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## **ARTICLES**

### A TACTICAL FOURTH AMENDMENT

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*What rules regulate when police can kill? As ongoing public controversy over high-profile police killings drives home, the civil, criminal, and administrative rules governing police use of force all remain deeply contested. Members of the public may assume that police rules and procedures provide detailed direction for when officers can use deadly force. However, many agencies train officers to respond to threats according to a force “continuum” that does not provide hard-edged rules for when or how police can use force or deadly force. Nor, as recent cases have illustrated, does a criminal prosecution under state law readily lend itself to defining appropriate police uses of force. People might assume that the U.S. Constitution protects citizens against completely unjustified uses of deadly force. They would be wrong to expect clear constitutional rules either, particularly in the wake of the U.S. Supreme Court’s ruling in *Graham v. Connor*. Can the Fourth Amendment doctrine be revitalized? This Article begins by excavating key lessons from an earlier moment in time when the Su-*

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*preme Court did, after careful consideration, adopt in Tennessee v. Garner constitutional rules based on the then-new field of police tactics. Today, where can we turn to develop sound guidance for police use of force? Police tactics have advanced considerably in the decades since, as has policing technology. We conducted an empirical analysis of the force policies of the fifty largest policing agencies in the United States, and found that many agencies lacked guidance on key subjects, such as the need to provide verbal warnings before using force. However, we identify a consistent approach among prominent agencies that adopt detailed policies incorporating tactical methods to de-escalate and minimize the need to use force, some in response to Department of Justice consent decrees. We also find real promise in lower court rulings that rely on tactical research and policy when assessing liability of police. This Article develops a theory of police use of force grounded in the growing body of police-tactics research designed to accomplish law enforcement goals while protecting the lives of officers and citizens. The courts, law enforcement, and the public all desperately require a revitalized constitutional standard regulating police use of force: It is time that we adopt a tactical Fourth Amendment.*

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INTRODUCTION

WHAT rules should regulate when police can kill? As ongoing public controversy over high-profile police killings drives home, the rules governing police use of force remain deeply contested. Members of the public may assume that police rules and procedures provide detailed direction about when officers can use deadly force. However, many agencies train officers to respond to threats according to a force “continuum” that does not provide hard-edged rules for when police can use deadly force. Nor, as recent cases have illustrated, does a criminal prosecution under state law readily lend itself to defining when police uses of force are appropriate. Where can we turn to develop sound guidance for police use of force? The answer must start with the Constitution, but current doctrine fails to provide clear guidance that can be applied by officers in the moment or by attorneys and judges in the aftermath of an officer-involved homicide or other use of force. From politicians, to community groups, to policing organizations, leading voices have called into question the Fourth Amendment’s “objective reasonableness” standard, arguing that it is insufficiently protective of life and a poor guide for law enforcement.<sup>1</sup> We agree, but argue that

<sup>1</sup> Wesley Lowery, *Police Chiefs Consider Dramatic Reforms to Officer Tactics, Training to Prevent so Many Shootings*, Wash. Post (Jan. 29, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/01/29/police-chiefs-consider-dramatic-reforms-to-officer-tactics-training-to-prevent-so-many-shootings/?utm\\_term=.a614d19bd20f](https://www.washingtonpost.com/news/post-nation/wp/2016/01/29/police-chiefs-consider-dramatic-reforms-to-officer-tactics-training-to-prevent-so-many-shootings/?utm_term=.a614d19bd20f) [https://perma.cc/8Z3C-NL9Z]; Police Exec. Research Forum, *Use of Force: Taking Policing to a Higher Standard*, at Policy 2 (Jan. 29, 2016), <http://www.policeforum.org/assets/30guidingprinciples.pdf> [https://perma.cc/R6P7-TU2Y]. Other policing organizations are more cautious. The International Association of Chiefs of Police (“IACP”) released a statement expressing concern that any changes or departures from the constitutional standard be consistent, “carefully researched and evidence-based.” Int’l Assoc. of Chiefs of Police, *IACP Statement on Use of Force* (Feb. 7, 2016),

need not be the case. The constitutional test can be reconstructed, building on early doctrine and recent lower court rulings. This Article develops a theory of force grounded in tactics research designed to accomplish law enforcement goals while protecting the lives of officers and members of the public. Fourth Amendment use-of-force doctrine can be reimagined, and it must be—if courts do not heed sound police tactics, constitutional doctrine will fade into irrelevance.

A 2014 police shooting in Cleveland is one high-profile example that highlights the everyday uses and misuses of Fourth Amendment law to answer the wrong questions in the wrong ways. When an officer shot and killed a young man named Tamir Rice, the Cuyahoga County prosecutor asked two policing experts to review the case. Both experts confined their analysis to federal constitutional law—presumably because they thought this analysis was dispositive of the question whether a crime had occurred. They both emphasized the Supreme Court’s decision in *Graham v. Connor*, which set a standard of reasonableness under the Fourth Amendment grounded in what the Court described as the “split-second judgments” an officer must make in a use-of-force situation.<sup>2</sup> One expert noted that when the officers’ vehicle stopped “within feet of a gunman who had stood up” and was “reaching toward his waistband,” the officers “were responding to a situation fraught with the potential for violence.”<sup>3</sup> Given the circumstances, the expert concluded

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<http://lawofficer.com/news/iacp-statement-on-use-of-force/> [<https://perma.cc/857G-E7X4>]. The subsequent National Consensus Policy on Use of Force released by the IACP in January 2017 does not merely restate the constitutional reasonableness baseline, but it also includes important guidance and statements concerning de-escalation, verbal warnings, warning shots, ongoing training, and other subjects discussed in these principles. See Int’l Assoc. of Chiefs of Police, National Consensus Policy on Use of Force 2–4 (January 2017) [hereinafter IACP National Consensus Policy on Use of Force], [http://www.iacp.org/Portals/0/documents/pdfs/National\\_Consensus\\_Policy\\_On\\_Use\\_Of\\_Force.pdf](http://www.iacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf) [<https://perma.cc/75XA-4NWX>]. The American Law Institute has also recommended such an approach and detailed it in draft principles for which one of the authors was an associate reporter and assisted in drafting. See Am. Law Inst., Principles of the Law: Policing, Use of Force ch. 5 (October 2015) [hereinafter ALI Draft Principles] (unpublished Council Draft) (on file with authors). We also advocate such an approach.

<sup>2</sup> 490 U.S. 386, 396–97 (1989).

<sup>3</sup> S. Lamar Sims, Investigation into the Officer-involved Shooting of Tamir Rice Which Occurred at Cudell Park, 1910 West Boulevard, Cleveland, OH, on November 22, 2014, at 12 (Oct. 6, 2015) [hereinafter Sims Report], <http://prosecutor.cuyahogacounty.us/pdf/prosecutor/en-US/Tamir%20Rice%20Investigation/Sims-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf> [<https://perma.cc/DCX9-ATCS>].

the officer who shot Rice “was reacting to an immediate threat.”<sup>4</sup> The second expert similarly began with the “practical effect of the Supreme Court’s decision in *Graham v. Connor* and other federal court cases,” counseling deference to “an officer’s need to make split-second judgments” at the moment force is used.<sup>5</sup> Neither focused on what one might expect a policing expert to opine on: whether officers acted as soundly trained police officers in the moments leading up to the shooting. Indeed, both disavowed such an analysis. One expert foreclosed any review of whether the officers should have stopped their car ten feet away from a potential gunman,<sup>6</sup> concluding that doing so would be “essentially, an inquiry into the officers’ tactics” and “exactly the kind of Monday morning quarterbacking the case law exhorts us to avoid.”<sup>7</sup> The other expert joined the chorus, stating that asking whether the officers “could have avoided the situation had they used better tactics” would require a type of “armchair quarterbacking” not appropriate “when determining the constitutionality of the use of force.”<sup>8</sup> Similarly, the same expert noted “some dispute” about whether the officer gave any kind of warning before firing—a crucial question—but it was deemed “insignificant to this constitutional review.”<sup>9</sup>

If the officers acted contrary to sound police tactics and policy, where a different approach could have allowed them to advance with cover or concealment and communicate from a safe distance, saving Rice’s life,<sup>10</sup> then are these experts right that tactics are irrelevant to what is “reasonable” under the Fourth Amendment? Was the county prosecutor right to rely on similar reasoning to conclude that no charges should be presented to a grand jury?<sup>11</sup> Under this view, the Fourth Amendment can im-

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<sup>4</sup> Id.

<sup>5</sup> Kimberly A. Crawford, Review of Deadly Force Incident: Tamir Rice 2–3 [hereinafter Crawford Report], [http://prosecutor.cuyahogacounty.us/pdf\\_prosecutor/en-US/Tamir%20Rice%20Investigation/Crawford-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf](http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Tamir%20Rice%20Investigation/Crawford-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf) [https://perma.cc/9GRM-NLBC].

<sup>6</sup> Doing so placed them in a situation in which they might have to react with deadly force. See Jeffrey J. Noble, Preliminary Expert Report of Jeffrey J. Noble 9 (Nov. 27, 2015), <http://www.documentcloud.org/documents/2623275-jeffrey-j-noble-expert-report.html> [https://perma.cc/9247-C9RQ].

<sup>7</sup> Sims Report, supra note 3, at 13–14 (internal quotation marks omitted).

<sup>8</sup> Crawford Report, supra note 5, at 6.

<sup>9</sup> Id. at 4.

<sup>10</sup> See, e.g., Noble, supra note 6, at 7.

<sup>11</sup> Timothy J. McGinty, Cuyahoga County Prosecutor’s Report on the November 22, 2014 Shooting Death of Tamir Rice 37–38 (Dec. 2015), [http://prosecutor.cuyahogacounty.us/pdf\\_prosecutor/en-US/Tamir%20Rice%20Investigation/McGinty-Report%20on%20the%20November%2022%202014%20Shooting%20Death%20of%20Tamir%20Rice.pdf](http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Tamir%20Rice%20Investigation/McGinty-Report%20on%20the%20November%2022%202014%20Shooting%20Death%20of%20Tamir%20Rice.pdf).

munize the most hot-headed, ill-trained, belligerent, or incompetent officers under the guise of “reasonableness.”<sup>12</sup> Could that be true, or do they have the Fourth Amendment wrong?

We believe they have the Fourth Amendment wrong, but getting it right requires drawing the correct relationship between police tactics and Fourth Amendment “reasonableness.” That work is increasingly important; ill-considered statements in *Graham* and other decisions reinforce a “split-second” theory of policing that sets the wrong constitutional floor.

This Article begins a project of trying to revive Fourth Amendment use-of-force doctrine from three decades of neglect by excavating key lessons from a moment in time when the U.S. Supreme Court did, after careful consideration, adopt constitutional rules based on the then-new field of police tactics. The Fourth Amendment provides a general right to be free from “unreasonable searches and seizures.”<sup>13</sup> That provision has, in turn, generated a complex body of case law focused specifically on the use of force by police. In *Tennessee v. Garner*, a high-water mark of that body of case law, the U.S. Supreme Court ruled that law enforcement could only use force proportionate to the threat faced by officers or the public. Specifically, the Court held that deadly force may not be used against a fleeing felon who does not pose a threat of death or great bodily harm.<sup>14</sup> The Court did not rely on the history of the Fourth Amendment or common law rules permitting deadly force to be used against any fleeing felon, but instead focused on research by criminologists and the police themselves on how sound tactics could minimize the need to use force, protecting both police and civilian lives without hindering law enforcement goals. Most notably, the Court relied on then-cutting-edge research by Dr. James J. Fyfe, whose seminal research on

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cuyahogacounty.us/pdf\_prosecutor/en-US/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf [https://perma.cc/WE3D-Q8N3]. The report emphasized Fourth Amendment case law concerning whether the officers’ actions “were reasonable under the Fourth Amendment.” *Id.* at 70.

<sup>12</sup> *Id.* at 40 (noting an officer that acts contrary to training may obtain qualified immunity, even if acting “imprudent, inappropriate, or even reckless” in conduct leading up to the incident (quoting *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777–78 (2015))).

<sup>13</sup> U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

<sup>14</sup> *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

patterns of use of force was at the center of the transformative tactical-training movement of the 1970s and 1980s.<sup>15</sup>

In contrast, the Court's subsequent Fourth Amendment jurisprudence is increasingly divorced from the tactical training that police receive to protect their own lives and those of citizens—in part because of accompanying rulings like *City of Los Angeles v. Heller*<sup>16</sup> and *City of Canton v. Harris*,<sup>17</sup> as well as qualified immunity rulings, that each make the training, policy, and supervision of a police agency secondary to the primary focus on the police officer's individual actions. Perhaps in no small part due to the individual-focused structure of the Section 1983 doctrine, the Supreme Court's post-*Garner* case law has been at loggerheads with the very fundamentals of police tactics. As a result, today's Fourth Amendment case law is not only poorly suited for police training, but actually counterproductive, confounding efforts to draft clear use-of-force policies. The impediments are the result of the flexible, "totality of the circumstances" analysis that the Supreme Court adopted to govern use of force under the Fourth Amendment. That flexible standard grows out of a mantra first articulated by the Court in the 1989 decision in *Graham*: that officers make "split-second" decisions in use-of-force situations. That description, originating in Justice Sandra Day O'Connor's dissent in *Garner*, has animated the Court's excessive-force case law ever since. The turn away from *Garner* was cemented by the Court's 2007 decision in *Scott v. Harris*, which reinforced the approach in *Graham* by holding that there are no clearly impermissible uses of deadly force (there is no "magical on/off switch that triggers rigid preconditions").<sup>18</sup> Instead, officers may use force, including deadly force, so long as it is objectively reasonable to do so in the circumstances of each case.<sup>19</sup>

The advantages of such an approach, from the perspective of avoiding civil liability, are clear. Only the most egregious uses of force can result in police liability and, even then, not easily. However, the approach is not so clearly advantageous to law enforcement if the goal is to avoid unnecessary uses of force, minimizing the situations that give rise to litigation in the first instance. Indeed, where life is at stake, the burden should be on defenders of a given practice to show that it preserves life

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<sup>15</sup> See *infra* Section II.A.

<sup>16</sup> 475 U.S. 796, 798 (1986).

<sup>17</sup> 489 U.S. 378, 388–89 (1989).

<sup>18</sup> 550 U.S. 372, 382 (2007).

<sup>19</sup> *Id.*

better than a more protective alternative. It has yet to be shown, for obvious reasons, that permitting officers to react in the moment is clearly a better way to safeguard the lives of police and civilians. Further, the “split-second” approach presents obvious problems from the perspective of law enforcement supervisors, who cannot provide meaningful guidance about or oversight of how officers react in the moment in an objectively reasonable way. Moreover, that flexible case law is often parsed by judges in the procedurally complex context of Section 1983 civil rights litigation, which often turns on rulings regarding individual officer immunity.<sup>20</sup> The resulting doctrine is notoriously opaque and fact dependent, providing little meaningful guidance to police officers and rarely resulting in compensation to persons injured by police officers.<sup>21</sup> Even more unfortunate than the turn away from what we view as *Garner*’s key methodological insight is the fact that many police agencies adopt the Supreme Court’s vacuous constitutional baseline as a matter of department policy. Training may go further, but agencies, perhaps for liability reasons, continue to rely on statements from courts as a source for formal guidance to officers, rather than basing practices on police-tactics research.

The distortions engendered by Fourth Amendment excessive-force law affect a range of police activities. This is true in the use-of-force context, where courts determine for Fourth Amendment civil-liability purposes whether police violence was justified at the moment it was used without considering the circumstances that led up to that moment. Good police departments care deeply about tactics, particularly the tactics that can be used to minimize the use of force or avoid it altogether, but limited budgets can give rise to barebones training in which instructors recite federal cases without giving officers sound guidance on when and how to avoid potentially fatal confrontations in the first instance. Similarly, there are no constitutional incentives for police agencies to adopt rules or provide officers with training on how to approach and engage with emotionally disturbed or disabled individuals. As a result, officers and civilians are exposed to violent confrontations that may be entirely avoidable. Misapplication of constitutional doctrine has negatively

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<sup>20</sup> See *infra* Section I.C.

<sup>21</sup> See, e.g., Rachel A. Harmon, *When is Police Violence Justified?*, 102 *Nw. U. L. Rev.* 1119, 1119–20 (2008) (calling the Supreme Court’s standard “indeterminate and undertheorized” and “confused”). Scholars have criticized excessive-force case law on several fronts, and some have advocated state law depart from the Constitution. See *infra* note 32.



impacted the everyday work police do. As we describe in Part II, police-tactics research and policy have changed even as the Supreme Court has entrenched its “split-second” approach toward police liability. Ongoing developments in best practices and training, building on the seminal work of Fyfe in the 1970s, have further refined the science of police tactics. Surveys of police policies on the use of force suggest that there is a wide array of approaches that agencies use.

We found as much when studying force policies of the fifty largest policing agencies in the United States. The empirical study presented in Part II reflects wide variation, but leading agencies incorporate lessons from decades of police-tactics research, consistently adopting detailed rules that are far more instructive and protective than the constitutional baseline.<sup>22</sup> A substantial number of agencies specifically addressed certain aspects of police tactics, including guidance on de-escalation (twenty-four), the need to minimize use of force (twenty-four), and suggesting tactics that could prevent the need to use force (twenty-seven). As those numbers suggest, many of the fifty largest agencies lack clear policies on these important issues. And even those comparatively sophisticated agencies that had written policies had very different approaches and many lacked guidance on key subjects. For example, many agencies did not require officers to provide, when feasible, verbal warnings before using deadly (and nondeadly) force.

