reasonableness analysis. On August 9, 2014, Officer Darren Wilson shot and killed eighteen-year-old Michael Brown – an unarmed black male – in Ferguson, Missouri, a suburb of St. Louis.[24] Though in the weeks following the shooting it was alleged that Michael had robbed a convenience store just before his encounter with Officer Wilson, Police Chief Tom Jackson reported after the shooting that Officer Wilson was not aware of the alleged robbery.[25] Rather, Officer Wilson first approached Michael for standing in the street and impeding traffic.[26] It is at this point that questions

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24. For a comprehensive explanation of the Michael Brown shooting, see Larry Buchanan et al., *Report: What Happened in Ferguson*, N.Y. TIMES (Aug. 10, 2015), http://www.nytimes.com/interactive/2015/03/04/us/report-what-happened-in-ferguson.html.

25. *See* Joe Millitzer & Vera Culley, *Chief Jackson: The Convenience Store Robbery and Michael Brown Shooting Not Connected*, FOX2NOW (Aug. 15, 2014, 2:56 PM), http://fox2now.com/2014/08/15/live-updates-ferguson-police-chief-tom-jackson-speaks-at-a-press-conference/.

26. In his grand jury testimony, Officer Wilson explained what caught his attention about Michael Brown:

> I see them walking down the middle of the street. And first thing that struck me was they're walking in the middle of the street. I had already seen a couple cars trying to pass, but they couldn't have traffic normal because they were in the middle, so one had to stop to let the car go around and then another car would come.

Grand Jury Transcript, vol. V at 207:9–15, State of Missouri v. Darren Wilson (Sept. 16, 2014), http://www.documentcloud.org/documents/1371222-wilson-testimony.html.

about reasonableness arise and color perceptions of whether Officer Wilson's use of deadly force was constitutionally permissible. To some, any killing of an unarmed suspect is unreasonable and, thus, excessive force. This position was bolstered by various witness accounts that Michael had his hands up, in surrender, when he was fatally shot by Officer Wilson.[27] To others, Officer Wilson acted completely reasonably when he shot Michael, after Michael allegedly wrestled the Officer for his gun, ran away, and then came charging back at the Officer in a rage.[28] The protests, riots, and debates that ensued served as a media attraction for months, giving the world prime seats from which to watch the reasonableness analysis unfold.

Though this case never went to the Supreme Court for a statement on the reasonableness standard – in fact, no criminal charges were ever filed in this case – the reasonableness analysis is embedded in the Missouri law that was presented to a St. Louis County grand jury. On August 20, 2014, a grand jury was convened to review possible charges against Officer Wilson.[29] The grand jury met regularly for three months, and on November 24, 2014, decided not to indict Officer Wilson.[30] There has been speculation about whether the unclear instructions given to the grand jury muddled the legal analysis enough to confuse jurors about when deadly force is deemed legal under Missouri law.[31] Missouri Revised Statute Section 563.046 allows a law enforcement officer to use deadly force to effect the arrest or prevent the escape of a criminal suspect "[w]hen he reasonably believes that such use of deadly force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested . . . [h]as committed or attempted to commit a felony."[32] However, this portion of the statute conflicts with the directive given by the Supreme Court on the use of deadly force in *Tennessee v. Garner*.[33] Therefore, the Missouri Approved Instructions have been revised to explain to jurors that police officers can use deadly force to carry out an arrest or prevent a suspect's escape only when that officer "reasonably believes" that the suspect is attempting to flee using a deadly weapon or that the suspect

27. *See* Buchanan et al., *supra* note 24.

28. *See* Greg Toppo, *Support Spreads for Officer in Ferguson Shooting*, USA TODAY (Aug. 20, 2014, 7:18 AM), http://www.usatoday.com/story/news/nation/2014/08/19/officer-supporters-ferguson-shooting/14259993/.

29. *See* Buchanan et al., *supra* note 24.

30. Ryan J. Reilly, *Ferguson Officer Darren Wilson Not Indicted in Michael Brown Shooting*, HUFFINGTON POST (Nov. 24, 2014), http://www.huffingtonpost.com/2014/11/24/michael-brown-grand-jury_n_6159070.html.

31. William Freivogel, *Grand Jury Wrangled With Confusing Instructions*, ST. LOUIS PUB. RADIO (Nov. 26, 2014), http://news.stlpublicradio.org/post/grand-jury-wrangled-confusing-instructions.

32. MO. REV. STAT. § 563.046.3(2) (2000).

33. Tennessee v. Garner, 471 U.S. 1, 3 (1985) (concluding that deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others").

"may endanger life or inflict serious physical injury unless arrested without delay."[34] The problem in the Darren Wilson case is that prosecutors gave the jurors both statements of the law at different times in the process.[35] In either iteration of the law, however, the reasonableness standard was present.

Given the erroneous instruction, the confusion for the jury would have been with what Officer Wilson was required to reasonably believe – that deadly force was necessary to conduct the arrest of Michael Brown, or that Michael was a threat to the officer or the public if he was not contained by Officer Wilson. The question that was not asked was whether Officer Wilson followed non-fatal encounter procedures before resorting to deadly force. This is, of course, because the law does not require such an inquiry. Instead, the jurors' only task was to mull over the reasonableness of Officer Wilson's actions – a judgment over which the nation was sharply divided. Even if the jury instructions had been clear, the legal weakness in the case, as in all excessive force cases, would have remained. This is because there is no consensus on what constitutes reasonable force by a police officer. And, when this issue finds itself in the national spotlight, as Michael Brown's death shows, the resolution is rarely widely satisfying.

This disagreement regarding the reasonableness of Officer Darren Wilson's actions sparked a national "Hands Up" movement against police violence that garnered international attention.[36] Protests following Michael Brown's death and other killings by police officers have included die-ins, with sometimes hundreds of people lying on sidewalks, the floors of shopping centers, and even lining the corridors of capitol buildings. These die-ins have painted a striking visual of the lives lost at the hands of police officers, and, most importantly, signaled to lawmakers and policymakers that, in the view of the protesters, the killings clearly have been unreasonable.[37] The

34. MAI-CR 3d 306.14.

35. For an excellent explanation of the confused legal standard used in the Darren Wilson grand jury proceedings, see *NAACP Legal Defense Fund Open Letter to Judge Maura McShane*, NAACP LEGAL DEFENSE FUND 3–6 (Jan. 5, 2015), http://www.naacpldf.org/files/case_issue/NAACP%20LDF%20Letter%20to%20Judge%20Maura%20McShane.pdf.

