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North Charleston, S.C. — Unarmed Walter Scott is shot by police officer Michael Thomas Slager on April 4, 2015.

Lawful Use of Deadly Force by the Police: What's Wrong in Ferguson and Elsewhere

Why did a Missouri grand jury not indict Officer Darren Wilson for killing Michael Brown? Although others have blamed the prosecutors or the bias of the grand jurors, the decision more likely reflects the failure of the law to properly calibrate the permissible use of deadly force by police officers when they attempt to arrest a suspect. This article explains why states should enact new laws that better balance legitimate needs for police safety with the rights of citizens to be free from the unjustified use of deadly force, using the Brown case as an example.

Editor's Note: The Aug. 9, 2014, killing of Michael Brown, an unarmed black male, by a white police officer, resulted in protests across the United States that echoed images last seen during the 1960s. Is there a way for police officers to protect public safety without killing unarmed suspects? Steven Salky, Jacob Schuman, and Keisha Stanford recommend that state statutes be amended to employ an "objective necessity" test in cases involving "deadly force" arrests.

The Killing of Michael Brown

The grand jury heard from many witnesses regarding Officer Wilson's encounter with Michael Brown. It is unknown which version the grand jurors accepted as true. Given their decision not to indict, however, it is fair to assume that they basically accepted Officer Wilson's version of the encounter, which combined with the undisputed forensic evidence to the following sequence:

First, Michael Brown stole a $15 packet of cigarillos from a convenience store; a surveillance video of Brown inside the store shows him grabbing a store clerk who demanded that he pay. Officer Wilson testified that he heard a police radio transmission about the "stealing" while he was sitting in his parked police Tahoe SUV before he first encountered Brown and a companion walking down the middle of the street. According to Wilson's testimony, he instructed the two to walk on the sidewalk, to which Brown responded angrily. Wilson then noticed the cigarillos in Brown's right hand and "that's when it clicked for [Wilson]" that "these are the two from the stealing."[1]

Second, after Brown disobeyed his request and continued to walk in the street, Wilson backed his vehicle

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into a position that blocked Brown from continuing. According to Wilson, when he tried to exit his police vehicle, Brown blocked him by slamming the driver's door shut and then punched him through the open window. At this point, Brown had, at least in Officer Wilson's mind, transformed from a jaywalker and suspected petty thief into a felon who assaulted a police officer.

Third, Wilson said that while he was defending himself with his left hand, he drew his pistol from its holster with his right hand. According to Wilson, Brown "immediately grabb[ed]" for the weapon.[2] Wilson also testified that, although his right hand remained on the pistol, Brown was also able to grip the gun, "twist[] it and then [] dig it down into" Wilson's hip.[3] Wilson also stated that, at some point during the struggle, he (Wilson) discharged the weapon at least twice. Wilson testified that he believed at least one bullet hit Brown, through the car door, in Brown's hip. After firing the two shots, Wilson also "noticed blood on the back of [his (Wilson's)] hand."[4] The forensic evidence confirms that Brown was shot during the encounter at the vehicle, but only in his right thumb. The other bullet fired by Wilson was found lodged in the driver's side door and did not, in fact, strike Brown.

Fourth, Brown fled after Wilson fired his gun. Wilson then radioed for help, telling dispatch, "shots fired, send me more cars"[5] and exited his vehicle with his gun drawn, chased Brown, calling for him to surrender and get down on the ground. According to Wilson, he knew that officers were "already in the area for the stealing that was originally reported," so he thought it would take no more than 30 seconds for backup to arrive.[6] As established by the bloodstains on the road, Brown ran at least 180 feet away from the SUV.