To the extent that there is consistency, we suggest it grows out of the dissemination of best practices within the policing industry, including through the top-down direction provided by the U.S. Department of Justice (“DOJ”). DOJ consent decrees often instigated policy reviews and resulted in policies with greater detail on tactics surrounding use of force. Those policies provide a model for training police on when and how to use force. In Part II, we describe the empirical foundations for sound tactics training and how it is developed in particular situations, such as those involving emotionally disturbed persons, disabled persons, and vehicle pursuits. The focus of sound tactical training is on giving officers time to make decisions from a position of safety and to de-escalate to avoid the need for force.

One response to the apparent disconnect between sound police practices and Fourth Amendment doctrine is to dismiss court-made law as out of date and ill advised. Leading policing organizations such as the

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<sup>22</sup> See *infra* Part II and Appendix: Use of Force Policies, Fifty Largest Agencies by Size.

Police Executive Research Forum (“PERF”) are doing just that. PERF recently endorsed a range of tactical decision-making practices we describe, including de-escalation, emphasizing that they seem to take police departments to “a higher standard than the legal requirements of *Graham v. Connor*.”<sup>23</sup> We agree that the *Graham* test is “necessary but not sufficient.”<sup>24</sup> However, in Part III, we suggest that Fourth Amendment doctrine can be resuscitated, making the constitutional floor “higher” and more informative—even given the confines of the structure of Section 1983 litigation. In some U.S. circuits, police encounters are at least “segmented” in a way that permits courts to focus on whether force was justified at different phases of an encounter—a decision that is often informed by testimony from leading experts on police tactics—and which reinforces for police agencies the importance of careful training and informed policy on the use of force. This is, in our view, an essential component of police reform. Courts and other policy makers—and legislators and policing agencies may be far more promising sources for reform than civil litigation—should look less at “snapshots” of the moment when force is used in individual cases and more at the series of events, including the officer’s actions, leading to the moment force is applied. Not only should the time period be expanded, but the content of the analysis should focus on police tactics. In Part III, we describe how that can occur, consistent with *Garner*, and, perhaps surprisingly, with qualified immunity case law that has developed in the decades since.

This Article does not focus on the crucially important intersection between race and the use of force. Statistics suggest that officers use force more against minorities than Whites, as well as disparately using types of force, including deadly force.<sup>25</sup> Some “shoot/don’t shoot” research

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<sup>23</sup> Police Exec. Research Forum, *supra* note 1, at Policy 2. The IACP has also described improvements and additional guidance beyond the constitutional baseline in its National Consensus Policy on Use of Force. IACP National Consensus Policy on Use of Force, *supra* note 1.

<sup>24</sup> Police Exec. Research Forum, *supra* note 1, at Policy 2.

<sup>25</sup> See Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 *Am. Crim. L. Rev.* 189, 199–202 (2017); Justin Nix et al., *Fatal Shootings by US Police Officers in 2015: A Bird’s Eye View*, 83 *Police Chief Mag.* 48, 50 (2016); FBI Uniform Crime Reporting Data Program, *Supplementary Homicide Report* (2012), <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/35023> [<https://perma.cc/6RCH-HVU8>] (“[This dataset] provide[s] detailed information on criminal homicides reported to the police.”). Regarding the lack of adequate data, see, for example, James J. Fyfe, *Too Many Missing Cases: Holes in our Knowledge About Police Use of Force*, 4 *Just. Res. & Pol’y* 87, 88–90 (2002). But see Roland G. Fryer, Jr., *An Empirical Analysis of Racial Dif-*

suggests that race does not affect an officer's decision making at the moment the trigger is pulled.<sup>26</sup> Yet even if an officer's *actual* split-second decision isn't race dependent, the series of events that puts an officer in that position might very well be; troubling statistics suggest it too often is.<sup>27</sup> The relationship of race and tactics is even less well understood than the relationship between race and force, and far more research should explore these questions.

This Article departs from much of the thrust of modern scholarship on the Fourth Amendment, which we seek to reorient. Existing theory of the Fourth Amendment focuses on whether courts should rely on the history of the Fourth Amendment, on practicalities of police discretion and law enforcement goals, or on other theories such as conceptions of individual dignity and privacy.<sup>28</sup> Professor Tracey Maclin and others have written important work examining the legacy of *Terry v. Ohio*, and law enforcement policy and race discrimination in the area of stop-and-frisk and street encounters.<sup>29</sup> This Article aims to do something similar in the force area by exploring the mixed legacy of *Garner*, developing neglected strains in the majority opinion that could become more influential now that police departments have made tactics a priority, albeit one not driven by Fourth Amendment considerations.<sup>30</sup> Our approach is consistent with Professor Rachel Harmon's work excavating support for doctrines of imminence, necessity, and proportionality from self-defense

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ferences in Police Use of Force 5 (Nat'l Bureau of Econ. Research, Working Paper No. 22399, 2016), <http://www.nber.org/papers/w22399> [<https://perma.cc/5F3K-V8AA>] (finding that, controlling for context and civilian behavior, there was no evidence of racial disparity in police shootings).

<sup>26</sup> See, e.g., Joshua Correll et al., Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot, 92 *J. Personality & Soc. Psychol.* 1006, 1015 (2007).

<sup>27</sup> See *infra* Section II.G.

<sup>28</sup> See, e.g., Tracey Maclin, The Central Meaning of the Fourth Amendment, 35 *Wm. & Mary L. Rev.* 197, 201–02 (1993) (arguing that the Supreme Court “has ignored or distorted the history of the Fourth Amendment”); Scott E. Sundby, “Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 *Colum. L. Rev.* 1751, 1754 (1994).

<sup>29</sup> See, e.g., Tracey Maclin, *Terry v. Ohio*’s Fourth Amendment Legacy: Black Men and Police Discretion, 72 *St. John’s L. Rev.* 1271, 1276–77 (1998).

<sup>30</sup> On the exclusionary rule and approaches that can incentivize “accountability-based policing,” see David A. Harris, How Accountability-Based Policing Can Reinforce—Or Replace—The Fourth Amendment Exclusionary Rule, 7 *Ohio St. J. Crim. L.* 149, 155 (2009).

law.<sup>31</sup> Other scholars focus more on policy than constitutional doctrine, and argue, for example, as Professors Ian Ayres and Dan Markovitz have done, that state law should prohibit police from using deadly force in the course of misdemeanor—or certain other categories of—arrests.<sup>32</sup> Police tactics should similarly inform any such proposals. No proposal to limit police use of force in a way that would unduly put officers' lives in danger should or would be adopted in judicial opinions, through legislation, or by law enforcement agencies.

As the Justices acknowledged in *Garner*, and have implicitly acknowledged many times since, the history of the Fourth Amendment is a distant guide. Today, officers must examine uses of vehicles in pursuit, modern handguns and rifles, TASERS, pepper spray, and other new and developing techniques of employing varying degrees of force. Research on the effects of stress on officers, interactions with emotionally disturbed and disabled individuals, and other topics will continue to improve policy and practice. We conclude by asking how we can build on key lessons from *Garner* and the early police-tactics revolution, present in aspects of more recent case law, to construct a tactical Fourth Amendment doctrine grounded in today's still-advancing tactics research and technology. We conclude that a reasonable officer is a well-trained officer, who has received instruction on sound police tactics. Our approach focuses on an empirical grounding for constitutional "reasonableness"—to better inform constitutional doctrine and to make clear the empirical foundations for sound police policy.

#### I. THE ARC OF FOURTH AMENDMENT USE-OF-FORCE DOCTRINE

The Fourth Amendment protects individual privacy and liberty by guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and sei-

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<sup>31</sup> Harmon, *supra* note 21, at 1172–73. We agree such concepts are only "implicit" in the Court's use-of-force doctrine, but we develop how such concepts are more broadly supported by modern police practices and that doctrine can be consistent with sound tactics.

<sup>32</sup> Ian Ayres & Daniel Markovitz, *Ending Excessive Police Force Starts with New Rules of Engagement*, Wash. Post (Dec. 25, 2014), [https://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58\\_story.html?utm\\_term=.fb8a8c9edf05](https://www.washingtonpost.com/opinions/ending-excessive-police-force-starts-with-new-rules-of-engagement/2014/12/25/7fa379c0-8a1e-11e4-a085-34e9b9f09a58_story.html?utm_term=.fb8a8c9edf05) [<https://perma.cc/ZR6F-TZSF>] (arguing police should not be "permitted to initiate force" in cases of misdemeanor arrests). As we argue, police are correct to view force as necessary when proportional to the threat faced in a situation and not necessarily depending on the type of crime and whether it is "minor."

zures.”<sup>33</sup> The application of physical force by an officer constitutes a seizure and is thus subject to Fourth Amendment protection.<sup>34</sup> To determine whether an intrusive government action runs afoul of that protection, the Fourth Amendment requires balancing “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.”<sup>35</sup> In the use-of-force context, as we will develop, this balancing test has been interpreted as requiring “‘objective reasonableness’ under the circumstances.”<sup>36</sup> This is a simultaneously open-ended and quite constrained “totality of the circumstances” test, however, very different from “totality of the circumstances” tests to be found in other areas of constitutional law. As the Court emphasized more recently in *Scott v. Harris*, there is no “easy-to-apply legal test in the Fourth Amendment context,” but instead, courts must “slosh” through “the factbound morass of ‘reasonableness.’”<sup>37</sup> Despite the suggestion that this is a broad review, the “totality of the circumstances” test is both deferential and constrained.

The Supreme Court has emphasized how courts reviewing police violence must take into account how “officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”<sup>38</sup> The situation must be evaluated from the perspective of a reasonable police officer, and the use of hindsight must be avoided.<sup>39</sup> Thus, the operative facts are those known to the officer at the moment that force is employed.<sup>40</sup> As that standard suggests, the Fourth Amendment analysis is limited in scope. The reasonableness of the officer’s actions prior to use of force, particularly the possibility that the officer contributed to the creation of the dangerous situation itself, is not relevant to the Fourth Amendment analysis. Once one understands how the Supreme Court has cabined the relevant circumstances, one appreciates that it is not a “totality of the circumstances” test at all. The legality of the officer’s actions is based on the information possessed by the officer at the moment force is employed, what some criminologists have

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<sup>33</sup> U.S. Const. amend. IV.

<sup>34</sup> *California v. Hodari D.*, 499 U.S. 621, 626–27 (1991).

<sup>35</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted).

<sup>36</sup> *Id.* at 399.

<sup>37</sup> 550 U.S. 372, 383 (2007).

<sup>38</sup> *Graham*, 490 U.S. at 397.

<sup>39</sup> *Id.* at 396.

<sup>40</sup> See, e.g., *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991).

titled “subjective objectivity.”<sup>41</sup> Nor is it precisely a “reasonableness” test. Reasonable professionals, it may be safely asserted, do not make life or death decisions if they can avoid it through preparation, training, or tactics.

This modern test under the Fourth Amendment (and accompanying and related qualified immunity case law interpreting Section 1983) is of relatively recent vintage; it had not quite taken shape when *Garner* was decided in 1985. In discussing *Garner*, though, one must understand *why* the Supreme Court has focused to such a degree on the actions of individual officers and not on police agencies and their training, supervision, and policy. The reason has to do with the structure of modern civil rights litigation, itself defined by the Court during the same time period that this Fourth Amendment doctrine took shape. Following the discussion of *Garner*, and then of the structure of modern Section 1983 law, we ask whether the doctrine could have taken another direction had the stars aligned differently at the Court.

#### A. Tennessee v. Garner: *Uncovering the Garner Approach*

The modern Fourth Amendment excessive-force jurisprudence took shape in the wake of *Garner*. That seminal case is so critical not because of its influence on what came afterward, we will argue, but because of crucial insights in the decision that have largely been neglected in the decades since. It is those lost aspects of *Garner* that need to be recovered.

Paralleling some of the most controversial use-of-force incidents in recent months and years, *Garner* involved the death of Edward Garner, an unarmed black fifteen-year-old eighth-grader, in Memphis, Tennessee.<sup>42</sup> Late one evening, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to a burglary in progress.<sup>43</sup> When they arrived, a neighbor told them that “she had heard glass breaking and that ‘they’ or ‘someone’ was breaking in next door.”<sup>44</sup> Officer Hymon went behind the house in time to hear a door slam and see someone—

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<sup>41</sup> Geoffrey P. Alpert & William C. Smith, How Reasonable is the Reasonable Man?: Police and Excessive Force, 85 J. Crim. L. & Criminology 481, 486 (1994).

<sup>42</sup> Samuel Walker et al., *The Color of Justice: Race, Ethnicity, and Crime in America* 144 (5th ed. 2012). Notably, neither the majority nor the dissenting opinion identifies Garner’s race.

<sup>43</sup> *Garner*, 471 U.S. at 3.

<sup>44</sup> *Id.*

Garner—“run across the backyard” of the burglarized house.<sup>45</sup> By virtue of his flashlight, Officer Hymon spotted Garner crouching near a six-foot-high chain link fence.<sup>46</sup> Seeing Garner’s face, Officer Hymon believed him to be seventeen or eighteen years old and between 5’5” and 5’7” tall.<sup>47</sup> More importantly, he could see Garner’s hands, and he was “reasonably sure” that Garner was unarmed.<sup>48</sup> Officer Hymon identified himself as an officer and shouted for Garner to halt, taking “a few steps toward him,” but Garner began climbing the fence.<sup>49</sup> Officer Hymon, who was thirty to forty feet away from Garner,<sup>50</sup> was “convinced” that Garner would escape if he made it over the fence.<sup>51</sup> To prevent that escape, Officer Hymon shot at Garner, hitting him in the back of the head.<sup>52</sup> Garner died on an operating table shortly after.<sup>53</sup>

Officer Hymon fired the fatal shot under the auspices of a common law rule, a Tennessee statute, and a policy of the Memphis Police Department. Under the common law, police were authorized to use deadly force to stop fleeing felons, although they were forbidden to do so to stop fleeing misdemeanants.<sup>54</sup> So clear was this rule that the Court described its “common-law pedigree” as “pure on its face.”<sup>55</sup> The Tennessee statute was just as clear. It stated, with regard to fleeing felons, 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.”<sup>56</sup> The policy of the Memphis Police Department did not go quite so far; it limited the use of deadly force in some ways, but permitted it to stop a fleeing burglar.<sup>57</sup> Yet despite the clarity and pedigree of the rules that authorized Officer Hymon’s actions, a six-Justice majority held that Officer Hymon had violated the Fourth Amendment.<sup>58</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 3–4.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.* at 4.

<sup>50</sup> John H. Blume III, *Deadly Force in Memphis: Tennessee v. Garner*, 15 *Cumb. L. Rev.* 89, 89 (1984).

<sup>51</sup> *Garner*, 471 U.S. at 4.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 12.

<sup>55</sup> *Id.* at 15.

<sup>56</sup> *Id.* at 4–5 (alterations in original) (quoting Tenn. Code Ann. § 40-7-108 (1982)).

<sup>57</sup> *Id.* at 5.

<sup>58</sup> *Id.* at 22.

What made the Court's decision in *Garner* stand out? It was not statements of what should have been painfully obvious to all involved, like "[t]he intrusiveness of a seizure by means of deadly force is unmatched," or that "[t]he use of deadly force is a self-defeating way of apprehending a suspect."<sup>59</sup> Nor even was it the introduction of proportionality into the Fourth Amendment analysis, implicit in the holding that deadly force is justified only when "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."<sup>60</sup> The Court's elaboration on that point—that an officer may use deadly force when threatened "with a weapon" or a "threat of serious physical harm"<sup>61</sup>—was similarly banal.

Instead, what made *Garner* remarkable was a passage that Justice Byron White wrote in response to the argument that stripping officers of the ability to use deadly force to stop fleeing felons would hamper effective law enforcement. Specifically, "it [was] argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee."<sup>62</sup> The state statute and department policy were justified, so the argument went, because the "meaningful threat of deadly force" might dissuade people from fleeing when police attempted to arrest them.<sup>63</sup> The fleeing-felon rule existed in part to promote compliance with police and to deter crime. And although it was predictable, this argument was not without some merit. After all, the Tennessee statute codified the common law rule, and deference was due to the policy justifications supporting the Legislature's decision.

But the Supreme Court did not defer to the Tennessee legislature. Instead, it called the underlying justifications into question by observing that "a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects."<sup>64</sup> That mattered, because it suggested that effective law enforcement did not depend on the fleeing-felon rule. "If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons," the Court emphasized, "there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in

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<sup>59</sup> Id. at 9–10.

<sup>60</sup> Id. at 11.

<sup>61</sup> Id.

<sup>62</sup> Id. at 9.

<sup>63</sup> Id. at 10.

<sup>64</sup> Id. at 10–11.



all felony cases.”<sup>65</sup> The Court then engaged in an extensive review of police policies, explicitly mentioning the Federal Bureau of Investigation, the New York City Police Department, and forty-four other law enforcement agencies. It cited research by the Boston Police Department Planning and Research Division and by the International Association of Chiefs of Police (“IACP”) for the proposition that most police departments had abandoned the common law rule in favor of a more restrictive policy. And it relied on the accreditation criteria of the Commission on Accreditation for Law Enforcement Agencies (“CALEA”), which established a restrictive deadly force policy as an industry best practice.<sup>66</sup>

The Court then noted *why* so many police agencies had abandoned a rule that, on its face, seemed to provide an unmitigated benefit to law enforcement. The Court cited to two pieces authored by Garner’s expert in the case, Dr. James J. Fyfe.<sup>67</sup> The first was his article “Observations on Police Deadly Force”; the second, an amicus brief that he authored for the Police Foundation.<sup>68</sup> Fyfe’s article identified the fundamental error with the argument raised by Officer Hyman and the State of Tennessee: There was a complete lack of evidence supporting any “clear association between police shootings and reduced crime rates.”<sup>69</sup> Fyfe argued in that piece that the traditional fleeing-felon rule should be abandoned by police departments, to be replaced with clear policies, training, and supervision on the use of deadly force and the careful investigation of all police shootings. By the time of the *Garner* decision, the majority of police departments in the United States had followed suit.