36. *See* HANDS UP UNITED, http://www.handsupunited.org/ (last visited Oct. 2, 2015); *The Movement*, HANDSUPDONTSHOOT, http://handsupdontshoot.com/about/the-movement/ (last visited Oct. 2, 2015).

37. For news accounts of these protests, see *'Die-In' Protest Held on Delmar Loop*, CBS ST. LOUIS (Nov. 16, 2014, 4:40 PM), http://stlouis.cbslocal.com/2014/11/16/die-in-protest-held-on-delmar-loop/; Yamiche Alcindor, *Demonstrators Stage 'Die-In' at NYC Apple Store, Macy's*, USA TODAY (Dec. 6, 2014, 11:13 AM), http://www.usatoday.com/story/tech/2014/12/05/protests-apple-store-new-york/19975797/; Christine O'Donnell, *Hundreds of Lawyers Stage 'Die-In' to Protest Police Brutality*, DOUG'S DIARY (Dec. 16, 2014, 2:45 PM), https://dougsdiary.wordpress.com/2014/12/17/hundreds-of-lawyers-stage-die-in-to-protest-police-brutality/; Cristina Fletes-Boutte, *'Die-In' at Missouri State Capitol*, ST. LOUIS POST-DISPATCH (Jan. 7, 2015), http://www.stltoday.com/news/multimedia/die-in-at-missouri-state-capitol/image_cef4a783-835b-56ac-a2aa-a263d467e3eb.html; Em-

phenomenon #BlackLivesMatter became not just a trending issue on Twitter, but a movement and a clear call for a focus on human dignity in the police use of force debate.[38]

On the other side of the wide divide was considerable support for Officer Wilson in the form of online support groups and over $100,000 raised for him and his family.[39] This stark division is evidence of the faultiness of the reasonableness standard. There is no consensus on what constitutes reasonable police action. This confusion is not just evidenced by the split public opinion on the use of fatal force by police officers, but also by the inconsistent legal response to those situations.

2. Other Cases Showing the Emptiness of the Reasonableness Approach

When it comes to the traditional reasonableness analysis of police force, there is no standard at all. Reasonableness often seems to be the default conclusion, even when the individual killed is unarmed, and even when that individual was committing either no criminal offense, or an extremely minor one. One such famous case of a controversial police shooting is that of Amadou Diallo, who was killed by four New York City police officers in 1999.[40] He was a twenty-two-year-old West African immigrant with no criminal record and was unarmed at the time of his death.[41] The officers, who were in unmarked cars and dressed in street clothes, happened upon Mr. Diallo as he stood in the entrance of the apartment building where he lived.[42] At their trial for the homicide, the officers testified that Mr. Diallo was acting suspiciously and that he did not yield to their commands to stop, but instead ran inside of the building when they approached.[43] The officers claimed that they began

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marie Huetteman, *Protesters Stage 'Die-In' at Capitol*, N.Y. TIMES (Jan. 21, 2015), http://www.nytimes.com/politics/first-draft/2015/01/21/protesters-stage-die-in-at-capitol/.

38. *See* BLACK LIVES MATTER, http://blacklivesmatter.com/ (last visited Oct. 2, 2015).

39. *See* Julia Talanova, *Support grows for Darren Wilson, officer who shot Ferguson teen Michael Brown*, CNN (Sept. 8, 2014), http://edition.cnn.com/2014/08/19/us/ferguson-darren-wilson-support/index.html; Paige Lavender, *'Support Officer Darren Wilson' GoFundMe Raises Over $137,000 For Cop Who Shot Michael Brown*, HUFFINGTON POST (Aug. 21, 2014, 2:59 PM), http://www.huffingtonpost.com/2014/08/21/darren-wilson-gofundme_n_5698013.html.

40. Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted Of All Charges*, N.Y. TIMES (Feb. 26, 2000), http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html.

41. *Id.*

42. *Id.*

43. *Id.*

firing upon him because they thought he was reaching for a gun.[44] Mr. Diallo was unarmed and was reaching for his wallet.[45] Officers fired forty-one shots at him, and he was hit nineteen times.[46] All of the officers involved in the shooting were acquitted,[47] leaving many confused as to how a jury truly could have found the officers' actions to be reasonable. Certainly shooting and killing Mr. Diallo was not necessary to subdue him, and the officers were never in danger because Mr. Diallo was unarmed. Despite the officers' claims of a mistaken belief that Mr. Diallo was reaching for a gun, forty-one shots fired for a gun that was never seen can certainly be considered unreasonable. However, because there is no clear protocol saying that officers cannot do this, the default reasonableness position prevailed.

Conflicting jury decisions, police department reviews, and civil suit awards in police violence cases reveal that the reasonableness standard has no clear basis in expected police behavior. For example, the January 29, 2012 police shooting of Aaron Campbell in Portland, Oregon, ended in three conflicting results: (1) a grand jury declining to indict the officers; (2) internal discipline of the officers; and (3) a civil rights suit victory for Campbell's family.[48] The twenty-five-year-old Campbell was shot while leaving the Sandy Terrace apartment building.[49] Police were responding to a call to check on the welfare of a suicidal, armed man.[50] In what has become a familiar story in these cases of fatal police force, officers claimed that they believed Campbell was reaching for a gun when Officer Ron Frashour shot him.[51] Campbell was unarmed.[52] After deciding not to indict the officers, the grand jury members released a three-page letter to the District Attorney indicating their "outrage" with Officer Frashour's actions.[53] The grand jury members explained:

> [W]e the grand jury determined that we could not indict Officer Ron Frashour on any criminal charge. That is not to say that we found him innocent, agreed with his decisions, or found that the police incident at Sandy Terrace was without flaw. What we found was that Officer

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Maxine Bernstein, *Portland Police Training Review Drafts of Frashour Shooting Show How Lieutenant's Analysis Changed*, OREGONIAN (Oct. 15, 2012, 8:26 PM), http://projects.oregonlive.com/focus/campbell/.