Fifth, Brown then turned and began to move back toward the officer. Wilson testified that, although he instructed Brown to "get on the ground,"[7] Brown "kind of [did] like a stutter step to start running"[8] and Brown's "left hand goes in a fist and goes to his side, his right goes under his shirt in his waistband and he started running at [Wilson]."[9] Wilson never testified that he thought Brown had a gun and, as noted earlier, Wilson claimed that Brown had unsuccessfully attempted to wrestle his revolver away from him. Nonetheless, as Brown moved in Wilson's direction, Wilson shot at Brown several times, hitting him at least once insofar as Wilson could tell. Wilson testified, "I know I missed a couple ... but I know I hit him at least once because I saw his body kind of jerk or fl[i]nched."[10]

Sixth, although Brown had been shot, he continued to charge toward Wilson. After Brown again failed to follow Wilson's repeated orders to get on the ground, Wilson fired several more volleys. Wilson testified that he did not recall how many times he shot at Brown or if he hit Brown every time, but Wilson knew he hit Brown at least once more "because he flinched again."[11] According to the autopsy reports, Brown was hit at least five times before Wilson fired the fatal shots. The county autopsy report found three bullet entry wounds in Brown's right arm and two in his chest.

Finally, when Brown was still approximately 160 feet away from him, Wilson fired two more rounds into the top of Brown's head. Brown immediately collapsed. The issue as to how Brown was postured at the moment these fatal shots were fired will presumably long be debated by the forensic experts. Was he already collapsed onto the ground? Was he falling down toward the ground with his head tilted forward? Or was he, as Wilson testified, crouched as if moving to tackle Wilson? Regardless, the evidence is undisputed that the final two bullets from Wilson's service revolver (which was empty when the encounter was completed) entered Brown's brain and killed him instantly.

The Grand Jury's Decision Not to Indict

These reconstructed facts, even taken in the light most favorable to Officer Wilson, provided probable cause for the grand jury to find that Officer Wilson had committed a state crime in connection with the killing of Michael Brown. It is not disputed that Wilson fired the shots that caused Brown's death. And it cannot be disputed that Michael Brown was unarmed when he was shot and killed. Based on these undisputed facts alone, there was "probable cause," a very low legal standard meaning "[a] reasonable ground to suspect that a person has committed ... a crime,"[12] for a charge of involuntary manslaughter, at a minimum. In Missouri, a person commits first-degree involuntary manslaughter if he "[r]ecklessly causes the death of another person,"[13] and commits second-degree involuntary manslaughter "if he acts with criminal negligence to cause the death of any person".[14]

However, in order to indict Officer Wilson, the grand jurors were instructed not only to consider whether probable cause existed to believe he committed a crime, but also to determine whether probable cause existed to believe that Officer Wilson neither acted in self-defense nor violated Missouri law regarding the use of deadly force in order to arrest Brown. The grand jurors were instructed as follows:

> [You must find p]robable cause to believe that he committed the offense, which means that he met all the elements of that offense. . . . And you must find probable cause to believe that Darren Wilson did not act in lawful self-defense and you must find probable cause to believe that Darren Wilson did not use lawful force in making an arrest. And only if you find those things, which is kind of like finding a negative, you cannot return an indictment on anything or true bill unless you find both of those things. Because both are complete defenses to any offense and they both have been raised in his, in the evidence.[15]

In other words, the grand jurors had to consider whether the officer's commission of a crime was justified either by the law of self-defense and/or by the law governing arrests, such that any crime committed was excused.

Although it is not (and may never be) known why the grand jurors voted as they did, it is unlikely that they concluded Wilson acted in self-defense. The use of deadly force in self-defense, under Missouri law, required that Officer Wilson reasonably believed deadly force was "*necessary* to protect himself . . . against death, serious physical injury, or any forcible felony."[16] According to Wilson's own testimony, after Brown attacked him in his police vehicle, Brown fled the scene. Wilson testified that, when he looked up after firing the initial two shots in his vehicle, he "[saw] Brown start to run and [Wilson] saw a cloud of dust behind [Brown]."[17] Officer Wilson then gave chase, with his semi-automatic revolver drawn, and when Brown turned back toward him, he shot at Brown a total of 10 times, seeing Brown's body "flinch" on multiple occasions when multiple bullets hit their target.[18]