The Supreme Court emphasized the importance of reviewing actual police practice rather than just reaffirming the existence of a common law rule, clear though it was. Blind adherence to a common law rule that permitted any amount of force, including deadly force, to stop a fleeing felon, would ignore “sweeping change in the legal and technological

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<sup>65</sup> Id. at 11.

<sup>66</sup> Id. 18–19.

<sup>67</sup> Id. at 10 n.10.

<sup>68</sup> James J. Fyfe, Observations on Police Deadly Force, 27 *Crime & Delinq.* 376, 378–81 (1981) [hereinafter Fyfe, Observations]. The Court also cited to an affidavit from the New York City Police Department, an amicus brief from the Police Foundation, and William A. Geller & Kevin J. Karales, Split-Second Decisions: Shootings of and by Chicago Police 35, 39 (1981). See also James J. Fyfe, Police Expert Witnesses, in *Expert Witnesses: Criminologists in the Courtroom 100*, 112 n.1 (Patrick R. Anderson & L. Thomas Winfree Jr. eds., 1987) [hereinafter Fyfe, Police Expert Witnesses] (noting that Fyfe was the defendant’s expert in *Garner* and drafted the amicus brief).

<sup>69</sup> Fyfe, Observations, *supra* note 68, at 379.

context.”<sup>70</sup> Specifically, the Court noted that the common law rule had developed in an era where far fewer crimes were classified as felonies and “when virtually all felonies were punishable by death.”<sup>71</sup> The common law rule also developed in a time when officers had only rudimentary hand-to-hand weapons, meaning that they were less capable of using deadly force. Moreover, because officers were limited to such weapons, any situation in which an officer could use force on a fleeing felon required the officer to be in such close proximity to the suspect that “the safety of the arresting officer was at risk.”<sup>72</sup> Although explicitly about preventing a fleeing felon’s escape, the Court realized that the common law rule implicated officer safety in a way that no longer applied once officers started carrying handguns.<sup>73</sup>

As a result of these observations, the Court held, “[R]eliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.”<sup>74</sup> No more could the courts turn to history to answer questions about police violence.

### *B. Split-Second Syndrome: From Graham to Harris*

History would not be the focus of subsequent cases, but neither would a careful assessment of police practices and policy.<sup>75</sup> That approach would be neglected in the decades that were to come. The seeds of that neglect were planted in the *Garner* dissent, authored by Justice Sandra Day O’Connor and joined by Chief Justice Warren Burger and then-Justice William Rehnquist.

Acknowledging the “unquestionably tragic” nature of Edward Garner’s death, the dissent nevertheless would have upheld the constitution-

<sup>70</sup> *Garner*, 471 U.S. at 13.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 14–15.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 13.

<sup>75</sup> *Garner* was not the first Supreme Court decision to carefully engage with police tactics. One prior example can be found in *Pennsylvania v. Mimms*, decided in 1977, which cited a study of police tactics, noting, “[W]e have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile,” and pointing out that according to a study, “approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.” 434 U.S. 106, 110 (1977) (per curiam) (quoting, in the second part, *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972) (internal quotation marks omitted) (citing Allen P. Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. Crim. L., Criminology & Police Sci. 93 (1963))). However, *Garner* engaged with police practices and policy far more carefully than prior decisions.

ality of Officer Hymon's decision to shoot an unarmed, fleeing burglar. To support that conclusion, the dissent emphasized the "difficult, split-second decisions police officers must make in these circumstances."<sup>76</sup> (Fyfe would later call this the "split-second syndrome" or fallacy.<sup>77</sup>) Justice O'Connor and her fellow dissenters argued that the use of deadly force to stop a fleeing burglar would be, in some cases, the only way of preventing escape. Although "some law enforcement agencies may choose to assume the risk that a criminal will remain at large," the dissent held, a contrary policy decision was not beyond the pale.<sup>78</sup> Nor, to the dissent, was a decision based on the potential deterrent value of a permissive rule inappropriate. The dissent found that "the effectiveness of police use of deadly force [as a deterrent] is arguable," and although it acknowledged that "many States or individual police departments have" adopted a restrictive rule, the dissent contended that "it should go without saying that the effectiveness or popularity of a particular police practice does not determine its constitutionality."<sup>79</sup> Nor was the lack of support for the efficacy of the fleeing-felon rule at all problematic; a state, the dissent argued, was not under any obligation to "produce social science statistics or to dispel any possible doubts" about its policy choices.<sup>80</sup>

More pertinently, the dissent argued that, for officers, the apprehension of a criminal "necessarily [involves] swift action predicated upon . . . on-the-spot observations."<sup>81</sup> The dissent sharply criticized the majority's rule, writing that, "The Court's silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances."<sup>82</sup> By limiting the ability of officers to use deadly force to situations in which they faced a threat to themselves or others, the dissent believed that the majority was putting far too demanding a burden on officers, who "are given no guidance for determining which objects,

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<sup>76</sup> *Garner*, 471 U.S. at 23 (O'Connor, J., dissenting).

<sup>77</sup> James J. Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence*, in *Critical Issues in Policing: Contemporary Readings* 466, 475–77 (Roger G. Dunham & Geoffrey P. Alpert eds., 2010).

<sup>78</sup> *Garner*, 471 U.S. at 27–28 (O'Connor, J., dissenting).

<sup>79</sup> *Id.* at 28.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 26 (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)) (internal quotation marks omitted).

<sup>82</sup> *Id.* at 32.

among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope, will justify the use of deadly force.”<sup>83</sup> Given the nature of police encounters, the “clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances.”<sup>84</sup>

That reasoning would become prominent in the Court’s rulings in the years to follow. It found its strongest expression in *Graham v. Connor*, a Section 1983 case in which Dethorne Graham claimed that officers used excessive force in the process of detaining him for investigation.<sup>85</sup> The case was one ripe for a discussion of the role of sound policy and training when evaluating the reasonableness of officers’ decisions. Yet the *Graham* decision was particularly noteworthy in what it did *not* discuss.

Although officers believed Graham, who they saw enter and then quickly leave a convenience store, to be drunk, he was not—he was a diabetic suffering from an insulin reaction. The officer at the scene requested backup, and the officers who arrived tightly handcuffed Graham despite his pleas to get him sugar and to check his wallet for a card showing that he was a diabetic. At one point, Graham lost consciousness. Graham’s friend brought him orange juice, but the officers refused to let him have it. One officer said: “I’ve seen a lot of people with sugar diabetes that never acted like this. Ain’t nothing wrong with the M. F. but drunk. Lock the S. B. up.”<sup>86</sup> Officers “placed him face down” on the hood of his friend’s car, and later “[f]our officers grabbed Graham and threw him headfirst into the police car.”<sup>87</sup> Graham, as the Court noted, “sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claim[ed] to have developed a loud ringing in his right ear.”<sup>88</sup> Eventually, the initial officer “received a report that Graham had done nothing wrong at the convenience store, and the officers drove him home and released him.”<sup>89</sup>

The conduct of the officers reads like a classically botched job, in which the officers lacked or ignored training on how to respond to a disabled person. They were investigating behavior that struck them as sus-

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 26.

<sup>85</sup> 490 U.S. 386, 388 (1989).

<sup>86</sup> *Id.* at 389.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 390.

<sup>89</sup> *Id.* at 389.

picious—Graham had walked into and then out of the convenience store in his search for something to stabilize his blood sugar<sup>90</sup>—not any particular crime. Nor were they asked to make “split-second” judgments; they had ample opportunity to verify that he was diabetic and to treat him as he went in and out of consciousness. This case was not the ideal vehicle to develop the notion that police officers must sometimes make quick-fire decisions and that an objective standard might best be used to analyze excessive-force claims under the Fourth Amendment.

Although the officers were mistaken, the Court suggested that such conduct would not violate the Fourth Amendment. “The calculus of reasonableness,” the Court wrote, “must embody allowance for the fact that police officers are often forced to make split-second judgments[] in circumstances that are tense, uncertain, and rapidly evolving.”<sup>91</sup> That description has been so often repeated that, as one of us has written:

Were some future anthropologists to turn to the federal reporters to form an opinion about the environment in which law enforcement officers use force, they would have little choice but to conclude that those “circumstances [were] tense, uncertain, and rapidly evolving” . . . . Since the Supreme Court first introduced that description in 1989, federal district and circuit courts have repeated it on more than 2300 occasions. It features widely in briefs and trial court documents and has made its way into federal and state pattern jury instructions. It is, by any measure, the accepted depiction of the environment in which police officers use force.<sup>92</sup>

However, the Supreme Court never discussed whether this (highly problematic) use of force was reasonable on the merits; the focus was instead on making clear that an objective reasonableness standard applies (together with the dicta on “rapidly evolving” situations in which “split-second judgments” must be made).<sup>93</sup> To be sure, the Court was right to emphasize that timing matters: that force should not be deemed reasonable if there was no “immediate threat to the safety of the offic-

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<sup>90</sup> Id. at 388–89.

<sup>91</sup> Id. at 396–97.

<sup>92</sup> Seth W. Stoughton, *Policing Facts*, 88 Tul. L. Rev. 847, 865 (2014) (alteration in original) (footnotes omitted).

<sup>93</sup> *Graham*, 490 U.S. at 397.

ers.”<sup>94</sup> In addition to cementing the deferential standard of review that would be used going forward, the *Graham* decision also put to rest an issue that had divided the circuits: whether substantive due process analysis was appropriate for excessive-use-of-force claims. As applied by lower courts, a substantive due process approach would have included determining whether officers acted in good faith or “maliciously and sadistically for the very purpose of causing harm.”<sup>95</sup> That determination, the Court held, was inappropriate: The Fourth Amendment alone governed police use of force, and, under the Fourth Amendment, the subjective motivations of individual officers are entirely irrelevant to the ultimate question of whether their actions were reasonable.<sup>96</sup> The rejection of a more subjective and substantive due process approach was a positive contribution of the *Graham* decision; the clear adoption of an objective standard had the promise of better imposing clear and informed standards of care. What was unfortunate, then, was how subsequent decisions did not focus on reasonableness informed by standards of care, but rather established a highly deferential inquiry focusing on an individual officer’s actions.

The seeds laid in Justice O’Connor’s *Garner* dissent bore fruit in *Graham*, but it was not until *Scott v. Harris* that they completely eclipsed the Court’s original approach to police violence. In *Harris*, an officer initiated a traffic stop after clocking Victor Harris’s car travelling at seventy-three miles per hour on a stretch of road with a fifty-five-mile-per-hour speed limit.<sup>97</sup> Rather than pull over, Harris fled, leading officers on a six-minute pursuit that reached speeds of eighty-five miles per hour.<sup>98</sup> To terminate the pursuit, Deputy Sheriff Timothy Scott attempted to use the Precision Intervention Technique (“PIT”), a maneuver intended to force a fleeing vehicle into a controlled spin by pushing the rear quarter panel of the fleeing car with the front quarter panel of a

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<sup>94</sup> *Id.* at 396; see also Harmon, *supra* note 21, at 1131 (noting that the *Graham* Court’s “approach falls critically short in addressing this crucial matter because it suggests that timing is one factor to be considered among many, when it is often simply dispositive”).

<sup>95</sup> *Graham*, 490 U.S. at 397 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)) (internal quotation marks omitted).

<sup>96</sup> *Id.*; see also Jill I. Brown, *Defining “Reasonable” Police Conduct: Graham v. Connor and Excessive Force During Arrest*, 38 UCLA L. Rev. 1257, 1267–69 (1991) (describing the inquiry).

<sup>97</sup> 550 U.S. at 374.

<sup>98</sup> *Id.* at 374–75.

police vehicle.<sup>99</sup> Deputy Scott had no training in how to perform the technique, however, and so he put his front bumper on Harris's rear bumper and accelerated.<sup>100</sup> Harris lost control of his car, which ran off the road and overturned, rendering him quadriplegic. Harris filed suit under Section 1983, contending that the situation did not satisfy *Garner*'s requirement for deadly force.<sup>101</sup>

The Supreme Court declared once and for all that *Garner* would be distinguished or reinterpreted to mean something quite limited:

*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness" test [citing *Graham*] to the use of a particular type of force in a particular situation.<sup>102</sup>

To rewrite *Garner* in that way is mistaken. Indeed, as Justice Breyer pointed out in his concurring opinion, and as Justice Stevens argued more forcefully in dissent, the Court itself ventured into declaring an inflexible or "absolute" *per se* rule that: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."<sup>103</sup>

Moreover—and this is something entirely missing in the judicial uses of *Garner* and the scholarly commentary on *Garner*—what made *Garner* distinctive was not just that the Court cited to clear factors making the use of deadly force impermissible in that case (the "bright-line" view of *Garner*).<sup>104</sup> Instead, we argue, it was the *method* (which, to be sure, the Court has all but ignored in the years since): focusing on police practices and tactics.

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<sup>99</sup> Id. at 375.

<sup>100</sup> Id.

<sup>101</sup> Id. at 375–76.

<sup>102</sup> Id. at 382.

<sup>103</sup> Id. at 389 (Breyer, J., concurring) (quoting id. at 386) (internal quotation marks omitted); see also id. at 396 (Stevens, J., dissenting) ("The Court today sets forth a *per se* rule that presumes its own version of the facts . . .").

<sup>104</sup> Harmon, *supra* note 21, at 1128 ("Lower court cases following *Garner* have taken the decision to establish a bright-line rule for the use of force against fleeing suspects that deadly force is justified—which is to say constitutionally reasonable—only against dangerous felons in flight . . .").

The *Harris* decision was notable in the way that it ignored the subject of police policy and practice. None of the Justices focused on the issue of police practices in the area—an issue on which experts provided opinions at trial and one that the parties briefed and developed through deposition testimony. Justice Stevens briefly noted that police might have alternatives, like the use of “stop sticks” to stop a fleeing vehicle, but did not discuss in any detail proper police training.<sup>105</sup> Although it is absent from both the Court’s opinion and the dissent, the record below focused not just on alternatives to a police chase, but also on the policy and training provided to the officers that chose to engage in this high-speed chase. Perhaps the most remarkable aspect of the record in the *Harris* case was Deputy Scott’s deposition testimony admitting that he had *no* training on how to conduct the PIT maneuver that he used to stop Harris’s vehicle, and that he received authorization to use the maneuver without discussing any relevant details with his supervisor.<sup>106</sup> On that issue, the testimony was as follows:

Q. . . . It’s my understanding now from going through all your training, you were never trained in any manner in the—in the [PIT] maneuver?

A. At that—up until this incident?

Q. Yeah.

A. That’s correct.

Q. Okay. And how is it you even learned of the pit maneuver or that it can be utilized as a pursuit tactic?

A. Through other officers that have received the training . . . .<sup>107</sup>

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<sup>105</sup> *Harris*, 550 U.S. at 396–97, 397 n.9.

<sup>106</sup> Deposition of Timothy C. Scott at 129–41, *Harris v. Coweta Cty.*, No. 3:01-CV-148-WBH (N.D. Ga. May 8, 2002). Notably, Deputy Scott rammed Harris’s fleeing vehicle not in his home jurisdiction, but in a neighboring jurisdiction that did not permit high-speed chases for safety reasons. *Id.* at 174–79.

<sup>107</sup> *Id.* at 127.



Deputy Scott did not know, for example, that the Georgia State Police only authorized officers to use the high-risk PIT maneuver after receiving forty-five hours of training.<sup>108</sup> The officer admitted in his deposition to having incorrectly used this maneuver (which was unsurprising given the lack of training on how to perform it). As he put it, “I did not [PIT] Victor Harris” although his “intentions were to do a [PIT].” Instead, he made “a[n] intentional direct contact” with his vehicle to try to bring Harris’s vehicle to a stop.<sup>109</sup>

The plaintiff’s expert in the case opined that a PIT maneuver can only be used in “a set of defined circumstances . . . (i.e., at low speeds on wide straightaways, on dry pavement by a properly trained driver).”<sup>110</sup> The expert noted that many policing agencies have “formulated policies and training materials that reflect” the dangers of use of deadly force in a pursuit situation.<sup>111</sup> For example, the IACP Model Pursuit Policy at the time stated: “Officers may not intentionally use their vehicle to bump or ram the suspect’s vehicle in order to force the vehicle to a stop off the road or in a ditch.”<sup>112</sup> The expert concluded that where the Coweta County department had trained *none* of its officers on how to use this highly dangerous PIT maneuver, yet allowed them to use the technique in inappropriate circumstances, the officers involved were not properly trained.<sup>113</sup> Further, the expert opined, the officers were improperly supervised: The supervisor who approved the application of the PIT maneuver—telling Deputy Scott, via radio, “Yeah, go ahead and take him out. Take him out.”—had no knowledge about the speed, road conditions, or other circumstances of the pursuit.<sup>114</sup> The result, according to the expert, was a use of deadly force that was “objectively unreasonable.”<sup>115</sup>

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<sup>108</sup> Id. at 130. Deputy Scott received the training and a “certificate” after the pursuit and crash at issue in this litigation. Id. at 129–31.

<sup>109</sup> Id. at 132, 135. The Coweta County police department had a policy allowing officers, even untrained officers, to use “[d]eliberate physical contact” to stop a fleeing vehicle with the approval of a supervisor. Id. at 152.

<sup>110</sup> Affidavit of Dr. Geoffrey P. Alpert at 5, *Harris v. Coweta Cty.*, No. 3:01-CV-148-WBH (N.D. Ga. Nov. 7, 2002).

<sup>111</sup> Id. at 8.

<sup>112</sup> Id. (internal quotation marks omitted).

<sup>113</sup> Id. at 11–12.