50. *Id.*

51. *Id.*

52. *Id.*

53. Letter from Multnomah Cty. Grand Jury to Michael D. Schrunk, Dist. Attorney, Multnomah Cty. (Feb. 10, 2010), http://www.scribd.com/doc/27133490/Aaron-Campbell-Grand-Jury-Letter.

> Frashour's actions were consistent with the relevant laws and statutes regarding the use of deadly force by a police officer.[54]

According to the letter, the "flaw" in the police incident turned out to be several deficiencies, including "flawed police policies, incomplete or inappropriate training, incomplete communication, and other issues with the police effort."[55] The grand jury members' own concerns about the case calls into question their decision to find that the officer truly acted reasonably in killing Campbell. Rather, the grand jury found that the law allowing an officer to kill an individual if the officer "believed he or his fellow officers were in imminent danger" allowed Officer Frashour to kill Campbell while simultaneously admitting the grand jury's belief that "Aaron Campbell should not have died that day."[56] Clearly, the prevailing sentiment was that the officer did not act appropriately, yet because the reasonableness standard only focuses on the officer's belief without regard to proper protocol, the result is no criminal liability.

The internal discipline and civil award in Aaron Campbell's case also suggests faultiness in the traditional reasonableness approach to the use of force by police officers. While the grand jury declined to find criminal liability for the officers, an internal investigation by the Portland Police Department found that "it was not reasonable for Officer Frashour to believe that Aaron Campbell posed an immediate threat of death or serious physical injury, which is what bureau policy and training requires."[57] According to the investigation: "Campbell did not come out of the apartment with a weapon drawn or in view. His hands were clasped together on top of his head and remained there. He walked backward toward officers and followed commands to stop, walk slowly, and stop again."[58] All of this showed that, contrary to the grand jury conclusion, Officer Frashour's decision to kill Campbell was not based on a reasonable perception of a deadly threat, but instead on the officer being "so focused on his perception of Campbell as a threat with a gun" that he failed to follow proper use of force protocol instituted by his department.[59] The department report relayed several alternatives to deadly force that could have – and apparently should have – been used by the officer in this particular situation.[60] As a result of the report, Portland's mayor and police chief decided to fire Officer Farshour and to suspend three other

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54. *Id.*

55. *Id.*

56. *Id.*

57. USE OF FORCE REVIEW BD., PORTLAND POLICE BUREAU, INTERNAL INVESTIGATION: AARON MARCELL CAMPBELL 1 (Nov. 2010), http://www.portlandonline.com/police/images/10-8352/UOFRB_report_Campbell.pdf.

58. *Id.* at 1–2.

59. *Id.* at 2.

60. The report spoke of the use of a beanbag strike, as well as a K9 option. *Id.*

officers involved in the incident.[61] The mayor's view of the incident led to the city of Portland agreeing to pay $1.2 million to Campbell's family to settle a civil rights suit.[62] The internal investigation and civil award show that when reasonableness is looked at from the point of view of protocol and non-fatal force alternatives, certain police killings are clearly unreasonable, even when the traditional Fourth Amendment reasonableness standard leaves that clarity in doubt. This inadequacy of the reasonableness standard supports the view that deadly police force ought to be considered as more than simply a Fourth Amendment seizure that can be handled with the traditional, officer-point-of-view-focused reasonableness analysis.

III. PUNISHMENT: A MORE REASONABLE APPROACH

When the true consequences of police force are acknowledged – that individuals are being executed for their perceived objectionable response to a police encounter – it becomes apparent that losing one's life at the hands of police officers is more akin to punishment than to a seizure. Rather than leaning on a standardless reasonableness analysis, there is much that can be learned from the Supreme Court's Eighth Amendment death penalty analysis. The same respect for human life that fuels the protections and guarantees given in the death penalty context can be incorporated into the reasonableness standard that now governs excessive force claims.

A. Viewing Police Force as Punishment

Although the Eighth Amendment purports to protect us from brutal punishment, the Supreme Court has taken the unnecessarily narrow approach of explicitly limiting the Eighth Amendment Cruel and Unusual Punishment Clause to post-conviction punishment. In cases concerning police force, the Court has cited to its decision in *Ingraham v. Wright*[63] to conclude that the Eighth Amendment does not apply. For instance, relying on *Ingraham*, the Court curtly stated in *Graham* that the "Eighth Amendment standard applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'"[64] Therefore, the *Graham* Court concluded that the Fourth Amendment, rather than the Eighth Amendment, is the constitutional provision under which to analyze claims of excessive police force. However, adopting the *Ingraham* view of the Eighth

61. *Cop Fired, 3 Suspended for Campbell Shooting*, KGW PORTLAND (Nov. 17, 2010, 5:26 AM), http://www.kgw.com/story/news/2014/07/21/11785336/.

62. Maxine Bernstein, *Portland to Pay $1.2 Million to Settle Civil Rights Suit in Aaron Campbell Shooting*, OREGONIAN (Feb. 1, 2012, 8:58 PM), http://www.oregonlive.com/portland/index.ssf/2012/02/portland_to_pay_12_million_to.html.

63. 430 U.S. 651, 670 (1977).

64. Graham v. Connor, 490 U.S. 386, 398–99 (1989) (citing *Ingraham*, 430 U.S. at 671 n.40).

Amendment in police force cases devalues the importance of the analysis in *Ingraham* that led the Court to hold that the Eighth Amendment was inapplicable. A closer look at the *Ingraham* Court's observations regarding corporal punishment against students reveals the *Graham* Court's error in determining that *Ingraham* stands for the inapplicability of the Eighth Amendment to police force as well.