Even accepting Officer Wilson's sworn testimony that Brown was still

moving in his direction, crouched as if he was going to tackle him (instead of stumbling to the ground from the impact of the previous gunshots), it is difficult to understand how the grand jury could have concluded that Wilson reasonably believed it was necessary to kill Brown in order to defend himself. When Wilson fired the fatal rounds, Brown was still more than half a football field away and Wilson knew he had already wounded a man who had never displayed a weapon of his own. There is no doubt that Michael Brown was a big man, standing 6 foot 4 inches and weighing approximately 285 pounds. But Officer Wilson, who held the only gun, was also a big man, almost the same height as Mr. Brown and weighing approximately 210 pounds. Although Officer Wilson undoubtedly had the right to use force to protect himself from harm, he could lawfully use *deadly force* only if it was "necessary." Remember, as well, that every bullet Wilson fired would have to meet that standard. Even if Wilson's use of deadly force was "objectively reasonable," as the Department of Justice concluded in deciding not to indict Officer Wilson for violating Michael Brown's constitutional rights, neither the bullets fired after Brown turned back from fleeing nor the final two bullets to the head seem "necessary" to protect Wilson from serious bodily harm. Accordingly, self-defense was an inadequate basis for the grand jury's decision to vote against Officer Wilson's indictment.

No, the more likely impediment to the indictment was the instruction the grand jury received concerning the justifiable use of deadly force to affect an arrest. This is where the grand jurors probably considered the evidence to fall short of what they were told was required to indict: that Officer Wilson had used unauthorized deadly force in order to arrest Brown.

The 'Arrest by Deadly Force' Instruction

Missouri, like most states, has a statute authorizing law enforcement officers to use deadly force to arrest a felon. The statute also imposes criminal penalties for the unauthorized use of deadly force by the police. The statute states, in pertinent part, that an officer making an arrest is justified in using deadly force "[w]hen he or she reasonably believes that such use of deadly force is immediately necessary to effect the arrest *and* also believes that the person to be arrested (a) [h]as committed or attempted to commit a felony; or (b) [i]s attempting to escape by use of a deadly weapon; or (c) [m]ay otherwise endanger life or inflict serious physical injury unless arrested without delay."[19]

Based on Officer Wilson's testimony, the grand jurors knew that he viewed Brown as a felon, since Brown had assaulted him. (The grand jurors were also told that Officer Wilson previously told investigators that he was arresting Brown because Brown had assaulted him.)[20] Thus, if the grand jurors followed the law of Missouri, they could indict Wilson only if they found that it was not necessary for him to have used deadly force to arrest Brown. In other words, if they believed the evidence supported Wilson's reasonable belief that Brown had no intention to surrender, then, under Missouri law, they could not vote to indict him. Although there were witnesses who testified that Brown was holding his hands up as if to surrender prior to Wilson shooting him, the totality of the evidence supported Wilson's testimony that Brown was "charging" at Wilson when he was shot dead. If the grand jurors believed Wilson's version, then Missouri law authorized him to use deadly force.

As an aside, it is worth noting that when the prosecutors instructed the jurors on the law to apply, they determined that the Missouri statute was, at least in part, unconstitutional. In *Tennessee v. Garner*,[21] the Supreme Court ruled that the use of deadly force by the police simply to stop a fleeing felon violated the Fourth Amendment of the Constitution. Even though Brown was not fleeing when he was shot dead, the prosecutors apparently gave the grand jurors a revised version of the Missouri arrest-by-deadly-force law, which they believed to be more in line with *Garner*. Unfortunately, the revised instruction the prosecutors gave to the grand jurors does not appear in the transcript or other court files released to the public.

Should the 'Use of Deadly Force to Arrest' Laws Be Reformed?

A wide range of state laws exists on the use of deadly force to make an arrest. Michigan and Alabama, for example, still permit their police to use deadly force if it is necessary to arrest a fleeing felon, without reference to any considerations related to the type of felony at issue or the danger the suspect poses to the officer or the public.[22]

In these states, if a police officer witnesses even a nonviolent felony – a drug deal, a car break-in, or simply the passing of a bad check – and can only apprehend the suspect by killing him, the officer is authorized to do so.