<sup>114</sup> Id. at 11. The conclusion of the expert report mistakenly refers to Deputy Scott as authorizing the use of deadly force; context makes clear that the expert was referring to Deputy Scott’s supervisor.

<sup>115</sup> Id.

Of course, the defendants also retained an expert, who concluded that the County's policy on pursuits was "consistent with numerous other policies by other law enforcement agencies," and that additional "supervision and training to the Deputies" would "not alter the appropriateness" of their actions in this case; further, the expert opined that many "United States law enforcement agencies do not provide instruction to their officers in vehicle-to-vehicle contact."<sup>116</sup>

Rather than discuss any of this factual and expert evidence, the *Harris* decision instead discussed the "relative culpability" of the officer and the victim of the force, a novel concept in Fourth Amendment law: a concept not just of fault, but of comparative fault. The majority explained, relying heavily on the videotape evidence from the officers' cruiser cameras that: "It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted."<sup>117</sup> Although it compared the officers with the fleeing suspect, the majority failed to compare the actions of the officers in this case with the actions that may have been taken by well-trained police officers—actions that might have avoided the high-speed chase or the need to use deadly force.

That aspect of the opinion is more understandable where the focus was on the most immediate decision to use the force. However, even given that focus, the lack of discussion of how the officer used force—using a maneuver that he was not trained on and admittedly botched—deserved far more discussion. If an officer had never been told how to use a firearm and admittedly fired it incorrectly, perhaps expecting it to have some effect other than it does, the jury would have had to consider serious questions concerning the reasonableness of the force. The specialized topic of high-speed chases and use of a police vehicle to stop a fleeing motorist, however, apparently eluded the Justices' attention entirely.

One could go on. More recent rulings from the Supreme Court have adopted the same view of reasonableness absent any reasonable standard of care. The Court's 2015 ruling in *City & County of San Francisco v. Sheehan* similarly disregarded what a reasonable and trained officer

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<sup>116</sup> Expert Witness Report by Michael A. Brave at 6, *Harris v. Coweta Cty.*, No. 3:01-CV-148-WBH (N.D. Ga. Sept. 16, 2002).

<sup>117</sup> *Harris*, 550 U.S. at 384.

would do in approaching a mentally ill person.<sup>118</sup> The Court's per curiam opinion in *Mullenix v. Luna* found qualified immunity appropriate where an officer shot a fleeing vehicle from a highway overpass contrary to policy, training, supervisor's instructions, and best practices.<sup>119</sup>

### C. The Structure of Section 1983 Litigation Against Police

The entire structure of federal civil rights litigation redirects the focus from systemic issues of policy, practice, supervision, and training, to the individual conduct of an officer. Civil rights litigation does not directly target police policymakers. Most such lawsuits name only individual officers as defendants, any judgments will be covered by municipal insurance, and even cases formally brought against the municipality will typically result in money judgments also covered by insurance (although perhaps affecting the cost of such insurance or self-insurance).<sup>120</sup> It is difficult to bring larger suits, whether individual suits raising questions of policy, or class actions seeking injunctive relief to change policy regarding the use of excessive force. As one federal judge has put it, “[c]laims of excessive physical force require a case-by-case analysis of the circumstances in order to determine whether the amount of force used in each scenario was commensurate with the perceived need for force.”<sup>121</sup> There is a range of doctrinal reasons why civil rights litigation focuses on individual officers and not on policy.

One reason why individual suits cannot easily affect policy and practice is that the Supreme Court adopted Article III limitations on actions seeking injunctive relief in *City of Los Angeles v. Lyons*, focusing there on the circumstances of the particular use of force by the police and the question whether it represented a sufficiently uniform policy.<sup>122</sup> The *Lyons* Court ruled it would not presume putative class members would be

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<sup>118</sup> *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777–78 (2015).

<sup>119</sup> *Mullenix v. Luna*, 136 S. Ct. 305, 306–07, 312 (2015) (per curiam).

<sup>120</sup> See Charles R. Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* 93–114 (2009); John Rappaport, *How Private Insurers Regulate Public Police*, 130 *Harv. L. Rev.* (forthcoming 2017) (manuscript at 3–4), <http://ssrn.com/abstract=2733783> [<https://perma.cc/TH8W-768Z>]; Joanna C. Schwartz, *Police Indemnification*, 89 *N.Y.U. L. Rev.* 885, 890 (2014).

<sup>121</sup> *Jones v. El v. Berge*, No. 00-C-421-C, 2001 WL 34379611, at \*14 (W.D. Wis. Aug. 14, 2001) (“Because the inquiry is highly individualized, plaintiffs’ claim that the physical force used against mentally ill inmates at Supermax is excessive does not pass the typicality or commonality prerequisites to class certification under [Fed. R. Civ. P.] 23(a).”).

<sup>122</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983).

likely to break the law and then encounter police in the future.<sup>123</sup> The Court also emphasized general principles of restraint in enjoining law enforcement, for reasons of comity and federalism.<sup>124</sup> Following *Lyons*, courts have held that, in order to obtain class-wide relief, a claimant would have to show that police behaved in the same unconstitutionally excessive way in sufficiently similar circumstances. That has been rarely achieved in use-of-force cases, although the standard has been met in search cases where a showing has been made that police followed a “blanket policy” that does not require individualized reasonable suspicion judgments at all—such as a policy of strip searching all detainees regardless of reasonable suspicion,<sup>125</sup> or in cases in which evidence strongly demonstrated reliance on race and not on reasonable suspicion.<sup>126</sup>

In addition, the structure of municipal liability under Section 1983 makes policy and practice claims against a city very difficult to bring—since a court will typically only hear claims of municipal liability once an underlying constitutional violation by an individual officer has been established.<sup>127</sup> In its 1986 ruling in *City of Los Angeles v. Heller* the Court approved trial-court bifurcation of liability in Section 1983 suits, such that if the jury does not find individual officers as having violated constitutional rights of the plaintiff, the case will not proceed further; without an individual violation, the fact that municipal policy or practice “might have *authorized* the use of constitutionally excessive force is quite beside the point.”<sup>128</sup> That ruling on the order of battle, as between

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<sup>123</sup> *Id.* at 106–07; see generally Brandon Garrett, Note, Standing While Black: Distinguishing *Lyons* in Racial Profiling Cases, 100 Colum. L. Rev. 1815, 1819–20 (2000) (noting that the *Lyons* Court found no standing to seek an injunction against prospective harm in part because *Lyons* had broken the law, which the Court would not assume others would do in the future).

<sup>124</sup> *Lyons*, 461 U.S. at 112 (urging “restraint in the issuance of injunctions against state officers engaged in the administration of the States’ criminal laws”); see also *Rizzo v. Goode*, 423 U.S. 362, 380 (1976) (noting that the same federalism concerns that counsel against federal courts intervening in criminal prosecutions in progress similarly counsel against federal courts issuing injunctive relief against members of the executive branches of state governments); *O’Shea v. Littleton*, 414 U.S. 488, 499 (1974) (explaining that federalism concerns underlie the need for restraint in offering equitable relief against state officers).

<sup>125</sup> See, e.g., *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 229–30 (2d Cir. 2006).

<sup>126</sup> See, e.g., *Floyd v. New York*, 959 F. Supp. 2d 540 (2013); see generally Garrett, *supra* note 123, at 1834 (arguing that lower courts distinguish *Lyons* based on evidence of a group-based harm such as an equal protection violation).

<sup>127</sup> *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691–92 (1978).

<sup>128</sup> 475 U.S. 796, 799 (1986) (*per curiam*).

individuals and municipalities, is far more important than many commentators appreciate. As a result of this bifurcation of Section 1983 litigation, civil rights litigation is presently structured to avoid questions of policy and training if at all possible, and focuses only on the case-by-case facts of a particular encounter.

Even if a case does proceed past litigation regarding the individual officer's actions, it is very difficult to hold a city accountable for a constitutional violation of an officer. The Supreme Court in its 1978 ruling in *Monell v. Department of Social Services*, allowed for liability of municipalities as "persons" under Section 1983 for constitutional violations.<sup>129</sup> However, showing liability if the city or agency did not have an outright unconstitutional policy is very difficult. In its 1989 ruling in *City of Canton v. Harris*, the Court held that under Section 1983 it must be shown that training or supervision was "deliberately indifferent" to constitutional rights, such that it was "so obvious" that failure to train or supervise, on a subject "closely related" to the resulting injury, would predictably produce constitutional violations.<sup>130</sup>

Liability of police supervisors is also hard to show—the same "deliberate indifference" standard applies.<sup>131</sup> The Supreme Court has also more recently indicated real misunderstanding of how supervisory liability in Section 1983 and *Bivens*<sup>132</sup> litigation is proven. In its ruling regarding pleading standards in *Ashcroft v. Iqbal*, a *Bivens* case filed against federal officers, the Court rejected the plaintiff's contention that a supervisor could be liable based on "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees," stating instead that "purpose" must be shown.<sup>133</sup> In fact, the Court misstated longstanding law; "deliberate indifference" of a supervisor is the standard for supervisory liability, and

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<sup>129</sup> *Monell*, 436 U.S. at 701 (internal quotation marks omitted).

<sup>130</sup> 489 U.S. 378, 390–91 (1989).

<sup>131</sup> See, e.g., *Hinshaw v. Doffer*, 785 F.2d 1260 (5th Cir. 1986); *Voutour v. Vitale*, 761 F.2d 812 (1st Cir. 1985); *Marchese v. Lucas*, 758 F.2d 181 (6th Cir. 1985).

<sup>132</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>133</sup> 556 U.S. 662, 677 (2009) (quoting Brief for Respondent Javid Iqbal at 45–46, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015), 2008 WL 4734962, at \*45–46) (internal quotation marks omitted). Part of the confusion appeared because of the underlying claim being an equal protection claim which itself required a showing of discriminatory purpose. *Id.* at 676–77.

“knowledge and acquiescence” could certainly support liability.<sup>134</sup> Nor would police leadership want supervisors to believe that they could avoid responsibility for constitutional violations by claiming a lack of “purpose” when they did have actual knowledge of and acquiesced in the violations.

Individual officer suits, however, also impose high obstacles on relief, and not just because of the Fourth Amendment doctrine discussed above, but also because of qualified immunity doctrine. Indeed, during the same time post-*Garner* that Supreme Court cases focused on an objective reasonableness standard for Fourth Amendment use-of-force doctrine, the Court also developed an objective reasonableness doctrine to insulate all government actors from liability for any type of constitutional claim. The doctrine of qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.”<sup>135</sup> The Court rejected a subjective approach with a good faith defense, and instead ruled that officers are immune from suit so long as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>136</sup> First, this fault standard protects officers who violated constitutional rights in a way that was not “unreasonable,” and second, it protects officers whose actions were not “clearly” unconstitutional at the time, based on controlling authority in the jurisdiction in question or a “consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.”<sup>137</sup> Some justifications make clear, however, that reasonable official conduct should be informed by what a reasonably well-trained officer would have done under the circumstances; we discuss this in Part III, as that case law has the potential to connect official immunity doctrine to an informed view of police tactics. In addition, qualified immunity defenses may be raised early in litigation, interlocutory appeals on the defense may be raised as an exception to the collateral order doc-

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<sup>134</sup> E.g., *id.* at 693–94 (Souter, J., dissenting) (discussing case law on supervisory liability); *Farmer v. Brennan*, 511 U.S. 825, 842 (1994); Diane M. Allen, *Liability of Supervisory Officials and Governmental Entities for Having Failed to Adequately Train, Supervise, or Control Individual Peace Officers Who Violate Plaintiff’s Civil Rights Under 42 U.S.C.A. § 1983*, 70 A.L.R. Fed. 17, 43 (1984).

<sup>135</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986). For an overview, see John C. Jeffries, Jr., *Essay, The Right-Remedy Gap in Constitutional Law*, 109 *Yale L.J.* 87, 94 (1999).

<sup>136</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>137</sup> *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

trine,<sup>138</sup> and courts may consider qualified immunity of officers before addressing whether the officers violated the Constitution.<sup>139</sup> The result places still greater emphasis on the fault of individual officers, in a highly deferential posture which makes prevailing in Section 1983 litigation quite difficult, unless a constitutional violation is quite clear and serious.<sup>140</sup>

By contrast, state law tort causes of action do not share that structure, where the focus of negligence rules, for example, is on assuring reasonable care. State intentional tort law typically adopts what amounts to a negligence standard that immunizes officers for actions that are reasonable and therefore deemed privileged.<sup>141</sup> Such rules limiting liability for assault do not define reasonableness based on any particular moment in time and, for example, the Restatement (Second) of Torts highlights how a rule of necessity applies, and deadly force can only be used “when it reasonably appears” to the officer “that there is no other alternative” means available short of abandoning the arrest.<sup>142</sup> In general, the Restatement provides that force “is not privileged” if the means used are “in excess” of that which an actor would “reasonably believe[] to be necessary.”<sup>143</sup> Such standards impose a duty of reasonable care consistent with principles of police policy and training that we will describe in this Article, including concepts of minimization of force, necessity, and proportionality. Unlike the Supreme Court’s recent Fourth Amendment doctrine, state law does not frame the inquiry using a narrow time period, as the Sections that follow describe.

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<sup>138</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 528–30 (1985); see also *Behrens v. Pelletier*, 516 U.S. 299, 307–11 (1996) (“[A]n order denying qualified immunity, to the extent it turns on an ‘issue of law,’ is immediately appealable.” (citation omitted) (quoting *Mitchell*, 472 U.S. at 530)).

<sup>139</sup> See *Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009). For criticism of the *Saucier* rule, see Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1275–81 (2006), and for a defense, see John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115 (2010).

<sup>140</sup> For criticism, see David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 67–68 (1989).

<sup>141</sup> Restatement (Second) of Torts § 131 (Am. Law Inst. 1965) (stating that an arrest is privileged if under warrant or “the actor reasonably believes that the arrest cannot otherwise be effected”).

<sup>142</sup> *Id.* § 131 cmt. f (noting that deadly force “is privileged only as a last resort”).

<sup>143</sup> *Id.* § 132.

In contrast, the qualified immunity doctrine, the Article III standing doctrine, and municipal and supervisory liability analyses all place the primary focus not on policy and training regarding use of force, but on the individual officer and a case-specific “analysis of the circumstances” approach.<sup>144</sup> This constitutional approach is misguided because it focuses on the wrong questions. This structure also influenced underlying Fourth Amendment doctrine, which during the same time period that this structure developed, began to similarly focus on individual-level officer action.

#### *D. Investigating Police Uses of Force*

The undue focus on an individual conception of reasonableness, apart from any view of reasonable care or sound policy or tactics, places a greater focus on the split-second in which force is used. This in turn magnifies the difficulty in establishing what actually transpired for purposes of liability. Regardless of how the constitutional standard is formulated, excessive-force cases will always be fact dependent to some extent: A judge or jury will need to examine the force used by the officer in the context of that particular interaction. The litigants, the judge, or a fact-finder may have to rely chiefly on the dueling testimony of the officer and civilian involved.<sup>145</sup> Moreover, the civilian may not be alive

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<sup>144</sup> See, e.g., *Jones v. Berge*, No. 00-C-421-C, 2001 WL 34379611, at \*14 (W.D. Wis. Aug. 14, 2001). For further criticism of this structure, see David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 *Harv. C.R.-C.L. L. Rev.* 465, 501 (1992).

<sup>145</sup> Even when the officer and civilian tell very different stories, those stories may never see the inside of a courtroom. Civilian plaintiffs in excessive-force cases are often criminal defendants being charged with assaulting or attempting to assault a police officer in the very incident which they allege involved excessive force. Defending those charges may be the plaintiff's top priority, not suing under civil rights statutes to obtain compensation or vindicate constitutional rights. If the civilian is convicted of a crime, such as assaulting a police officer, that conviction may legally or practically bar any civil rights action against law enforcement. *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (holding collateral estoppel defense potentially available in civil rights damages action where federal constitutional claim raised in criminal suppression hearing). For a summary of the complex law in the area, see Michael Avery et al., *Police Misconduct: Law and Litigation* § 9:6 (3d ed. 2000). In other cases, individuals may not file a complaint or initiate a lawsuit at all, perhaps out of fear for the possible consequences, disbelief that their complaint will have a positive outcome, aversion to litigiousness, or desire to put an incident behind them. Kenneth Adams, *Measuring the Prevalence of Abuse of Force*, in *Police Violence: Understanding and Controlling Police Abuse of Force* 52, 68–70 (William A. Geller & Hans Toch eds., 1996) (discussing studies that found between sixty-seven and ninety-seven percent “of excessive force incidents go unreported”); see also Matthew R. Durose et al., U.S. Dep’t of Justice, Bureau of Justice Statis-



and able to dispute the officer's version of events. Courts do recognize the problem. For example, the Seventh Circuit noted in one case that "a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at a trial."<sup>146</sup> And, as the Ninth Circuit put it, a "court may not simply accept what may be a self-serving account by the police officer."<sup>147</sup> Still, if a civilian or his family decides to bring an excessive-force suit, how can they ever dispute the officer's version of events (assuming the officer does not cheerfully admit to having violated someone's constitutional rights)? There may be other evidence, but exactly what type or types of evidence are available will depend on what type of use of force was involved and what documentation occurred at the scene. Eyewitnesses are possible, although potentially even less reliable in use-of-force cases than in other contexts. Forensic investigation may reveal some information, particularly ballistics concerning bullet origins, paths, and distance; medical evidence related to the severity and causes of injuries; and evidence of a struggle such as torn clothing. More recent cases may involve videotape from a police cruiser dash camera, surveillance cameras, or an officer's body-worn camera that captures a force incident, although even a video may not tell the complete story from all of the relevant perspectives.<sup>148</sup> Such evidence, and particularly the extent to which it supports or discredits an officer's account, are of the utmost importance to determining not just the facts, but also the credibility of the testifying parties and witnesses.<sup>149</sup> After a police shooting or other use of force it is not necessarily easy to recover what the circumstances

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tics, *Contacts Between Police and the Public: Findings from the 2002 National Survey 20* (2005), <https://www.bjs.gov/content/pub/pdf/cpp02.pdf> [<https://perma.cc/WX38-A9ZC>] (finding that eighty-seven percent of people against whom force was used perceived it as improper or excessive, but less than twenty percent of those persons filed a complaint or initiated a lawsuit).