The narrow holding in *Ingraham* was that the Eighth Amendment's protection against cruel and unusual punishment was inapplicable in the case of corporal punishment of public school children.[65] Though the Court went through a discussion of the history of the Eighth Amendment, it did so mostly to show the Amendment's intended connection to the criminal process. The *Ingraham* Court noted that the issues covered by the Eighth Amendment – bails, fines, and punishment – were associated with the criminal process.[66] Thus, the Court reasoned, "[B]y subjecting the three [issues] to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government."[67] Therefore, the Court explained, the Eighth Amendment was not meant to apply to sanctions unrelated to the criminal process, such as the discipline of schoolchildren.

However, unlike corporal punishment in public schools, police investigation into criminal behavior *is* the starting point of this "criminal law function of government." The Supreme Court's own recognition of such force as a Fourth Amendment seizure supports this view. A seizure occurs when, due to police actions and the circumstances on the scene, "a reasonable person would have believed that he was not free to leave."[68] Situations in which police use force against an individual clearly fall within this definition as the Supreme Court has explained:

> Examples of circumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.[69]

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65. *Ingraham*, 430 U.S. at 671. The corporal punishment in *Ingraham* "consisted of paddling the recalcitrant student on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick" and resulted in "no apparent physical injury to the student." *Id*. at 656–57.

66. *Id.* at 664.

67. *Id.*

68. United States v. Mendenhall, 446 U.S. 544, 554–55 (1980).

69. *Id.* at 554 (citing Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968); Dunaway v. New York, 442 U.S. 200, 207, & n.6 (1979); WAYNE R. LAFAVE, SEARCH AND SEIZURE 53–55 (1978)).

Certainly, then, when an officer uses force – especially deadly force – against an individual, a Fourth Amendment seizure has occurred. When a seizure occurs, it must be justified either by reasonable suspicion (for stops) or probable cause (for seizures amounting to the restrictiveness of an arrest).[70] The definitions of both reasonable suspicion and probable cause indicate the required connection between the seizure and criminal activity. Reasonable suspicion requires an officer to have articulable facts "which lead[] him reasonably to conclude in light of his experience that criminal activity may be afoot."[71] Likewise, probable cause for an arrest requires officers to have "reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."[72] Thus, when officers seize a person using force – a seizure that requires some level of suspicion of criminal activity – there is a clear connection to the criminal process, much unlike the paddling of schoolchildren.

It is therefore faulty to not acknowledge that the force used by those law enforcement officials as they carry out their criminal law investigatory duty is a form of punishment. Criminal punishment is imposed upon a person as a response to that person's objectionable behavior – the violation of the criminal statutes of a particular jurisdiction. Punishment is inflicted in order to deter criminal behavior, rehabilitate the criminal offender, incapacitate dangerous individuals, express society's desire for retribution against the lawbreaker, or any combination of these purposes of punishment.[73] Likewise, when a law enforcement official seizes an individual, it is because of some perceived criminal violation committed by that individual. In fact, it is that perception of objectionable behavior that legally justifies the seizure in the first place. As previously explained, in order for the seizure of a person tantamount to an arrest to be reasonable under the Fourth Amendment, it must be supported by probable cause.[74] This means that an officer – or a magistrate in cases where a warrant is required – must determine that there is a "fair probability" that the individual has committed a criminal offense.

In the case of Michael Brown, the alleged criminal offense was impeding traffic. And while Officer Wilson may have initially only needed reasonable suspicion to stop Michael to inquire further, once deadly force was used, Michael's seizure was elevated to an arrest, which would require probable

70. Navarette v. California, 134 S. Ct. 1683 (2014) (quoting Alabama v. White, 496 U.S. 325, 330 (1990) ("The 'reasonable suspicion' necessary to justify such a stop 'is dependent upon both the content of information possessed by police and its degree of reliability.'"); Devenpeck v. Alford, 543 U.S. 146, 152 (2004) ("In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed.").

71. Terry v. Ohio, 392 U.S. 1, 30 (1968).

72. Beck v. Ohio, 379 U.S. 89, 91 (1964).

73. ARTHUR W. CAMPBELL, LAWS OF SENTENCING 17 (2d ed. 1991).

74. *Devenpeck*, 543 U.S. at 152.

cause that he had committed an offense.[75] According to Officer Wilson, at the point that deadly force was used, Michael's objectionable behavior was threatening Officer Wilson's life, which could be categorized as a host of criminal offenses – from assault to attempted murder.[76] Thus, the deadly force used against Michael was in response to his perceived criminal behavior. In Officer Wilson's version of the story, the lethal force was meant to deter Michael's life threatening advance toward the officer.[77] Officer Wilson's account depicts Michael as an enraged monster, untamable by any amount of negotiation.[78] Thus, any thought of a chance for rehabilitation would be futile.[79] Further, as those who support Officer Wilson's actions would argue, the allegedly outrageously threatening behavior displayed by Michael Brown was deserving of retribution.[80] And, the shots that took Michael's life were certainly meant to incapacitate him.[81] Officer Darren Wilson, then, subjected Michael to a level of force that operated in the same manner as punishment.

B. New View of Reasonableness

Even after acknowledging that police force is akin to punishment, the Supreme Court may still decline to apply the Eighth Amendment to excessive police force claims. Perhaps the Court will decide, as it described in *Ingraham*, that it has never applied the Eighth Amendment to punishment that occurred before a criminal conviction and therefore will not begin doing so.[82] Such a conclusion, however, does not prevent the Supreme Court from incor-

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75. *See* California v. Hodari D, 499 U.S. 621, 626 (1991) ("An arrest requires *either* physical force . . . *or,* where that is absent, *submission* to the assertion of authority.").

76. In his grand jury testimony, Officer Wilson alleged that Michael punched him in the face (Grand Jury Transcript, *supra* note 26, at 210:12–24), reached into his car (*id.* at 212:12–22), repeatedly swung at him (*id.* at 213:1–4 and 214:1–5), and grabbed the Officer's gun (*id.* at 215:2–6 and 223:1–3).

77. In describing the first time he shot his gun while Michael was at his car, Officer Wilson explained thinking "this guy is going to kill me if he gets ahold of this gun." *Id.* at 224:10–12.