Connecticut, by contrast, limits deadly force to violent felonies, allowing a police officer to kill a suspect only if he "reasonably believes" it is necessary to "effect an arrest . . . of a person whom he reasonably believes has committed or attempted to commit a felony which involved the infliction or threatened infliction of serious physical injury and if, where feasible, he has given warning of his intent to use deadly physical force."[23] North Carolina focuses on the threat the suspect poses to the public, authorizing police officers to use deadly force only if they "reasonably believe" the suspect "is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay."[24] Washington combines both of these approaches but also effectively excises their "reasonableness" requirements, authorizing police officers to use deadly force against felons who either committed violent crimes or who pose a threat to the public so long as they act "without malice and with a good faith belief that [the use of deadly force] is justifiable."[25]

The national debate stimulated by the Michael Brown case should prioritize achieving a better balance between public and officer safety and individual liberty than any existing state law governing police use of deadly force. Such laws should authorize only (a) the objectively necessary use of deadly force, and (b) only then to apprehend suspected felons who pose a significant ongoing threat to the officer or the public.

The second half of this formulation – that deadly force be authorized only in cases involving felons who pose a danger to the public or to the arresting officer – should be uncontroversial. As the Supreme Court observed in *Garner*: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."[26] In this respect, the deadly-force rule in the Model Penal Code is sensible. That rule provides that a police officer is justified in using deadly force to make an arrest only if "the crime for which the arrest is made involved conduct including the use or threatened use of deadly force" or "there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed."[27]

The first half of the proposed rule – that the use of deadly force be "objectively necessary"– likely is more controversial. It is, in effect, the inverse of the "good faith" rule applied in some states. While Washington, for instance, allows police officers to use deadly force as long as they *honestly* believe it to be justified, and while Connecticut and North Carolina authorize deadly force so long as the police *reasonably* believe it essential to catch the suspect, police use of deadly force should be excused only when it is *actually* necessary to make an arrest. In other words, police officers' subjective perspectives should not govern whether they are charged with committing a crime. Only homicides committed by the police that are objectively justified should be considered lawful. This proposed standard would empower grand juries (and petit juries) to determine if the officer committed a crime, regardless of an officer's subjective belief that the use of deadly force was necessary.

Only homicides committed by the police that are objectively justified should be considered lawful.

It is worth noting that such a proposed limit on police officers' ability to use deadly force to arrest would have no impact on their right to invoke "self-defense." The police, in other words, would still be able to argue that they "reasonably believed" that deadly force was necessary to protect themselves (or others in the immediate area) from death or serious bodily injury. Policing is dangerous work and the law should give deference to law enforcement agents making split-second decisions to perceived threats from those seeking to do them serious bodily harm. Second,

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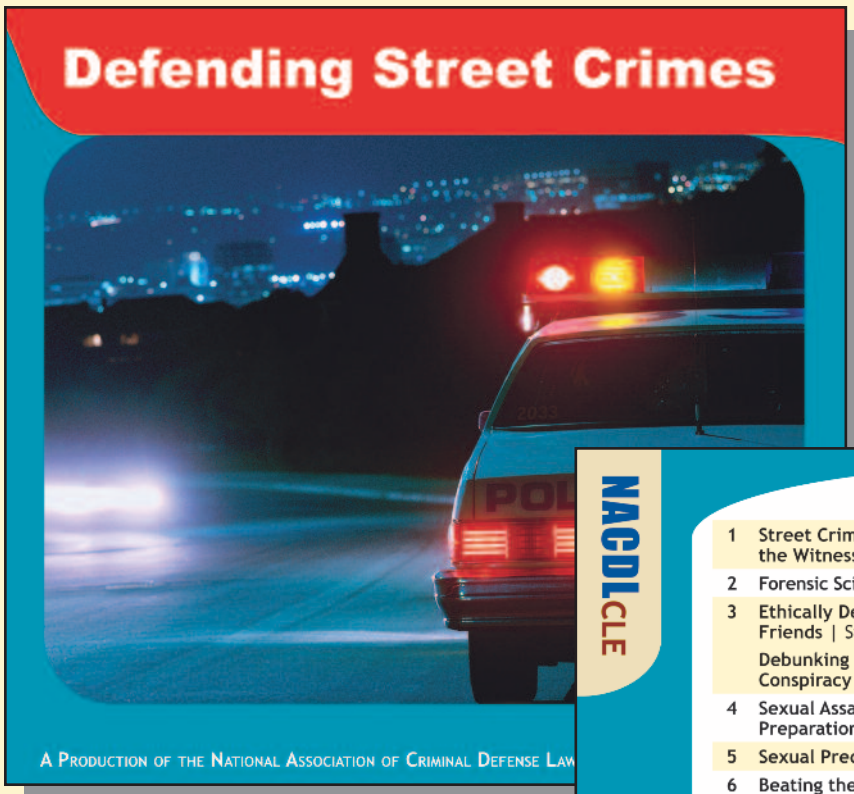