<sup>146</sup> *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994).

<sup>147</sup> *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

<sup>148</sup> For a vivid demonstration of this, using body-camera videos in a series of mock incidents, see Timothy Williams et al., *Police Body Cameras: What Do You See?*, N.Y. Times (Apr. 1, 2006), [http://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html?\\_r=0](http://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html?_r=0) [<https://perma.cc/KGE3-9ML3>].

<sup>149</sup> See, e.g., *Abraham v. Raso*, 183 F.3d 279, 293–94 (3d Cir. 1999) (discussing ballistic and videotape evidence); *Hopkins v. Andaya*, 958 F.2d 881, 885 (9th Cir. 1992) ("[T]he medical evidence in the record undermines [the officer]'s story in numerous ways."); *Ting v. United States*, 927 F.2d 1504, 1510 (9th Cir. 1991) (discussing ballistic evidence).

were that confronted the police officer—it is even less realistic to expect judges and jurors to accurately recover what happened in a “split-second.”

## II. THE POLICE-TACTICS REVOLUTION

The vast majority of police encounters do not involve the use of force. In 2008, the most recent year for which data are available, police officers interacted with individuals nearly 67 million times and used or threatened to use force in about 1.4% of those encounters.<sup>150</sup> Force or threats of force are more common in traffic stops (4.9%) and street stops (25.4%).<sup>151</sup> Unsurprisingly, officers are more likely to use force against a person suspected of wrongdoing,<sup>152</sup> especially when making an arrest.<sup>153</sup> But the low percentages mask high absolute numbers; using the 2008 statistics, officers used force approximately 938,000 times. Although we lack reliable information about what type of force officers used, we do know that most police violence involves pushing, grabbing, or hitting rather than the use of more serious force or a weapon.<sup>154</sup> But even if

<sup>150</sup> Christine Eith & Matthew R. Durose, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Contacts Between Police and the Public, 2008*, at 6, 12 (2011), <http://www.bjs.gov/content/pub/pdf/cpp08.pdf> [<https://perma.cc/DM75-ZLC4>]. Other studies have found wildly different numbers. The IACP, for example, found that in 1999, officers used force in 3.61 per 10,000 calls for service, for a rate of 0.0361%. Int’l Assoc. of Chiefs of Police, *Police Use of Force in America 2001*, at i–ii (2001), <http://www.theiacp.org/Portals/0/pdfs/Publications/2001useofforce.pdf> [<https://perma.cc/A658-475J>]. A regrettable lack of standardization makes the different numbers difficult to compare; exactly what definition of “force” a study adopts and whether it standardizes “calls for service” or officer-civilian encounters or the number of sworn officers can dramatically affect the end result. Comparing data on police force may also allow for the recognition of trends. For example, a 1993 study by Antony Pate and Lorie Fridell found that officers at large police agencies used force less often but used deadly force more often than officers at smaller agencies. 1 Antony M. Pate & Lorie A. Fridell, *Police Use of Force: Official Reports, Citizen Complaints, and Legal Consequences 4-14-4-16* (1993), <https://www.ncjrs.gov/pdffiles1/Digitization/146825NCJRS.pdf> [<https://perma.cc/9QJM-SFQ6>].

<sup>151</sup> Lynn Langton & Matthew Durose, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Police Behavior during Traffic and Street Stops, 2011*, at 10, 12 (2013), <https://www.bjs.gov/content/pub/pdf/pbtss11.pdf> [<https://perma.cc/9G8Y-XC72>].

<sup>152</sup> Eith & Durose, *supra* note 150, at 14.

<sup>153</sup> As many as one-fifth of arrests require the use of some force. Joel H. Garner & Christopher D. Maxwell, *Measuring the Amount of Force Used By and Against the Police in Six Jurisdictions*, in *Use of Force by Police: Overview of National and Local Data* 25, 39, 41 (Nat’l Inst. of Justice & Bureau of Justice Statistics eds., 1999), <https://www.ncjrs.gov/pdffiles1/nij/176330-2.pdf> [<https://perma.cc/67KT-EY9Y>].

<sup>154</sup> Eith & Durose, *supra* note 150, at 12–13.

“most” police violence is relatively low level, the sheer volume suggests that there are, every year, many tens of thousands of situations in which serious, even deadly, force is used. Media outlets such as the *Guardian*<sup>155</sup> and the *Washington Post*,<sup>156</sup> and private efforts such as KilledBy-Police.net,<sup>157</sup> offer a count of people who die while interacting with the police,<sup>158</sup> but as important as such efforts are, they fail to account for uses of deadly force that do not result in death.

While media attention has left many with the impression that police violence has increased in recent years, the opposite is likely true. According to the best information we have—which is far from the best that we *could* have—police today use force less frequently than they have historically.<sup>159</sup> Further, the type of force they use has changed.<sup>160</sup> This is not just a recent phenomenon, and the changes can be traced to the 1960s and 1970s. At the time, the Fourth Amendment did not regulate the use of force and police departments provided scant training to guide officers. The “split-second syndrome” may have some basis in historical practice: Until relatively recently, use-of-force policies and training, if they existed at all, left it to officers to make last-minute, on-the-spot decisions about whether and how to use force, including deadly force. Indeed, until the 1970s, “police tactics” meant the techniques that officers used to subdue and restrain individuals. The notion that tactics could encompass practices that allow officers to avoid or minimize the need to use force was poorly developed.

All of this would quickly change. During the very time period that the Supreme Court adopted its unduly individualized approach toward police use of force, policing researchers discovered systematic approaches that could minimize and avoid the need to use force. The modern re-

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<sup>155</sup> The Counted: People Killed by Police in the US, *The Guardian*, <http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>.

<sup>156</sup> Fatal Force, *Wash. Post*, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> [<https://perma.cc/WRY4-PUYH>].

<sup>157</sup> Killed by Police 2016, <http://killedbypolice.net/> [<https://perma.cc/G8BD-HAS6>].

<sup>158</sup> For an argument that such counts are overinclusive because they include individuals who would have died regardless of any interaction with the police, see Nick Selby et al., *In Context: Understanding Police Killings of Unarmed Civilians* 7 (2016).

<sup>159</sup> According to the Bureau of Justice Statistics, officers used or threatened force in about 1.5% of encounters in 2002. Durose et al., *supra* note 145, at iv–v.

<sup>160</sup> Int’l Assoc. of Chiefs of Police, *supra* note 150, at ii (showing an increase in the ratio of chemical weapons to physical force and a decrease in the ratio of firearm usage to physical force).

search on police tactics, as well as the realization that better procedures could improve the safety of officers and civilians alike, can be traced to the early work of Fyfe, a lieutenant with the New York City Police Department (“NYPD”) who earned a Ph.D. in the 1970s.<sup>161</sup>

#### A. *Early Police-Tactics Research*

Fyfe’s early work, and that of others by the 1970s, prefigured a sea change in the scholarship surrounding police practices and use of force. The *Garner* decision by the Supreme Court, as the opinion itself makes clear, was informed by a preexisting and then-growing body of research and best practices. A central theme of that body of work was that police officers are not members of “a near-supernatural profession who rely more upon art and instinct than upon systematic knowledge, and whose work is an unending series of instant life-or-death decisions.”<sup>162</sup> Instead, careful use-of-force policies, police tactics and training, and strong supervision and investigation was required to minimize use of force and protect officer safety.

Through the early 1970s, it was rare for police departments to have any written policy on the use of force. Instead, many departments relied on “oral policy.”<sup>163</sup> Leading policing texts said nothing about deadly force, and officers described a “Wild West” and “open season” mentality toward using weapons, one in which warning shots could be fired and fleeing-felony suspects, such as Edward Garner, could be shot.<sup>164</sup>

A seminal work during that time period was Fyfe’s dissertation examining all shooting incidents in New York City over a five-year period, from 1971 through 1975. This work included a remarkable dataset of 3,573 distinct instances—involving 4,904 officers, and 2,926 “shooting incidents”—of police firearm discharges and assaults on police by persons who were either armed with deadly weapons or inflicted serious physical injury.<sup>165</sup> This was an important time to be doing this research. Nationally, far more officers were being killed every year than had pre-

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<sup>161</sup> For a classic overview, see Jerome H. Skolnick & James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* xvi–xviii (1993).

<sup>162</sup> Fyfe, *Police Expert Witnesses*, supra note 68, at 101.

<sup>163</sup> Samuel Walker, *The New World of Police Accountability* 41 (2005).

<sup>164</sup> *Id.* at 42.

<sup>165</sup> James Joseph Fyfe, *Shots Fired: An Examination of New York City Police Firearms Discharges* 55 (Apr. 1978) (unpublished Ph.D. dissertation, State Univ. of N.Y. at Albany).

viously been the case.<sup>166</sup> Fyfe's research was built, in part, on the intuition that officers could be trained to respond in a way that reduced the danger they faced.<sup>167</sup> That, in turn, could reduce the need for officers to use lethal force in response to that danger. In 1972, the NYPD had adopted an influential first-time written policy on deadly force (one which abandoned a fleeing-felon rule).

The results of Fyfe's research were groundbreaking. He identified robberies as giving rise to the most shootings in New York City.<sup>168</sup> He also found that looking at the number of shots fired, a common practice at the time, was not a useful metric. Fyfe described how relying on number of shots fired "is likely to generate faulty conclusions," largely because some "spectacular incidents" can involve confrontations with suspects "who remained a threat despite being shot many times."<sup>169</sup> Some people who pose deadly threats to police "won't go down."<sup>170</sup> Fyfe's report noted that some officers were force prone, and that the department had formerly tended "to look the other way," but had since started to create early-warning systems to identify such officers.<sup>171</sup> Fyfe also explored the problem of shootings by off-duty officers, who were required by policy to carry their weapons at all times. He questioned whether requiring officers to carry weapons while off duty was a good idea, given the deadly encounters that so frequently resulted.<sup>172</sup> Additionally, Fyfe asked whether there could not be some compromise be-

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<sup>166</sup> Fed. Bureau of Investigation, Table 47 Law Enforcement Officers Feloniously Killed: Race and Sex of Known Offender, 2005-2014, [https://www.fbi.gov/about-us/cjis/ucr/leoka/2014/tables/table\\_47\\_leos\\_fk\\_race\\_and\\_sex\\_of\\_known\\_offender\\_2005-2014.xls](https://www.fbi.gov/about-us/cjis/ucr/leoka/2014/tables/table_47_leos_fk_race_and_sex_of_known_offender_2005-2014.xls) [<https://perma.cc/77UP-DLGL>]. In the ten-year period ending in 1970, for example, 63.3 officers were feloniously killed on average every year. That number almost doubled in the ten-year period ending in 1980, growing to an annual average of 114.8 officers feloniously killed. Univ. of Albany, Hindelang Criminal Justice Research Ctr., Sourcebook of Criminal Justice Statistics Online tbl. 3.154.2012, <http://www.albany.edu/sourcebook/pdf/t31542012.pdf> [<https://perma.cc/32WQ-YAC3>].

<sup>167</sup> Police Organization and Training: Innovations in Research and Practice 159 (M.R. Haberfeld et al. eds., 2012) (quoting an interview in which Fyfe said that: "[T]he goal of the training is to teach officers to approach the situation in such a way that their protective task is maximised while their exposure to danger is minimised. This has to be done especially by restructuring the situation in such a way that shooting becomes less likely." (citing F.P.C.M. de Jong & J.G.B. Mensink, *Sharp or Not Sharp...: an Investigation into the Use of a Shooting Simulator* (1994))).

<sup>168</sup> Fyfe, *Shots Fired*, supra note 165, at 500.

<sup>169</sup> *Id.* at 257.

<sup>170</sup> *Id.* at 258.

<sup>171</sup> *Id.* at 248, 251.

<sup>172</sup> *Id.* at 507.

tween “the nightstick and the revolver,” an intermediate level of force that would allow officers to more effectively “stop[] without killing.”<sup>173</sup>

In a follow-up study, Fyfe found that “a considerable reduction in the frequency of police shooting accompanied New York City’s direct intervention on the firearms discretion of its police officers” and the adoption of the new and more restrictive use-of-force policies in 1972.<sup>174</sup> These reductions occurred in “the most controversial shooting incidents: shootings to prevent or terminate crimes.”<sup>175</sup> At the same time, “these shooting decreases were not accompanied by increased officer injury or death.”<sup>176</sup> This suggested that the connection between use-of-force policies and the actual use of force was stronger than may have been previously estimated, while the connection between the use of deadly force and officer safety was weaker.<sup>177</sup>

What Fyfe’s research and research by others during that time period showed can be summarized as follows: (1) there is “extreme variation” in rates of police shooting across jurisdictions; (2) shootings disproportionately involve black victims, but are also associated with community violence and arrest rates; and (3) organizational factors regarding police policies, training, and police chief priorities may affect police shootings.<sup>178</sup>

Based on that research, Fyfe recommended, in the article that was cited in *Garner*, that:

1. Police departments should institute clear policy guidelines to limit the use of deadly force.
2. Policy guidelines should be related to the dangerousness of suspects, and should prohibit use of deadly force to apprehend nonviolent suspects.<sup>179</sup>

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<sup>173</sup> Id. at 518.

<sup>174</sup> James J. Fyfe, *Administrative Interventions on Police Shooting Discretion: An Empirical Examination*, 7 J. Crim. Just. 309, 322 (1979), *reprinted in* Readings on Police Use of Deadly Force 258, 277 (James J. Fyfe ed., 1982).

<sup>175</sup> Id. at 279.

<sup>176</sup> Id.

<sup>177</sup> Id. at 277–79.

<sup>178</sup> James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. Crim. L. & Criminology 707, 707–08 (1982).

<sup>179</sup> Fyfe, *Observations*, *supra* note 68, at 388.

Eleven more recommendations delved far more deeply into the review, investigation, and internal adjudication of police shootings; soliciting citizen complaints; responsibility of field supervisors; and training programs.<sup>180</sup> The recommendations further discussed using policies and practices to reduce “the potential for police-citizen violence” and proposed rethinking rewards for officers and the “quantitative measures of police work.”<sup>181</sup> These recommendations were fairly straightforward, but they proved to be highly influential, and they came at a time when police agencies were professionalizing their procedures. Far more agencies adopted written policies on use of force in the years that followed.<sup>182</sup>

### *B. Current Police Use-of-Force Policies*

What guides the decision when and whether to use force? To this day, the data collection on police use of force itself remains highly incomplete.<sup>183</sup> While some police technology has dramatically changed just in the past decade, the approach toward police tactics has remained fairly stable since the 1980s, with some notable exceptions.<sup>184</sup> The tactical revolution resulted in the development of policies and training, both of which are now ubiquitous, to guide police use of force. In 2000, the Bureau of Justice Statistics estimated that well over 93% of police agencies had policies governing the use of deadly force and 87% had policies for nonlethal force.<sup>185</sup> Sound policies concerning use of force are necessary

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See Matthew J. Hickman & Brian A. Reaves, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Local Police Departments 2000*, at iv (2003), <http://www.bjs.gov/content/pub/pdf/lpd00.pdf> [<https://perma.cc/3NJQ-6953>].

<sup>183</sup> Fyfe, *Too Many Missing Cases*, *supra* note 25, at 99 (discussing the continuing lack of good data on police use of force); Jodi M. Brown & Patrick A. Langan, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Policing and Homicide, 1976-98: Justifiable Homicide by Police, Police Officers Murdered by Felons 28-30* (2001) (describing Supplemental Homicide Reports statistics).

<sup>184</sup> Police tactics have shifted dramatically in the context of active-shooter response, for example, and agencies across the country have increased the use of dynamic “no-knock” raids and the deployment of specialized SWAT-style units to execute drug-related search and arrest warrants. Radley Balko, *Rise of the Warrior Cop: The Militarization of America’s Police Forces* 172 (2013); Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 *Wake Forest L. Rev.* 611, 643 (2016).

<sup>185</sup> Hickman & Reaves, *supra* note 182, at iv.

but far from sufficient, since written practices must be implemented, and in particular, officers must be trained to react in difficult situations using techniques that cannot be concisely reduced to policy.<sup>186</sup>

Dating back to and before the seminal research and policy changes in the 1970s, police trainers have emphasized the importance of training and policy where many features of officers' decisions are not intuitive and cannot be expected to be made carefully for the first time while the officer reacts to an encounter.<sup>187</sup> Training is a necessary supplement to policy, and there is insufficient room in a single article—or even a single volume—to discuss every aspect and nuance of tactics training. In this Part, we provide an overview of the foundational concepts that police tactics are built upon, as well as a brief review of some of the more salient features of tactical training. Much of the training on the use of force takes place at the police academy, where most local officers receive their initial police education. As of 2013, the most recent year for which data are available, about 45,000 police recruits enrolled in, and about 38,600 graduated from, one of the more than 650 police academies scattered across the country, where they received an average of 840 hours of training.<sup>188</sup> A significant portion of that training focuses on the four high-liability areas: firearms, combatives,<sup>189</sup> driving, and first

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<sup>186</sup> Unfortunately, there are ample reasons to believe that written policies are neither reflective nor directive of actual practice. See Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 *Minn. L. Rev.* 2179, 2213–14 (2014).