78. At one point in his grand jury testimony, Officer Wilson said that he felt "like a five-year-old holding onto Hulk Hogan." *Id.* at 212:18–22. He also described Michael as looking like a "demon." *Id.* at 225:2–3.

79. Officer Wilson testified before the grand jury that as he fired a flurry of shots at Michael, the enraged suspect "looked like he was almost bulking up to run through the shots, like it was making him mad that I'm shooting at him." *Id.* at 228:19–21.

80. In describing the fatal series of shots, Officer Wilson said, "I remember looking at my sites and firing, all I see is his head and that's what I shot." *Id.* at 229:16–18.

81. Officer Wilson described his last shot against Michael this way: "And then when it went into him, the demeanor on his face went blank, the aggression was gone, it was gone, I mean, I knew he stopped, the threat was stopped." *Id.* at 229:21–25.

82. Ingraham v. Wright, 430 U.S. 651, 666–68 (1977).

porating the Eighth Amendment's values into the Fourth Amendment's reasonableness analysis.

As already explained, the traditional Fourth Amendment reasonableness analysis for police force errs by focusing completely on the point of view of a "reasonable" officer.[83] Deadly force can be used by an officer who reasonably believes that such force is necessary to prevent the escape of a dangerous suspect.[84] However, without regulations and procedures regarding meaningful alternatives to deadly force, it is flawed to ask whether an officer reasonably believes that deadly force is necessary. In the officer's point of view, of course, deadly force is necessary if that officer is frightened by the aggression or perceived aggression of the suspect. Any officer looking at the situation from the outside may feel the same way because it is unclear what the alternatives would be in those situations. Should the officer retreat? Use a taser? Call for back up? Any of those options may be appropriate if the focus were on sparing the lives of suspects and on outfitting and training police officers in the use of non-lethal force. In other words, the concept of "reasonableness" has no real meaning if it is asked without regard to alternatives. And it certainly has no meaning when it is asked without the existence of clear rules and procedures that regulate police action.

If the Supreme Court continues to analyze police force under the Fourth Amendment only, there is still a need to give meaning to the "reasonable officer" standard. This requires a clear understanding of what reasonable officers ought to do in certain situations. As such standards are developed through procedures and regulations for the use of force by officers, the same concern for human dignity that the Supreme Court has read into the Eighth Amendment should fuel reforms of police conduct procedures. Even the Department of Justice noted in its December 2014 investigation of the Cleveland Division of Police that "[t]he use of force by police should be guided by a respect for human life and human dignity."[85] Without necessarily throwing out the reasonableness analysis, procedural protections can be put in place to show that our country goes to great lengths to spare the lives of individuals, even in the death penalty on the streets.

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83. Graham v. Connor, 490 U.S. 386, 396 (1989).

84. Tennessee v. Garner, 471 U.S. 1, 3 (1985).

85. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE (Dec. 4, 2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf.

IV. RECONCEPTUALIZING THE PROBLEM: THE DEATH PENALTY ON THE STREETS

In its Eighth Amendment cruel and unusual punishment jurisprudence, the Supreme Court has stressed the importance of respecting human dignity.[86] The Court has explained that "the fundamental premise of the [cruel and unusual punishment] Clause [is] that even the vilest criminal remains a human being possessed of common human dignity."[87] With this concept as motivation, the Supreme Court has developed a number of protections in capital cases – limiting the situations in which the death penalty can be imposed through the court system. A brief review of some of these protections reveals the lengths that the American criminal justice system goes to in order to spare the lives of even those convicted of heinous crimes. In other words, individuals have a host of protections against the death penalty in the courts. For instance, as is discussed below, the death penalty must be proportionate to the crime of conviction, and death cannot be a mandatory punishment.[88] However, when it comes to the death penalty on the streets – when death is imposed by police officers as a response to an individual's objectionable behavior – procedural protections are nonexistent. And, when the procedural protections of the death penalty in the courts are considered against the backdrop of the death penalty on the streets, it becomes quite apparent that the same concern for human dignity has not been, but should be, incorporated into the law against excessive police force.

A. The Death Penalty Must Be Proportional to the Crime

The Supreme Court has interpreted the Eighth Amendment's Cruel and Unusual Punishment Clause to require proportionality between the crime committed and the punishment imposed.[89] Thus, the Court has found that punishment is unconstitutionally excessive if it is "grossly out of proportion to the severity of the crime."[90] When it comes to the death penalty, the Court has described that form of punishment as "unique in its severity and irrevocability."[91] Due to this severity, the death penalty has been reserved for "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[92]

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86. Furman v. Georgia, 408 U.S. 238, 270 (1972) ("A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity.").

87. *Id.* at 273.

88. Gregg v. Georgia, 428 U.S. 153, 154 (1976); Woodson v. North Carolina, 428 U.S. 280, 280–81 (1976).

89. *Gregg*, 428 U.S. at 154.

90. Coker v. Georgia, 433 U.S. 584, 592 (1977).

91. *Id*. at 598 (quoting *Gregg*, 428 U.S. at 154).

92. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)).

For this reason, the Supreme Court has repeatedly declined to uphold the death penalty in situations where the defendant did not intentionally cause the death of another human.[93]

When it comes to police force, the disproportionality of using "irrevocable" deadly force against an individual suspected of committing a crime less severe than deliberate homicide has not found its way into the legal discourse. Of course, the justification used in cases of fatal police force, as previously explained, is that the officer reasonably believed that the suspect was about to use deadly force against the officer or others.[94] However, when it comes to the death penalty in the court system, a reasonable belief that someone was planning to use deadly force against a victim is not enough to justify the imposition of the death penalty upon that person.[95] A criminal conviction requires proof beyond a reasonable doubt,[96] and even an attempted murder is not thought to be punishable by the death penalty.[97] However, with the death penalty on the streets, even an officer's mistaken belief that a suspect is planning to use deadly force has been enough to justify that officer killing the individual. While statistics on the number of unarmed persons who have been killed by police are not collected by any government entity,[98] news accounts reveal that these killings do occur.[99] And when they do, the legal

93. *See, e.g.*, *Kennedy*, 554 U.S. at 407 (holding that the death penalty is unconstitutional when applied to child rape); *Coker*, 433 U.S. at 584 (holding that the death penalty is unconstitutional when applied to adult rape).