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this formulation would have no impact on the actual charges brought against an officer, nor the punishment the officer would face if convicted. An officer who reasonably believed deadly force was necessary to make an arrest would no longer have an "arrest" defense, but could still face a lighter charge and receive a lighter sentence based on his or her subjective perspective.

An "objective necessity" test in cases of deadly-force arrests is appropriate for several fundamental reasons. First, when a police officer uses deadly force to apprehend a suspect, the burden should fall on the officer to demonstrate that such force was required. The current state of the law in states like Missouri fails to encourage the police who are wielding the firearms to think twice before shooting to kill. Second, the "reasonable belief" approach that prevails in most states allows officers who use unnecessary force to avoid responsibility by focusing on their subjective perspectives of the victim – consider Officer Wilson's descriptions of Brown as a "demon" and "Hulk Hogan." This makes it too easy to avoid indictment, especially in cases with racial undertones. Finally, a law enforcement officer's ability to use deadly force to make an arrest should not only be viewed as a matter of practical police work, but also as a reflection of the fundamental relationship between those authorized to protect us and the suspect legally presumed to be not guilty. Whether the state is authorized to deprive a civilian of his right to life should not come down to the mental state of one particular police officer. Instead, the government should be allowed to kill only when such killings are actually necessary, an issue that grand juries (and petit juries), as direct representatives of the populace, are best positioned to determine.

Conclusion

The killing of Michael Brown and the subsequent failure to indict Officer Darren Wilson have sparked a national conversation on how to ensure that the police can protect public safety without killing unarmed suspects. One area in which that conversation can be turned to immediate, concrete action is the reform of state statutes that govern the use of deadly force to make an arrest.

Notes

1. Grand Jury Tr. Volume V, 209:2-7 Sept. 16, 2014.
2. *Id.* at 214:21.
3. *Id.* at 215:2-6.
4. *Id.* at 224:19-20.
5. *Id.* at 226:13.
6. *Id.* at 232:5-14.
7. *Id.* at 227:5.
8. *Id.* at 227:9-10.
9. *Id.* at 227:10-13.
10. *Id.* at 228:3-5.
11. *Id.* at 228:17-18.
12. BLACK'S LAW DICTIONARY (9th ed. 2009).
13. MO. REV. STAT. § 565.024.1(1).
14. *Id.* § 565.024.3.
15. Grand Jury Tr. Vol. XXIV, 140:5-18, Nov. 21, 2014.
16. MO. REV. STAT. 563.031.2(1) (emphasis added).
17. Grand Jury Tr. Vol. V, 226-10-11.
18. *Id.* at 228:3-18.
19. MO. REV. STAT. § 563.046.3(2) (emphasis added).
20. Grand Jury Tr. Vol. XXIV, 133:21-25.
21. 471 U.S. 1 (1985).
22. *See* ALA. CODE § 13A-3-27(b)(1); *People v. Couch*, 461 N.W.2d 683 (Mich. 1990).
23. CONN. GEN. STAT. ANN. § 53a-22(c)(2).
24. N.C. GEN. STAT. Ann. § 15A-401(d)(2)(b).
25. WASH. REV. CODE § 9A.16.040(3).
26. 471 U.S. at 11.
27. *See* MODEL PENAL CODE § 3.07(2)(b)(iv). ■

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