<sup>187</sup> See Geoffrey P. Alpert et al., *Police Uses of Force* ch. 2 (forthcoming); see also IACP National Consensus Policy on Use of Force, *supra* note 1, at 4 (describing need for annual training on agency use-of-force policy and “regular and periodic training” on techniques such as de-escalation and use of less-lethal force). To the extent that tactics have found their way into policy at all, they have long been treated separately from the use of force. However, the two have been connected in police practices research and in police training, and increasingly, the two have been connected in the more detailed and up-to-date use-of-force policies, as described. Indeed, some of the same policies that minimize the need to use force are designed to minimize dangers to officers: An officer who is in less danger has less need to use force to address that danger.

<sup>188</sup> Brian A. Reaves, U.S. Dep't of Justice, Bureau of Justice Statistics, *State and Local Law Enforcement Training Academies, 2013*, at 1, 4 (2016) [hereinafter *State and Local Law Enforcement Training Academies, 2013*], <https://www.bjs.gov/content/pub/pdf/slleta13.pdf> [<https://perma.cc/LG3L-PTPN>].

<sup>189</sup> We use “combatives” to refer to officers' use of physical force. Although not unheard of, the word “combatives” is typically disfavored by law enforcement, which most often uses the phrase “defensive tactics.” Though more frequently used, that term erroneously suggests that the training is focused on officers defending themselves or others from attack. Some po-



aid.<sup>190</sup> Only very rarely does an academy omit training in firearms, provided by 98% of academies, and combatives, provided by 99% of academies.<sup>191</sup> Not only are these topics of instruction common, they are also what “[r]ecruits spen[d] the most time learning,” with an average of 60 hours dedicated to firearms and 63 hours to combatives—each one more than any other single block of training.<sup>192</sup> These numbers have not changed substantially since 2002, when the vast majority of academies required an average of 60 hours of training in firearms and 56 hours in combatives.<sup>193</sup> Although systematic data are not available, this training often continues when a candidate graduates from the academy and begins working for a police department that has its own policy or policies governing the use of force.

Nevertheless, training on tactics remains inadequate. The large blocks of time police academies dedicate to firearms and combatives training stand in sharp contrast to the relative paucity of training in the knowledge and skills officers need to effectively utilize nonviolent methods of conflict resolution. Recall that upward of 98% of police academies provide, on average, more than 120 hours of lethal and less-lethal force training.<sup>194</sup> In contrast, in 2013, 95% of academies offered an average of only 12 hours of training in “[c]ultural diversity/human relations.”<sup>195</sup> Even fewer academies provided training in basic community policing strategies, with 82% of academies spending an average of only 10 hours on that topic.<sup>196</sup> And a similarly small number—only 82% of

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lice training is legitimately defensive in that sense, of course, but the majority focuses on the use of aggressive force to apprehend and handcuff a suspect who is either complying or non-violently resisting. In this way, combatives training mirrors the way that officers actually use force: “The vast majority of the time . . . officers use force aggressively, not defensively.” Stoughton, *supra* note 92, at 868.

<sup>190</sup> Brian A. Reaves, U.S. Dep’t of Justice, Bureau of Justice Statistics, *State and Local Law Enforcement Training Academies*, 2006, at 6 (2009) [hereinafter *State and Local Law Enforcement Training Academies*, 2006], <http://www.bjs.gov/content/pub/pdf/slleta06.pdf> [<https://perma.cc/RWS9-A6Q6>].

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Matthew J. Hickman, U.S. Dep’t of Justice, Bureau of Justice Statistics, *State and Local Law Enforcement Training Academies*, 2002, at 9 (2005) [hereinafter *State and Local Law Enforcement Training Academies*, 2002], <http://www.bjs.gov/content/pub/pdf/slleta02.pdf> [<https://perma.cc/Y7LE-C69U>].

<sup>194</sup> See *State and Local Law Enforcement Training Academies*, 2006, *supra* note 188, at 6.

<sup>195</sup> *State and Local Law Enforcement Training Academies*, 2013, *supra* note 188, at 7.

<sup>196</sup> *Id.*

academies—provided any training at all in “[m]ediation skills/conflict management.”<sup>197</sup> Those that did provided an average of 9 hours.<sup>198</sup> That number is lower than the 88% of academies that provided an average of 8 hours of mediation/conflict management training in 2006 and the 83% that offered an average of 8 hours of training in 2002.<sup>199</sup> Further, where a substantial majority of firearms and combatives training is experiential—officers handle and shoot firearms at a range and they learn combatives by practicing them on one another or on an instructor wearing protective gear—a substantial portion of conflict resolution and de-escalation training is provided through lecture-based, classroom instruction. This has proven problematic; a traditional, lecture-based classroom environment is not conducive to teaching physical and mental skills officers must apply in real-world settings.<sup>200</sup>

### *C. An Introduction to Police Tactics*

Modern police tactics, while addressing a wide range of situations that police must encounter, all have a common goal: managing risk. In the use-of-force context, tactics are the techniques and procedures that officers use to balance the relative risks to themselves and civilians in any given situation so that they can handle encounters as safely as circumstances permit. Some of the techniques officers employ are informed by empirical research, and some require more research in order to validate their use. Far more work must be done to empirically examine police tactics and policing more generally. We do not mean to suggest that particular types of police tactics have been empirically validated as best practices. What we do argue is that the use of tactics to reduce overall risk, thereby minimizing or avoiding the use of force, is far preferable to an approach that permits or encourages officers to react in the moment. We hope that further research will lead to the continued re-

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> State and Local Law Enforcement Training Academies, 2006, *supra* note 190, at 1, 6; State and Local Law Enforcement Training Academies, 2002, *supra* note 193, at 9.

<sup>200</sup> *Zuchel v. City & Cty. of Denver*, 997 F.2d 730, 739 (10th Cir. 1993) (noting expert testimony concluding that training films are viewed “quite often as video games” and that field exercises and “role-play situations . . . are much more effective”); Mark R. McCoy, Teaching Style and the Application of Adult Learning Principles by Police Instructors, 29 *Policing: Int’l J. Police Strategies & Mgmt.* 77, 89 (2006); Richard B. Weinblatt, New Police Training Philosophy: Adult Learning Model on Verge of Nationwide Rollout, *Law & Ord.* 84 (Aug. 1999).

finement of existing tactics and the development of new tactics that can safely minimize the use of force.

Tactical procedures are informed by the observation that officer decision making suffers in highly stressful situations. Even the best-trained officers may have bad judgment when they are forced to make truly split-second decisions, in large part because they lack the time to consider alternative approaches. For that reason, *time* is a foundational concept that underlies modern police tactics. With time, officers are better able to make accurate risk assessments, consider the range of appropriate tactical options, and take actions that can minimize or avoid the use of force altogether. In the following Subsections, we explore time as a tactical concept, the tactics that officers use operationally to create time, and the techniques that officers can employ in the time that they create.<sup>201</sup>

### *1. Decision Time as a Tactical Concept*

Time is a central concept in police tactics, affecting as it does the accuracy of officers' perceptions and the quality of decision making. The Court suggested as much in *Graham v. Connor*, emphasizing that the Fourth Amendment's reasonableness standard must accommodate the "split-second" nature of officers' use-of-force decisions.<sup>202</sup> Unsurprisingly, police tactics often seek to "create" time in which officers can assess or respond to the situation, either by maintaining distance or by introducing obstacles that make it more difficult for threats to reach

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<sup>201</sup> We note, as a threshold matter, that reliable information about police training is notoriously difficult to come by. See Myron Moskovitz, A Rule in Search of a Reason: An Empirical Reexamination of *Chimel* and *Belton*, 2002 Wis. L. Rev. 657, 662–63 (describing the difficulty of obtaining information about how officers are trained to conduct searches). Police training is provided through a mix of lectures and experiential learning, with minimal emphasis on written materials. This section draws from what materials are available, primarily books and articles directed at an audience consisting of law police professionals. The difficulty of relying on such materials comes from the fact that, by and large, they are not intended to be introductory. Indeed, they often assume that readers will already be familiar with the concepts we introduce here.

<sup>202</sup> 490 U.S. 386, 397 (1989); see also IACP National Consensus Policy on Use of Force, supra note 1, at 4 ("Whenever possible and when such delay will not compromise the safety of the officer or another and will not result in the destruction of evidence, escape of a suspect, or commission of a crime, an officer shall allow an individual time and opportunity to submit to verbal commands before force is used.").

them.<sup>203</sup> Creating time in this way benefits officers, as two separate conceptions of human decision making—the (1) Observation, Orientation, Decision, and Action (“OODA”) Loop and (2) System 1/System 2 thinking—suggest. Much of modern law enforcement tactics are designed around a simplified model of human reaction known as the OODA Loop.<sup>204</sup> Under this model, any individual—including both officers and suspects—can physically react to a situation only after going through four distinct phases: Observation, Orientation, Decision, and Action.<sup>205</sup> Observation involves gathering sensory information about the world; for example, an officer sees someone reaching into a pocket, hears a gunshot, or feels an arrestee pull away from them. This information is processed in the Orientation phase, during which the individual puts her observations into context and draws conclusions about the situation.<sup>206</sup> The person reaching into her pocket may be reaching for her keys so she can unlock her car, or for a weapon so that she can attack the officer, for example. The Orientation phase of the OODA Loop is when the officer applies preexisting mental models to determine the relative likelihood of

<sup>203</sup> Police Exec. Research Forum, Re-engineering Training on Police Use of Force 40–41 (2015), <http://www.policeforum.org/assets/reengineeringtraining1.pdf> [<https://perma.cc/C9T6-2CPU>]; Police Exec. Research Forum, *supra* note 1, at Policies 16, 17, 20; Urban All. on Race Relations, *Saving Lives: Alternatives to the Use of Lethal Force by Police* 7 (2000), <https://urbanalliance.files.wordpress.com/2012/05/savinglivesreport.pdf> [<https://perma.cc/YZN9-CHSN>].

<sup>204</sup> The OODA Loop was originally posited by Colonel John Boyd, an Air Force pilot whose theories and strategies enabled the pilots he trained to consistently out-fly the technologically superior enemy aircraft. Tracy A. Hightower, *Boyd’s O.O.D.A. Loop and How We Use It*, *Tactical Response Blog* (Oct. 20, 2016, 3:20 PM) <https://tacticalresponse.com/blogs/library/18649427-boyd-s-o-o-d-a-loop-and-how-we-use-it> [<https://perma.cc/Z3JX-WVWQ>]; see also J. Pete Blair & M. Hunter Martaindale, *Evaluating Police Tactics: An Empirical Assessment of Room Entry Techniques* 41 (Joycelyn M. Pollock & Michael C. Braswell eds., 2014) (“In the tactical world, [decision making] is often explained using Boyd’s Cycle [another name for the OODA Loop]”); Tomas C. Mijares & Ronald M. McCarthy, *Significant Tactical Police Cases: Learning from Past Events to Improve upon Future Responses* 14 (2015) (describing the OODA Loop as having been “extrapolated [from the military context] for use in other environments ranging from business management to close quarter combat”); Amaury Murgado, *Why the OODA Loop is Still Relevant*, *Police: L. Enforcement Mag.* (Jan. 10, 2013), <http://www.policemag.com/channel/careers-training/articles/2013/01/why-the-ooda-loop-is-still-relevant.aspx> [<https://perma.cc/5JFB-LTDU>] (“Every law enforcement officer needs to understand the OODA loop because it explains how people act and react in a demanding, evolving, and highly charged situation. This decision-making model can be used to deconstruct verbal and physical confrontations.”).

<sup>205</sup> Hightower, *supra* note 204.

<sup>206</sup> *Id.*

each possibility.<sup>207</sup> During the Decision phase, the officer selects from among the range of alternative responses to the perceived situation.<sup>208</sup> That response is put into motion during the Action phase.<sup>209</sup> The OODA Loop is both *continuous* and *overlapping*—officers and civilians alike are constantly taking in new information, processing that information, making decisions on the basis of that processing, and implementing those decisions.<sup>210</sup> Efficiency and accuracy are both viewed as essential; as police training emphasizes, action is faster than reaction.<sup>211</sup> By being the first one to put a decision into action, the officer can “reset” or “re-boot” a suspect’s OODA Loop by forcing the suspect to react to new information (the officer’s action).<sup>212</sup> Police tactics encourage officers to put themselves into positions of relative tactical advantage, which pro-

<sup>207</sup> Donald A. MacCuish, Orientation: Key to the OODA Loop—The Culture Factor, 3 J. Def. Resources Mgmt. 67, 70 (2012).

<sup>208</sup> Hightower, *supra* note 204.

<sup>209</sup> *Id.*

<sup>210</sup> MacCuish, *supra* note 207, at 67.

<sup>211</sup> See, e.g., Charles Remsberg, Rethinking Reaction Time, Police: L. Enforcement Mag. (Dec. 1, 2004), <http://www.policemag.com/channel/patrol/articles/2004/12/officer-survival.aspx> [https://perma.cc/5CU6-665N]. The common-sense concept that response follows stimulus is channeled into police training in the form of the “reactionary gap,” a phrase introduced by Charles Remsberg in the 1980s to refer to amount of time an officer needs to become aware of and react to any given threat. Charles Remsberg, *The Tactical Edge: Surviving High-Risk Patrol* 437, 440 (1986) [hereinafter Remsberg, *Tactical Edge*] (emphasis omitted); see also Amaury Murgado, Closing the Gap, Police: L. Enforcement Mag. (July 10, 2013), <http://www.policemag.com/channel/careers-training/articles/2013/07/closing-the-gap.aspx> [https://perma.cc/5AWC-FFWX] (using “reactionary gap” to refer to the distance that must be maintained between an officer and suspect in order to give the officer sufficient time to react). The reactionary gap was popularized by John Tueller, who created a drill designed to show officers that a suspect with an edged weapon could attack an officer twenty-one feet away before the officer could respond with lethal force, giving rise to what became known as the “21-foot rule.” Ron Martinelli, Revisiting the “21-Foot Rule,” Police: L. Enforcement Mag. (Sept. 18, 2014), <http://www.policemag.com/channel/weapons/articles/2014/09/revisiting-the-21-foot-rule.aspx> [https://perma.cc/TSB8-2JFA]. This “rule” was never intended to be a definitive measure of the reactionary gap in the edged weapons context; it was intended as an illustration of the reactionary gap to demonstrate to officers that the suspect’s action was faster than their reaction. *Id.*

<sup>212</sup> The concept of “rebooting” or “resetting” the OODA Loop process is common in law enforcement. See, e.g., Hightower, *supra* note 204 (“Making sure our students understand the O.O.D.A. Loop and how we react as humans can go a long way toward accomplishing that goal. The really great thing about understanding the O.O.D.A. Loop is the realization that everybody has one and their O.O.D.A. Loop is affected by the same factors that yours is. This is one of the reasons why in nearly every drill we teach it incorporates moving. This has the effect of resetting your opponent’s O.O.D.A. Loop and giving you still another advantage.”).

vide more time for, and thus improve the quality of, every step in the OODA Loop process.

The OODA Loop provides a foundational understanding of modern police tactics, but research from cognitive psychology and neuroscience also offer useful insights. Professor Daniel Kahneman popularized a dual-process theory of human thought, categorizing cognition into “System 1” and “System 2” thinking.<sup>213</sup> System 1 thinking is fast, and it is fast because it is subconscious; primitive, reflexive assessments and responses to sudden stimuli are examples of System 1 thinking. System 2 thinking, by contrast, is slower because it requires conscious deliberation; contemplation or the use of logic are examples of System 2 thinking.<sup>214</sup> If, for example, a red-faced stranger were aggressively to scream a math problem at you, your perception of him as angry would be the result of System 1, while actually solving the math problem would require System 2.<sup>215</sup> As this example suggests, the different systems may be preferable in different types of situations. In some circumstances, a quick System 1 reaction based on the gist of the situation may be preferable; indeed, Kahneman suggests that System 1 serves an evolutionary function by decreasing our reaction time in threatening situations.<sup>216</sup> Police tactics can decrease the need to use System 1 thinking in officer-civilian encounters; by reducing immediate threats to the officer, tactics create more opportunities for officers to engage in System 2 thinking. Given the life and death stakes, a deliberate decision to use force is preferable, if it can be reached safely.

Further, System 1 reactions pose special problems in the use-of-force context. Substantial research suggests that, while moderate levels of stress may enhance sensory perception and attention, people faced with more serious perceived or actual physical threats, particularly deadly threats, may experience stress reactions that make sound decision making far more challenging.<sup>217</sup> Responses colloquially called “flight or

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<sup>213</sup> Daniel Kahneman, *Thinking, Fast and Slow* 20 (2011).

<sup>214</sup> *Id.* at 21; see also Gideon Keren & Yaacov Schul, *Two Is Not Always Better than One: A Critical Evaluation of Two-System Theories*, 4 *Persp. on Psychol. Sci.* 533, 546 (2009) (discussing the role of both systems in problem solving).

<sup>215</sup> Kahneman, *supra* note 213, at 19–20.

<sup>216</sup> *Id.* at 301.