94. MO. REV. STAT. § 563.046.3(2) (2000).

95. 18 U.S.C. § 3591 (2012).

96. Patterson v. New York, 432 U.S. 197, 210 (1977) ("We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.").

97. The only statute allowing capital punishment for an attempted murder offense is federal statute 18 U.S.C. § 3591(b)(2), which allows the death penalty for attempting, authorizing, or advising the killing of any officer, juror, or witness in cases involving a continuing criminal enterprise, regardless of whether such killing actually occurs. 18 U.S.C. § 3591(b)(2). However, this statute has not been tested before the Supreme Court, and no person is on death row for this offense. *See Death Penalty for Offenses Other Than Murder*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder (last visited Oct. 3, 2015).

98. Until the Death in Custody Reporting Act of 2013, law enforcement agencies were not required to report the number of homicides caused by their officers. *See* Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (2014); *see also* Allie Gross & Bryan Schatz, *Congress is Finally Going to Make Local Law Enforcement Report how many People They Kill*, MOTHER JONES (Dec. 17, 2014, 7:00 AM), http://www.motherjones.com/politics/2014/12/death-custody-reporting-act-police-shootings-ferguson-garner.

99. For example, one source has collected the names of seventy-six unarmed people of color who were killed by police officers between 1999 and 2014. *See* Juzwiak & Chan, *supra* note 4.

analysis remains the same – a focus on the reasonable belief of the police officer. The tragedy is that this analysis is employed without regard to the underlying crime that motivated the police encounter in the first place.

In recent years, the United States has seen numerous police killings of people who were suspected of crimes that would never carry the death penalty in the court system. An excellent example of the often disproportional effect of the death penalty on the streets is the death of Eric Garner in Staten Island, New York.[100] In July 2014, witnesses say Eric Garner, a forty-three-year-old father of six, was breaking up a fight when police arrived on the scene.[101] Officers were allegedly familiar with Mr. Garner because they had seen him selling untaxed cigarettes – a crime in New York City.[102] This gave them probable cause to arrest Mr. Garner for an offense that carries a fine of up to $5000 and up to thirty days of imprisonment.[103] Mr. Garner, however, was never given an opportunity to either plead to or fight his charges.[104] He was never given the dignity of a court process.[105] Instead, an officer held Mr. Garner, who suffered from asthma, in an impermissible chokehold, causing Mr. Garner to exclaim repeatedly, "I can't breathe!"[106] Mr. Garner later died and the city medical examiner declared his death a homicide caused by "the compression of his chest and prone positioning during physical restraint by police."[107] For what amounted to a misdemeanor offense, Mr. Garner received the death penalty – a penalty that would be patently unconstitutional in the court system.

One might argue that the underlying suspected crimes of individuals killed by police is often more serious than selling untaxed cigarettes. However, even when this is the case, the death penalty is a disproportionate punishment if the underlying crime is not intentionally causing someone's death. Often, the claim by officers is that the individual was somehow resisting arrest.[108] In many jurisdictions, resisting arrest is treated only as a misdemean-

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100. Judith Browne Dianis, *Eric Garner Was Killed by More Than Just a Chokehold*, MSNBC (Aug. 5, 2014, 9:43 AM), http://www.msnbc.com/msnbc/what-killed-eric-garner.

101. *Id.*

102. *Id.*; *see also* N.Y. TAX LAW § 1814 (McKinney 2015).

103. § 1814(h)(2).

104. Browne Dianis, *supra* note 100.

105. *Id.*

106. *Id.*

107. Jake Pearson, *Eric Garner's Death by Police Chokehold Ruled a Homicide*, HUFFINGTON POST (Aug. 1, 2014, 3:27 PM), http://www.huffingtonpost.com/2014/08/01/eric-garner-homicide_n_5642481.html.

108. This was the claim made by the officers involved in Eric Garner's situation. *See* C.J. Sullivan, *Man Dies After Suffering Heart Attack During Arrest*, N.Y. POST (July 18, 2014, 1:00 AM), http://nypost.com/2014/07/18/man-dies-after-suffering-heart-attack-during-arrest/. However, there are a host of such stories. *See, e.g.*, *KCKPD: Man Dies After Resisting Arrest, Brief Struggle with Police*, 41 ACTION NEWS (May 23, 2014, 6:23 AM), http://www.kshb.com/news/crime/kckpd-man-dies-

or and carries, at most, twelve months of imprisonment – a far cry from the death penalty.[109] Even if an officer claims that the individual resisting arrest assaulted the officer in a serious manner, at most that offense carries thirty years to life imprisonment.[110] A sentence of death would clearly be cruel and unusual in our court system. Yet, we have tolerated such disrespect for human dignity for the death penalty on the streets through the application of disproportionate punishment.

B. Death Cannot Be Mandatory: The Need for Alternate Choices

Another manner in which the Supreme Court has respected human dignity in the death penalty context is by prohibiting statutes that make death a mandatory penalty. In the 1976 case *Woodson v. North Carolina*, the Supreme Court addressed the constitutionality of a North Carolina statute stating that certain deliberate and premeditated murders shall be punishable by death.[111] In coming to its conclusion that such a statute was unconstitutional, the Court again noted the "unique and irreversible" nature of the death penalty.[112] The Court explored the country's history of moving away from the mandatory imposition of such a final and severe sentence.[113] In its written opinion in *Woodson*, the Court quoted Chief Justice Burger's dissent in *Furman v. Georgia,*[114] in which he said that the change from mandatory death

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after-after-resisting-arrest-brief-struggle-with-police; *Victorville Man Dies After Being Tased Due To Resisting Arrest*, VICTOR VALLEY NEWS (Aug. 13, 2014), http://www.vvng.com/victorville-man-dies-after-being-tased-due-to-resisting-arrest/; Cole Reichenberg, *Montana Man Shot and Killed After Resisting Arrest in California*, THE MOOSE 95.1 FM (Oct. 28, 2013), http://mooseradio.com/montana-man-shot-and-killed-after-resisting-arrest-in-california/; Alex Cabrero, *Sevier County Man Killed After Resisting DUI Arrest*, KSL (July 30, 2011), http://www.ksl.com/?nid=148&sid=16591865.