<sup>217</sup> See, e.g., William R. Lohvallo, *Stress and Health: Biological and Psychological Interactions* 89–98 (2d ed. 2005); Raffael Kalisch et al., *A Conceptual Framework for the Neurobiological Study of Resilience*, *Behav. & Brain Sci.* 1, 3 (2015).

fight” can result.<sup>218</sup> This response can be an effective System 1 reaction, a biological response designed to ensure safety of an individual, but it does not necessarily comport with law enforcement goals to protect the public and minimize loss of life or injury, both to officers and the public. This is particularly true in light of the cognitive challenges associated with high-stress environments. Officers may have distorted sensory perceptions, including visual distortions (e.g., “tunnel vision”), auditory distortions (e.g., “auditory blunting”), and distortions in how time is perceived (perceiving events as moving more quickly or more slowly than they actually are);<sup>219</sup> cognitive impairments, such as slowed reaction time; and physiological deficiencies, including a reduction in manual dexterity and motor skills.<sup>220</sup> In light of the heavy, if not exclusive, reliance on System 1 thinking in dangerous environments, police tactics can create space for System 2 thinking by reducing the risk to the officer. By providing more time for officers to both gather and process information before responding, police tactics serve to improve the quality of decision making.<sup>221</sup> Whether one analyzes them under the rubric of the OODA Loop or System 1/System 2 thinking, police tactics seek to maximize the amount of time an officer has to assess the situation, make an informed decision, and implement a response.<sup>222</sup> The narrow, “split-

<sup>218</sup> Kalisch et al., *supra* note 217, at 3.

<sup>219</sup> David A. Klinger & Rod K. Brunson, *Police Officers’ Perceptual Distortions During Lethal Force Situations: Informing the Reasonableness Standard*, 8 *Criminology & Pub. Pol’y* 117, 123 (2009); see also Dean T. Olson, *Improving Deadly Force Decision Making*, 67 *FBI L. Enforcement Bull.* 1, 7 (1998) (discussing “the deterioration of fine and complex motor skills under survival stress”); Bobby Westmoreland & Billy D. Haddock, *Code “3” Driving: Psychological and Physiological Stress Effects*, 37 *Law & Ord.* 29, 30 (1989) (describing how the stress of an emergency can lead to tunnel vision); Seth D. DuCharme, Note, *The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 *Fordham L. Rev.* 2515, 2541–42 (2002) (explaining three categories of distorted sensory perception).

<sup>220</sup> Judith P. Andersen & Harri Gustafsberg, *A Training Method to Improve Police Use of Force Decision Making: A Randomized Controlled Trial*, 6 *SAGE Open* 1, 2–3 (2016), <http://sgo.sagepub.com/content/6/2/2158244016638708> [<https://perma.cc/X8EP-38NC>]; DuCharme, *supra* note 219, at 2546–48.

<sup>221</sup> See generally Gerd Gigerenzer, *Simply Rational: Decision Making in the Real World* 107–39 (2015) (exploring methods for enabling rational decision making through heuristics).

<sup>222</sup> Although most police tactics seek to maximize the amount of time that an officer has to assess and respond to the situation, some tactics rely on restricting the amount of time a suspect has to do the same thing. No-knock warrants, for example, are often executed using “dynamic entry” tactics, in which officers rapidly enter a location “using specialized battering rams or entry explosives,” potentially including the use of “flash-bang grenades designed to temporarily disorient the occupants.” *The Encyclopedia of Police Science* 792 (Jack R.

second” frame under which use-of-force decisions are analyzed is not only inapposite, it stands in tension with the conceptual foundation of police tactics. In the following Subsections, we discuss tactical procedures that officers use to create time and the techniques that take advantage of that time to reduce the potential need for force. As a threshold matter, we acknowledge the somewhat artificial dichotomy in our presentation: Rather than falling neatly in one category or the other, some tactics are intended to both create time and minimize resistance. Nevertheless, thinking about tactics along those dimensions—creating time and minimizing force—provides a useful framework for understanding police operations.

## 2. *Creating Decision Time*

**Tactical Approach.** Officers can reduce the amount of time they need to make decisions in the moment by making those decisions—to the extent possible—ahead of time or by restricting ex ante the need to make certain decisions altogether. Officers are taught “to make tactical thinking a constant part of their working lives by considering, as they approach each encounter, their response to possible resistance.”<sup>223</sup> Such training is aimed at increasing the speed with which officers can respond to resistance when it manifests, effectively packing better decision making into the same amount of time. Similarly, officers are taught to position their bodies in a way that allows them to respond quickly to threats—keeping their arms uncrossed and hands out of their pockets,

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Greene ed., 3d ed. 2007). A dynamic entry involves officers “go[ing] in hard and fast, relying on speed, surprise and radical tactics” that are intended to create a situation in which, from the suspect’s perspective, “one second there is nothing happening and the next all hell breaks loose.” Remsberg, *Tactical Edge*, supra note 211, at 229. The goal is not to maximize the time officers have to make decisions, but rather to deny the occupants the time they need to properly assess the situation and mount any effective resistance. Charles “Sid” Heal, *Sound Doctrine: A Tactical Primer* 79 (2000) (observing that because people “are handicapped by an inability to instantly process and react to a new stimulus, surprise deprives a suspect of the ability to react to new circumstances effectively”).

The potential for mistakes inherent in a time-pressured environment makes dynamic entry “infinitely more dangerous” than other entry tactics, and its use is accordingly “very limited.” Remsberg, *Tactical Edge*, supra note 211, at 237 (emphasis omitted). There are, unfortunately, a number of examples where a dynamic entry had tragic results. See Radley Balko, *Cato Inst., Overkill: The Rise of Paramilitary Police Raids in America 2–4* (2006) (documenting examples).

<sup>223</sup> Stoughton, supra note 92, at 865.



for example—and that makes it more difficult for a suspect to attack them.<sup>224</sup>

Additionally, “[a]n officer will take steps to control a scene well before they [sic] initiate contact with someone” by, for example, not initiating a traffic stop or a pedestrian encounter until the environment favors the officer,<sup>225</sup> or by building in a buffer in which they can assess and act without being time pressured. For example, officers responding to an address typically park down the block; doing so not only reduces the opportunity to ambush officers in their vehicles, but it also gives officers additional time in which to gather information about a scene before they begin interacting with civilians.<sup>226</sup>

Further, an officer’s tactical approach can effectively restrict the range of future decisions that must be made. In other words, a decision made early in an encounter, or even before an encounter begins, when there is no time pressure can avoid putting officers into a position where they have to make a time-pressured decision. “[Officer]-created . . . jeopardy,” on the other hand, refers to a dangerous situation into which an officer unnecessarily puts himself.<sup>227</sup> A poor tactical decision, such as stepping in front of a moving vehicle, can deprive the officer of time in which to safely make a decision about how to act, forcing the officer to make a seat-of-the-pants decision about how to respond. Similarly, a good tactical approach can restrict the potential threats that officers have to address, leaving them more time to focus on those that remain. By approaching the passenger side of a stopped vehicle, for example, officers reduce or eliminate the need to think about

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<sup>224</sup> See *id.* at 866; Patrol Tip: The Interview Stance, Sentinel Handbook Blog (May 11, 2013, 10:50 PM), <https://sentinelhandbook.wordpress.com/2013/05/11/patrol-tip-the-interview-stance/> [<https://perma.cc/QHY8-5ZPF>] (“Hands should be held above waist level to speed your reaction time, using the non-dominant hand to gesture if necessary. Keep hands relaxed and open, preferably without anything held in them to allow instant reaction. Never hook a thumb in your belt, or pocket!”). By taking a “bladed” stance, standing at a slight angle with the officer’s holster-side leg back a little bit, and keeping hands a few inches away from the body and above the belly button, the officer keeps his firearm out of the suspect’s reach and positions his own arms so that they can be quickly used defensively or aggressively. Richard Nance, Tactical Footwork, Officer.com (Sept. 20, 2007), <http://www.officer.com/article/10249461/tactical-footwork> [<https://perma.cc/9AQV-NGY5>] (click through images of stances to sixth picture).

<sup>225</sup> Stoughton, *supra* note 92, at 866.

<sup>226</sup> *Id.* (describing officers’ tactical maneuvering before initiating contact with a civilian).

<sup>227</sup> Jeffrey J. Noble & Geoffrey P. Alpert, State-Created Danger: Should Police Officers Be Accountable for Reckless Tactical Decision Making?, *in* Critical Issues in Policing: Contemporary Readings 481, 493 (Roger G. Dunham & Geoffrey P. Alpert eds., 6th ed. 2010).

passing traffic as a potential threat should the driver offer some resistance. In the same vein, two officers interacting with a driver or pedestrian will take on the roles of a “contact” officer, who interacts with the civilian, and a “cover” officer, who takes up a tactically advantageous position—such as in an “L”—with one officer in front of the pedestrian and the other off to one side.<sup>228</sup> Such positioning gives officers time-related advantages over the suspect; officers can see each other in a way that improves communication while ensuring that the suspect can only pay attention to one of them at a time, and officers are also out of each other’s line of fire, reducing the amount of time they need to deploy deadly force, should it become necessary.<sup>229</sup>

**Distance.** The closer an officer is to danger, the less time she has to assess the situation and respond to that danger. By increasing the distance between themselves and a potential threat, officers can create time in which to make and implement informed decisions. There is no way to establish, *ex ante*, any clear rules about “safe” or “safer” distances; as a tactical concept, distance must be operationalized in a way that accounts for the nature of the threat and the officer’s actions at the time.<sup>230</sup> For example, a man with a knife is less dangerous to officers who are thirty feet away than he is to officers who are five feet away. Similarly, a man with a knife is less dangerous to officers who are already aware of the knife and have taken steps to minimize the amount of time they would need to respond to aggression, such as drawing their firearms. The failure to create or use distance can deprive officers of the time they need to continually assess the situation, take protective actions, and respond appropriately to changes in the risk they face. The shooting of Tamir Rice, discussed in the introduction, is a sad example of a use of force that could have been avoided with distance. The officer who ultimately shot Rice exited a patrol car that had been parked—by a second officer—in

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<sup>228</sup> See generally Steven Albrecht & John Morrison, *Contact & Cover: Two-Officer Suspect Control 23* (1992) (discussing the role of the cover officer); *Contact & Cover*, *Law Officer*, (Oct. 1, 2009), <http://lawofficer.com/archive/contact-cover/> [<https://perma.cc/X4TY-GB99>] (same).

<sup>229</sup> While such tactics provide a time-related advantage, it is important to note that they may hinder trust-building efforts. Our discussion here is limited to the safety and decision-making implications of police tactics; we do not address the tension that can exist between officer safety and police legitimacy.

<sup>230</sup> See Dave Grossi, *The Reactionary Gap: Reminders on Threats and Distances*, *PoliceOne.com* (June 3, 2013), <https://www.policeone.com/police-trainers/articles/6258834-The-reactionary-gap-Reminders-on-threats-and-distances/> [<https://perma.cc/FMW5-D9XS>].

close proximity to a suspect whom officers had been told had threatened passers-by with a handgun.<sup>231</sup> That officer had no opportunity to assess the situation from a position of relative safety; he was thrust into exactly the type of split-second decision making that good tactics seek to avoid. The result is as unsurprising as it is tragic, and it almost certainly would have been different had the officers parked a block away.

**Cover & Concealment.** As officers approach a situation, particularly a potentially dangerous situation, they are taught to use cover and concealment. “Cover” refers to a physical obstacle that protects an officer from a particular threat.<sup>232</sup> For example, a concrete wall or an engine block provides cover from small-caliber handgun fire. “Concealment” refers to an obstacle that breaks the suspect’s line of sight to the officer, hiding the officer from view, but that is not necessarily sufficient to physically obstruct the threat itself.<sup>233</sup> Thus, a car door offers concealment, but not cover from handgun fire. Whether a particular obstacle provides cover or concealment is context specific; the same car door that provides concealment from handgun fire also provides cover from a thrown knife. Cover and concealment are tactical concepts because they reduce the immediate risk to officers, which means that officers have more time to analyze a situation and act appropriately. When an officer can, for example, assess the scene and give commands from relative safety—behind cover or concealment—then the officer need not resort to deadly force immediately to prevent the suspect from accessing or using a weapon.

As an officer approaches any given situation, he is taught to use environmental factors to maximize his own safety, to look for and think about how best to use cover and concealment. Officers learn to physically position themselves in a tactically-advantageous way.<sup>234</sup> For example,

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<sup>231</sup> See Crawford Report, *supra* note 5, at 1, 4.

<sup>232</sup> This is not “cover” in the sense of obtaining backup from other officers; “contact and cover” refers instead to having a backup officer assist with operational safety. Albrecht & Morrison, *supra* note 228, at 22.

<sup>233</sup> Mike “Ziggy” Siegfried, Video: Cars, Cover, and Concealment, Police: L. Enforcement Mag. (Oct. 1, 2011), <http://www.policemag.com/channel/patrol/articles/2011/10/cars-cover-and-concealment.aspx> [<https://perma.cc/4C5Z-42V9>] (“Every well-trained cop can explain the difference between cover and concealment. One common summary I have heard is[:] ‘Cover stops the bullets that are being fired at you[,] and concealment hides you from the suspect but does not stop bullets.’”).

<sup>234</sup> Ronald J. Adams et al., *Street Survival: Tactics for Armed Encounters* 155 (1980) (“As you approach any situation, you want to be in the habit of looking for cover, so you can react

an officer who initiates a traffic stop will park his car behind and slightly to the left of the stopped vehicle, which puts more of the engine block between the officer and the stopped vehicle, providing cover.<sup>235</sup> Further, the officer may use his overhead lights or a spotlight to create a “wall of light” that hides the police vehicle from anyone in the suspect vehicle, providing a measure of concealment. Had officers parked a block away from where Tamir Rice was standing, for example, they could have approached the park while using foliage, other vehicles, light and telephone poles, tree trunks, and other features as cover and concealment, keeping those obstacles between themselves and the suspect they were approaching.

**Tactical Restraint & Tactical Withdrawal.** Sound tactics do not end with officers *approaching* with cover and concealment. As an officer approaches a particular situation or encounters resistance or the risk of resistance, she must choose whether to aggress, hold her position, or withdraw. In many situations, officers may be better served by holding a tactically-advantageous position (tactical restraint) or by withdrawing to a more tactically-advantageous position (tactical withdrawal) rather than advancing further.<sup>236</sup> Both restraint and withdrawal have the effect of creating time, slowing an encounter so that officers can avoid making a split-second decision to use force. When it can be safely accomplished, maintaining or retreating to a position of safety can reduce the immediate threat to the officer, which avoids the need to use force to deal with that threat at that moment. Consider a simple example: An officer responds to a wheelchair-bound paraplegic who is armed with, and aggressively waving, a knife in a large, empty parking lot. Should the officer approach to within arm’s length of the suspect, he might have to use deadly force to avert the high risk of being stabbed or cut. It takes no extensive tactical training to conclude that the officer should avoid put-

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automatically to reach it should trouble erupt.”); *id.* at 69–75 (describing how officers preparing to approach a pedestrian should select the location and environment that favors them).

<sup>235</sup> That positioning also provides the officer with some protection from vehicles traveling on the road.

<sup>236</sup> See, e.g., Police Exec. Research Forum, *Critical Issues in Policing Series: Guiding Principles on Use of Force* 20–22 (2016) (discussing how tactical repositioning can be part of a proportional police response to threat); Seth Stoughton, *Law Enforcement’s “Warrior” Problem*, 128 *Harv. L. Rev. F.* 225, 232–33 (2015); see also Louis Hayes, Jr., *Police Operational Philosophy, Illinois Model* (Apr. 21, 2013), <http://www.theillinoismodel.com/2013/04/police-operational-philosophy.html> [<https://perma.cc/HF6Q-T6HZ>] (characterizing restraint as tending toward the stabilization end of the operational philosophy spectrum, which is favored by courts).

ting himself in that position by stopping a relatively safe distance away (to avoid being stabbed) and by using cover or concealment (to mitigate the risk of a thrown knife), rather than rushing in to go “hands on” by physically engaging the suspect. In other words, unless the exigencies of the situation demand otherwise, the officer should use tactical restraint. Should the suspect move closer to the officer, the officer can tactically withdraw by falling back to maintain a safe distance. And should the suspect move away from the officer, the officer can mirror that movement to retain some control over the scene (particularly control over the suspect’s ability to leave unimpeded or to access civilians) without closing to an unsafe distance.<sup>237</sup>

Although decision time is a central concept—perhaps *the* central concept—of police tactics, Fourth Amendment decisions do not take any particular notice of the tactics that are designed to maximize the quality of officer decision making, including distance, cover and concealment, and restraint and withdrawal.

### *3. Minimizing Force*

Police tactics can reduce the need for force by encouraging officers to approach individuals in ways that both reduce the incentives for resistance and affirmatively discourage resistance. As the descriptions suggest, these techniques are difficult to use in a time-pressured environment, one in which officers must make a truly split-second decision between using force and not. As a result, these are tactics that require an officer to create time in which to use them. In Section E, we describe police policies that counsel limiting force to the minimum force that is necessary; many agencies and even some statutes now require that force be used “only when necessary.”<sup>238</sup>

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<sup>237</sup> There are, of course, limits to tactical movement. In many cases, for example, it would be imprudent for officers to move in a way that allows the suspect to escape a controlled perimeter. For example, officers surrounding a suspect in the middle of the street can use a roving perimeter that follows the suspect as he walks around, but officers surrounding a suspect on a sidewalk might not be able to do so for fear that the suspect will duck into a building. Given sufficient time, officers in the latter case could evacuate and secure nearby buildings to preserve their flexibility to establish a roving perimeter.

<sup>238</sup> See, e.g., U.S. Dep’t of Homeland Sec., U.S. Customs & Border Prot., HB 4500-01C, Use of Force Policy, Guidelines and Procedures Handbook 3 (2014); see also Utah Code Ann. § 76-2-404 (2012) (severely limiting the use of deadly force); Samuel Walker, *The New World of Police Accountability* 51 (2005) (describing minimum-force requirements as “[t]he prevailing standard”).