109. For example, if Eric Garner had been convicted of resisting arrest under New York law, his punishment would have been for a class A misdemeanor, which carries a maximum penalty of only one year of imprisonment. N.Y. PENAL LAW § 205.30 (McKinney 2015); N.Y. PENAL LAW § 70.15 (McKinney 2015). In Michael Brown's case, resisting arrest in Missouri can be a class A misdemeanor, punishable by up to one year of imprisonment. MO. REV. STAT. § 575.150 (2000); MO. REV. STAT. § 558.011 (2000). It can also be a class E felony if the person resists by fleeing and creates a substantial risk of serious physical injury or death to any person, punishable by up to four years of imprisonment. MO. REV. STAT. § 575.150; MO. REV. STAT. § 558.011.

110. For instance, under Missouri law, assault of a police officer is a class A felony, which carries ten to thirty years imprisonment, and in some cases life imprisonment. MO. REV. STAT. § 565.081 (2000); MO. REV. STAT. § 558.011.

111. Woodson v. North Carolina, 428 U.S. 280, 286 (1976).

112. *Id.* at 287.

113. *Id.* at 298–99.

114. *Id.* at 297 (citing Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)).

sentences "was greeted by the Court as a humanizing development."[115] Therefore, the Court condemned the use of a mandatory death penalty as going beyond "the limits of civilized standards."[116]

In keeping with these civilized standards of humanity, the *Woodson* Court also noted juries' reluctance to believe that a death sentence is appropriate in every case of intentional and premeditated murder. As the Court explained, juries in North Carolina at the time were often declining to render guilty verdicts because of the severity of the punishment of death that would be mandated against the defendant.[117] The same is true today. Juries across the United States impose the death penalty in only about three percent of eligible cases.[118] This indicates that, when given the discretion to do so, jurors usually believe that even an intentional murderer has some redeeming value and is deserving of life. This was an important recognition in leading the *Woodson* Court to decide that a mandatory death penalty scheme is cruel and unusual. As the Court poetically put it:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[119]

What the Supreme Court is really acknowledging is that people are more than what they have done and that juries tend to realize this as well when given mitigating information about an individual. It is in this way that the death penalty jurisprudence incorporates a respect for human dignity into even the most severe and final sentence.

In *Woodson*, the Court recognized that North Carolina's mandatory sentencing law was meant to protect against jurors imposing the death penalty in an arbitrary fashion. However, as the Court recognized, a mandatory approach goes too far in the opposite direction – leaving no room for a jury's consideration of factors that may warrant a sentence less than death and giv-

115. *Id.* at 298 (citing *Furman*, 408 U.S. at 402).

116. *Id.* at 301 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

117. *Id.* at 302–03.

118. *See* Hugo A. Bedau, *The Case Against the Death Penalty*, ACLU, https://www.aclu.org/case-against-death-penalty (last updated 2012) ("Of all those convicted on a charge of criminal homicide, only 3 percent – about 1 in 33 – are eventually sentenced to death.").

119. *Woodson*, 428 U.S. at 305.

ing no meaningful guidance in how such a consideration should be made.[120] The Court clarifies that, rather than just replacing the judgment of juries with a mandatory penalty, legislatures are supposed to provide "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."[121] Thus, the death penalty in the court system respects human dignity, not only through disallowing the death penalty to be mandatory, but also by putting objective standards and procedures in place to prevent a jury's potentially arbitrary decisions. The same certainly has not been true for the death penalty on the streets.

While the death penalty on the streets is not a mandatory sanction, it suffers from the same deficiencies that plagued mandatory death penalty schemes. For instance, when police officers kill individuals, their decision does not take into account the fact that many people in society would object to the view that the suspect was deserving of death in that instance. One need only look to recent controversies involving police killings for proof of that point.[122] Instead of focusing on the humanity of the individual, analyses of the legality of deadly police force are preoccupied with the actions of the suspected criminal. Death, though, whether it is imposed through the court system or on the streets at the hand of law enforcement, is an irreversible and severe outcome. Thus, its imposition should not be tolerated without regard for the suspect's right to live. This suggestion is not meant to diminish the importance of the lives of police officers, nor is it meant to ignore the on-the-scene decisions that police officers have to make in deciding whether deadly force is appropriate. Rather, the purpose of comparing the death penalty on the streets to the death penalty in the courts is to encourage a place for the humanity of the suspect in the analysis of whether deadly force ought to be used in a particular situation.

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120. *Id.* at 303 ("North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die.").

121. *Id.*

122. For instance, there are a number of accounts online asserting the opinion that victims of police violence did not have to die. *See, e.g.*, Autumn Alston, *If Michael Brown Robbed a Store, He Still Didn't Deserve to Die*, LIBERAL AM. (Aug. 15, 2014), http://www.liberalamerica.org/2014/08/15/if-michael-brown-robbed-a-store-he-still-didnt-deserve-to-die/; PenrS, *Michael Brown Did Not Deserve to Die!*, DAILY KOS (Aug. 15, 2014), http://www.dailykos.com/story/2014/08/15/1321955/-Michael-Brown-Did-Not-Deserve-to-Die; Richard Anthony, *Michael Brown and Eric Garner Didn't Have to Die*, UFP NEWS (Dec. 23, 2014), http://universalfreepress.com/michael-brown-eric-garner-didnt-die/; Jonathan Capehart, *Tamir Rice and Michael Brown Didn't Deserve to Die*, WASH. POST (Dec. 1, 2014), http://www.washingtonpost.com/blogs/post-partisan/wp/2014/12/01/tamir-rice-and-michael-brown-didnt-deserve-to-die/.

Instead of treating criminal suspects in police encounters "as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death[,]"[123] the perspective should be that all individuals are deserving of a chance at life. Just as juries in capital cases often choose a sanction less severe than death for deliberate murderers, the law ought to encourage police officers to choose non-lethal force in most encounters – even with those individuals who have allegedly threatened the life of a police officer or others. The truth is that police departments do not receive much by way of training, resource support, and regulation in order to safely turn to non-fatal force in most jurisdictions.[124] A debilitating shot to the leg may be sufficient to contain a fleeing felon, making a fatal shot to the back of the head unnecessary. Backup officers can be called in to show force, rather than using deadly force, in the case of unruly suspects. Officers can be more regularly outfitted with less lethal equipment, such as Tasers, to be used in any situations where it would be safe for officers to do so.[125] And, in some cases, unarmed, fleeing suspects can be allowed to flee because officers have their identifying information and can apprehend them later under less volatile conditions. Because the law of excessive force does not speak to these alternate procedures, the death penalty on the street is very similar to the flawed mandatory death penalty schemes in that it too lacks "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."[126] Instead, we are left with a Fourth Amendment reasonableness analysis that does not focus on ways to avoid the deaths of everyday individuals.

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123. *Woodson*, 428 U.S. at 304.

124. In his grand jury testimony, Darren Wilson, the officer who shot and killed the unarmed Michael Brown in Ferguson, Missouri, explained that in his department there is usually only one Taser available, and he does not carry it because it is uncomfortable to do so. Grand Jury Transcript, *supra* note 26, at 205:18–23. Most police are trained using a force continuum, which allows for increased degrees of force as the encounter elevates. *See The Use-of-Force Continuum*, NAT'L INST. JUST. (Aug. 4, 2009), http://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/continuum.aspx. This is very different from de-escalating a dangerous situation in order to be able to safely use non-lethal force, which is the method for which this Article advocates. *See id.*

125. Though the use of Tasers is not without its own problems, and it certainly can be abused, there is increasing evidence that using Tasers can de-escalate a police encounter. *See, e.g.*, Stephanie Taylor, *Police Train for Taser Use; Authorities Say They Keep Incidents From Turning More Violent,* TUSCALOOSA NEWS (Feb. 9, 2015, 11:00 PM), http://www.tuscaloosanews.com/article/20150209/news/150209541.

126. *Woodson*, 428 U.S. at 303.

V. A HUMAN DIGNITY STANDARD REQUIRES PROCEDURAL PROTECTIONS BEFORE POLICE FORCE IS REASONABLE

Without a consideration of whether an officer could have used non-deadly force before resorting to deadly force in a confrontation, the consideration of whether that officer's actions were reasonable has no ready meaning. If the Eighth Amendment's human dignity standard was incorporated into the Fourth Amendment reasonableness inquiry for claims of excessive police force, then a requirement of procedural protections of life would have room in the analysis. The purpose of this Article is not to suggest what those protections should be in every case, but rather to make the case for the need for procedural protections of life in the use of force by police officers. There are many entities that are equipped to suggest the types of non-lethal force protocols that can safely be used in a variety of police encounters.[127] What this Article is meant to argue is that an officer's use of deadly force should never satisfy a reasonable standard unless that officer employed appropriate non-lethal alternatives before turning to the use of deadly force. Certainly, there may be some situations in which non-lethal force is deemed unsafe to the officer or other involved individuals. However, considering non-lethal alternatives is not the same as asking if an officer reasonably believed that the suspect was going to use deadly force against the officer or others. Even in some situations when the answer to the traditional reasonableness questions is in the affirmative, a human dignity standard would call for the use of non-fatal force if it could safely be applied to contain the suspect.

The Portland Police Department's internal investigation of the Aaron Campbell shooting spoke of several non-fatal force alternatives that could have been employed by the officer in that situation. The report spoke of the use of a bean bag strike, as well as a K9 option. In not considering these alternatives, the investigation report concluded that "Officer Frashour failed to weigh all options and tools, consider the totality of the situation, and to de-escalate his mindset, prior to the use of lethal force."[128] Weighing all of the options and tools and employing de-escalation methods are just the sort of procedural protections that must be built into the reasonableness standard for police force. A reasonable officer – one who is truly trying to avoid the loss of the suspect's life – will turn to non-lethal force first and will use methods of diffusing tension before employing the death penalty on the streets. The law should call for such respect for human dignity by police officers. That is the solution for which the "Hands Up" and #BlackLivesMatter movements

127. Police departments themselves are a prime institution to develop non-lethal force protocols to be followed before fatal force is applied. Community organizations can also have a voice in the sort of force that they would agree to be subjected to before deadly force is applied. Of course, once a non-lethal alternative requirement is built into the law, even entrepreneurs and other companies may step in with innovations in the development of non-lethal weaponry to sell to police departments.

128. USE OF FORCE REVIEW BD., *supra* note 57.

are pleading. That is what the Eighth Amendment teaches is the way to properly employ punishment.

VI. CONCLUSION

Comparing the death penalty in the court system to the death penalty on the streets demonstrates the utter lack of procedural protections afforded to individuals against deadly police force. Rather than requiring that non-fatal force be used when it is safe to do so, the law merely requires that police officers act reasonably in their decisions to use deadly force. This reasonableness standard has no true, satisfying meaning, however, because there is no consensus on what constitutes reasonable police action – either in the law, police protocol across the nation, or societal perceptions of appropriate police behavior. Therefore, when the issue of police reasonableness arises in the death penalty on the street – when a police officer has used deadly force against an individual as punishment – we are left with inconsistent results and, most tragically, the unnecessary loss of life. In order to make the death penalty on the streets more consistent with the death penalty in the court system, the Supreme Court ought to incorporate an Eighth Amendment respect for human dignity standard into the Fourth Amendment reasonableness analysis when claims of excessive force are brought against police officers. Doing so will refocus the force question from whether an officer felt threatened by a suspect to what officers should have done before turning to deadly force. This analysis will necessarily require the development of fatal force protocols that train officers in the use of non-lethal force and support police departments in providing officers with the resources to safely employ non-deadly force – even in non-contentious situations. The Eighth Amendment provides an excellent framework for respecting the lives of even those suspected of criminal activity – an approach that is crucial when we begin to accept the deadly use of force by police officers as the death penalty on the streets.