**Conflict Avoidance.** An officer-civilian encounter is a series of iterative events as both the officer and the civilian respond to the other's actions. When a civilian views an officer as domineering, disrespectful, or entitled, the perception is that the officer is assuming a higher social status than the civilian holds. That perception can rub people the wrong way, provoking pushback or outright resistance as the civilian seeks to assert his own status: "Because few people like being humiliated or gratuitously ordered about, an officer's expectation of and insistence on deference increases the potential for conflict. This may be particularly true in times of tension between the police and the community."<sup>239</sup> Officers can use conflict-avoidance techniques to minimize the chances that their actions will provoke civilian resistance. By interacting with civilians in a way that acknowledges their social status and by recognizing a civilian's need to maintain "face" in front of the officer and other members of the community, officers can avoid conflict that a different attitude can create. There is, for example, a meaningful distinction in how an individual will respond to an officer who makes an effort to earn her cooperation and an officer who demands her compliance. One of us demonstrates this concept in police training through the use of a "cooperation/compliance" drill. The audience is divided in half, and the following instructions are directed at the first half: "Would you guys mind standing up for me? Great, thanks. Yeah, everybody stand up for me here. I know, this is odd, but bear with me. Okay, we're all standing. Great!"<sup>240</sup> The half of the audience that is now standing is asked to perform several intentionally silly actions:

Let's stretch our arms way overhead. Yeah, put 'em up there. Great job, really reach up. Okay, this is our Superman pose. Now let's put our arms up at a forty-five degree angle, really hold 'em up there. Okay, awesome, now point your fingers down at the ground. Wonderful, everyone. This is our Batman pose. Let's finish out the big three of the Justice League, go ahead and give me a Wonder Woman pose,

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<sup>239</sup> Stoughton, *supra* note 184, at 655–56.

<sup>240</sup> Stoughton has conducted this exercise a dozen times at different events, including the National Association of Women Law Enforcement Executives Annual Conference in 2015; the Trending Issues in Policing Summit at the Federal Law Enforcement Training Center on September 29, 2016; and a Senior Executive training session at the Bureau of Alcohol, Tobacco, Firearms, and Explosives on December 1, 2016. After Stoughton did it with the Richmond County Sheriff's Office Training Unit, the office began doing the same drill with its officers.

too. Really excellent job, thank you, everybody. Go ahead and sit down for me, and let's everyone give them a round of applause.

Attention is then turned to the other half of the audience, who received a series of barked commands, "Stand the fuck up! Do it now! Stand up! Stand the fuck up, damn it!" In doing this drill multiple times in front of audiences of various sizes, including several hundred people, only a very few people stand up. They are then asked (politely) to sit down, and the audience is asked to think about what just happened. Half of the audience not only stood when asked, they publicly performed a series of mildly embarrassing actions. But the vast majority of the other half refused to even stand up, a much simpler and less embarrassing action. Those who do stand up typically exhibit some face-saving behaviors, such as laughing or joking with one another to communicate that they are humoring an odd request, not complying with an order. The point, as the audience quickly realizes, is that the manner in which they were told to stand created conflict and prompted resistance. As that demonstration suggests, officers can use conflict avoidance techniques to encourage cooperation in situations where a more adversarial or commandeering approach can generate resistance.<sup>241</sup>

**De-escalation.** Whereas conflict avoidance techniques are intended to avoid creating conflict, de-escalation techniques are designed to nonviolently resolve conflict that has already manifested. It is here, even more than conflict avoidance, where tactical communication plays a role in managing the social interaction. De-escalation techniques teach officers to calibrate their own response when a civilian's actions deprive *them* of status. "Verbal Judo," an early iteration of tactical communication training, suggested that officers deflect insults or curses without trying to engage with or respond to them.<sup>242</sup> Officers were trained to respond to insults by using a "strip phrase," a phrase described as "a deflector that strips the insult of its power," before pivoting to refocus the conversation.<sup>243</sup> For example, an officer who was insulted during the course of a traffic stop might respond, "Well, I appreciate that, sir, but I need to see your license."<sup>244</sup> Where "Verbal Judo" training emphasized deflecting

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<sup>241</sup> Unfortunately, officers are still widely taught to take command of any given situation. See Stoughton, *supra* note 184, at 651–58.

<sup>242</sup> George J. Thompson & Jerry B. Jenkins, *Verbal Judo: The Gentle Art of Persuasion* 62–63 (2013).

<sup>243</sup> *Id.* at 63 (internal quotation marks omitted).

<sup>244</sup> *Id.*

aggression, more recent tactical-communications training has drawn from procedural-justice concepts to emphasize positive engagement as a way to reduce conflict. For example, Sue Rahr, a member of President Obama's Task Force on 21st Century Policing,<sup>245</sup> Seattle Police Chief John Diaz, and then-Washington State Criminal Justice Training Commission Director Joe Hawe use the acronym "LEED," for "Listen and Explain with Equity and Dignity."<sup>246</sup> Tactical-communications training that focuses specifically on de-escalation includes a broad range of techniques intended to develop rapport and build goodwill, all of which are intended to minimize the use of force, but which require time to deploy.

**Verbal Directions.** Verbal directions can provide notice to a civilian about what the officer intends to do, what the officer wants the civilian to do (a command), or what the consequences of noncompliance might be (a warning). Verbal directions encourage communication—both between the officer and the suspect and between officers—and, because they need not be accompanied by a change in position or physical force, they offer officers an opportunity to assess the situation as well as time in which to make decisions or adjust their approach. The Supreme Court stated in *Garner* that verbal warnings should be given "where feasible" before using deadly force against a fleeing suspect.<sup>247</sup> However, more detailed policies describe how officers can use clear instructions to help reduce the need for use of force; we describe in Section E how most large agencies encourage or require the use of verbal warnings before applying deadly force, although fewer do so regarding nondeadly force.<sup>248</sup>

**Backup.** Other tactics, involving securing additional resources such as backup, can reduce the amount of force that officers must use on an individual. In some cases, having multiple officers present can create a moderating effect on civilian behavior; someone who may consider re-

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<sup>245</sup> Press Release, White House, President Obama Announces Task Force on 21st Century Policing (Dec. 18, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/18/president-obama-announces-task-force-21st-century-policing> [<https://perma.cc/HMH9-W87R>].

<sup>246</sup> Sue Rahr et al., The Four Pillars of Justice Based Policing: Listen and Explain with Equity and Dignity, The Loyalty Sols. Grp. (Mar. 9, 2014), <http://loyaltysolutionsgroup.com/the-four-pillars-of-justice-based-policing/> [<https://perma.cc/H8R7-NLMS>].

<sup>247</sup> 471 U.S. at 11–12.

<sup>248</sup> See, e.g., Memorandum from Attorney Gen., Dep't of Justice, Commentary Regarding the Use of Deadly Force in Non-Custodial Situations (Oct. 17, 1995), <https://www.justice.gov/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-1> [<https://perma.cc/EY5D-L9YR>].



sisting one officer's attempt to put her into handcuffs may be less likely to do so when there are additional officers on scene. Even when it does not change a civilian's decision to resist, it can still reduce the use of force by providing officers with a numerical advantage; actions that may threaten one officer can be less threatening when there are multiple officers involved.<sup>249</sup> Because the threat is reduced, the amount of force that officers need to use to address that threat may similarly be reduced.

**Tactical Case Study: Crisis Intervention Tactics.** Perhaps the best-known modern example of a wholesale shift toward tactical training comes in the form of Crisis Intervention Training, which has established a strong track record of improving the ability of officers to safely deal with individuals in the midst of a mental health crisis. Prior to the 1970s, officers were taught to quickly and aggressively establish control over suspects, especially those with apparent mental illnesses.<sup>250</sup> In the 1970s, this training shifted to what modern policing knows as the Crisis Intervention model.<sup>251</sup> Crisis Intervention is an umbrella term for a series of tactics and techniques that are intended to enable officers to avoid force when interacting with someone in the midst of crisis. Although Crisis Intervention Training and Crisis Intervention Teams are most closely associated with mental health issues, the nature of the "crisis" is effectively irrelevant: The core principles are applicable whether someone is emotionally distressed because of a mental health issue or because of events in his personal life. Crisis Intervention Training typically includes multiple dimensions, including how officers can recognize a person in crisis and the tactics and techniques that officers can use to avoid violence by communicating effectively.<sup>252</sup> The tactical component of Crisis

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<sup>249</sup> William Terrill & Stephen D. Mastroski, *Situational and Officer-Based Determinants of Police Coercion*, 19 *Just. Q.* 215, 234–35 (2002) (suggesting that having multiple officers on scene may decrease the need to use force). It is important to acknowledge the sociological drivers of use-of-force decisions, however, as empirical research has found a correlation between having more officers on scene and the increased use of force. *Id.* at 239. The presence of multiple officers may decrease the potential threat while still creating an incentive for officers to use force to maintain their professional image in front of their colleagues.

<sup>250</sup> The need to establish control over a scene and to demonstrate what is known as "command presence" remains a predominant model for officers in other contexts. Stoughton, *supra* note 184, at 652.

<sup>251</sup> Robert T. Flint, *Crisis Intervention Training*, 43 *FBI L. Enforcement Bull.* 6 (1974).

<sup>252</sup> Our focus here is on the tactical applications of a Crisis Intervention approach, but it is worth noting that Crisis Intervention itself goes well beyond the street-level interaction between rank-and-file officers and persons in crisis. A broader approach to Crisis Intervention may include partnerships between the medical mental health community and the police

Intervention Training instructs officers to maintain a safe distance to slow the pace of the encounter so that they can use tactical communication and verbal de-escalation.<sup>253</sup> Although empirical evidence about police uses of force is notoriously spotty, several studies suggest that officers who use the tactics they learn from Crisis Intervention Training use less force than officers who have not had such training.<sup>254</sup> Officers also engage in more treatment-oriented responses, potentially using their enforcement authority (i.e., arrest powers) less often with regard to individuals with mental health issues,<sup>255</sup> which may contribute to the reduction in uses of force.

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agency to provide a range of support services after the initial interaction with an officer. The “Memphis Model” of Crisis Intervention, for example, includes tactics and techniques within a broader approach that emphasizes pre-arrest jail diversion and post-event treatment continuity. Memphis Model, CIT International, <http://www.citinternational.org/training-overview/163-memphis-model.html>. The “Illinois Model” emphasizes adaptive problem solving. Louis Hayes, Jr., Police Crisis Intervention & Illinois Model, The Illinois Model (Aug. 14, 2015), <http://www.theillinoismodel.com/2015/08/police-crisis-intervention-illinois.html> [<https://perma.cc/Q9P8-HX63>].

<sup>253</sup> See Randolph Dupont et al., Crisis Intervention Team Core Elements 14 (2007), <http://cit.memphis.edu/pdf/CoreElements.pdf> [<https://perma.cc/VL89-YREX>]; U.S. Dep’t of Justice, Office of Cmty. Oriented Policing Serv., Final Report of the President’s Task Force on 21st Century Policing 2 (2015), <http://www.cops.usdoj.gov/pdf/taskforce/taskforcefinalreport.pdf> [<https://perma.cc/M2PH-WMEV>]; Amy C. Watson & Anjali J. Fulambarker, The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners, 8 *Best Prac. Ment. Health* 71 (2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3769782/> [<https://perma.cc/87NY-REWU>].

<sup>254</sup> See Michael T. Compton et al., Use of Force Preferences and Perceived Effectiveness of Actions Among Crisis Intervention Team (CIT) Police Officers and Non-CIT Officers in an Escalating Psychiatric Crisis Involving a Subject with Schizophrenia, 37 *Schizophrenia Bull.* 737, 742 (2011); Jennifer Skeem & Lynne Bibeau, How Does Violence Potential Relate to Crisis Intervention Team Responses to Emergencies?, 59 *Psychiatric Serv.* 201, 204 (2008); Paul W. Spaite & Mark S. Davis, The Mentally Ill and the Criminal Justice System: A Review of Programs 17–23 (June 2005), [http://www.namiohio.org/images/publications/Publications/REVIEW\\_PROGRAMS.pdf](http://www.namiohio.org/images/publications/Publications/REVIEW_PROGRAMS.pdf) [<https://perma.cc/C6TE-6ERU>] (finding multiple benefits identified in prior CIT studies, including fewer injuries to officers and a reduction in the number of arrests and use-of-force incidents).

<sup>255</sup> See Henry J. Steadman et al., Comparing Outcomes of Major Models of Police Responses to Mental Health Emergencies, 51 *Psychiatric Serv.* 645 (2000) (finding that officers in Memphis who had received training in the Memphis CIT model were less likely to arrest persons with mental illnesses than officers who used a different specialized response in two other jurisdictions); Jennifer L.S. Teller et al., Crisis Intervention Team Training for Police Officers Responding to Mental Disturbance Calls, 57 *Psychiatric Serv.* 234–35 (2006).

*D. Proportionality and the Force Matrix*

In addition to the tactical concepts of time and force minimization, proportionality is also central to police tactics, policies, and the agency-specific training that officers receive. The most common incarnation of proportionality today can be found in the “force matrix” used by thirty-one of the fifty largest police agencies.<sup>256</sup> A force matrix recognizes that the use of force is not binary: The fact that force is justified in a given scenario does not mean that *all* applications of force are justified in that scenario. Often, some types of force—say, tackling someone to the ground—will be appropriate at the same time that other types of force—such as deadly force—will not be. Many police policies and training materials communicate this point through the use of a “force matrix”<sup>257</sup> that visually depicts when police may use escalating degrees of force.<sup>258</sup> The adoption of use-of-force matrices remains a controversial point within law enforcement circles; some trainers dislike the underlying concepts,<sup>259</sup> while others dislike the way the concepts are implemented in a force matrix.<sup>260</sup> Nevertheless, force matrices remain a common feature of police use-of-force policies.<sup>261</sup>

The development of a force matrix depends on the arrangement of two components: a resistance continuum and a force continuum. Both continua categorize behavior—a resistance continuum categorizes civil-

<sup>256</sup> See *infra* Appendix.

<sup>257</sup> We use “force continuum” to refer to a standalone classification of officer force and “force matrix” to refer to a force continuum in combination with a resistance continuum. It is common to see less precise usage in which the two terms are synonymous.

<sup>258</sup> Paul W. Brown, *The Continuum of Force in Community Supervision*, 58 *Fed. Probation* 31, 31–32 (1994).

<sup>259</sup> See John Bostain, *Use of Force: Are Continuums Still Necessary?*, 4 *FLETC J.* 33, 33 (2006); Fed. Law Enf’t Training Ctr., *Use of Force Continuum* (Podcast Transcript), <https://web.archive.org/web/20110101181319/http://www.fletc.gov/training/programs/legal-division/podcasts/hot-issues-podcasts/hot-issues-transcripts/use-of-force-continuum-podcast-transcript.html> [https://perma.cc/39VZ-RNBM].

<sup>260</sup> Louis Hayes, Jr., *Police Force: The Gap Between Reasonable and Necessary*, *Virtus Group* (Feb. 7, 2016), <http://www.virtusleadership.com/1/post/2016/02/police-force-the-gap-between-reasonable-and-necessary.html> [https://perma.cc/736V-D7JF].

<sup>261</sup> Research in 2006 estimated over seventy percent of law enforcement agencies included force matrices in their departmental policies. William Terrill & Eugene A. Paoline, *Force Continuums: Moving Beyond Speculation and Toward Empiricism*, 7 *Law Enforcement Exec.* 27, 28 (2007). Research in 2011 estimated the number at more than eighty percent. William Terrill et al., *Final Technical Report Draft: Assessing Police Use of Force Policy and Outcomes ii* (May 2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/237794.pdf> [https://perma.cc/4VM4-BBPZ].

ian behavior while the force continuum categorizes officer behavior—and arrange the categories by relative severity.<sup>262</sup> A force matrix correlates the force continuum with the resistance continuum, creating a formalized representation of how the gradations of force can be applied in response to various types of resistance. A stand-alone force continuum, in other words, tells an officer *what* force he can use (what use-of-force options are available to him), but a force matrix introduces a resistance continuum to tell him *when* he can use it.<sup>263</sup>

There can be significant variation with regard to the way a force matrix is depicted,<sup>264</sup> as well as the amount of detail embedded in the matrix itself,<sup>265</sup> but most force and resistance continua broadly conform to the following pattern. Resistance is broken into levels that characterize a civilian's actions, such as the following six levels:

1. Presence: the civilian's body language, demeanor, and attitude;
2. Verbal Resistance: verbal indications of non-compliance;
3. Passive Physical Resistance: non-compliance, failing to obey an officer's orders;
4. Active Physical Resistance: engaging the muscles in a non-aggressive way, as by pulling away or running;

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<sup>262</sup> U.S. Dep't of Justice, Nat'l Inst. of Justice, The Use-of-Force Continuum (Aug. 4, 2009) [hereinafter The Use-of-Force Continuum], <http://www.ojp.usdoj.gov/nij/topics/law-enforcement/officer-safety/use-of-force/pages/continuum.aspx> [https://perma.cc/4VM4-BBPZ] (referring to force continua as “describ[ing] a[n] escalating series of actions an officer may take to resolve a situation”); see also William A. Geller & Michael S. Scott, Deadly Force: What We Know 309 (1992) (“The ‘force continuum’ connotes a spectrum of control tactics from body language and oral communication to weaponless physical control to nonlethal weapons to lethal measures.”).

<sup>263</sup> Additional policies beyond the force matrix may also govern when force is appropriate. See *infra* Section II.E.

<sup>264</sup> See, e.g., Christine Hess Orthmann et al., Criminal Investigation 242–43 (10th ed. 2012) (providing examples of both a linear force matrix and a circular force matrix); John G. Peters, Jr. & Michael A. Brave, Force Continuums: Are They Still Needed?, 22 Police & Sec. News 1, 3 (Jan./Feb. 2006) (reproducing a barometer-style force matrix); Ross Wolf et al., Police Use of Force and the Cumulative Force Factor, 32 Policing 739, 744 (2009) (displaying a ladder-style force matrix).

<sup>265</sup> See, e.g., Chi. Police Dep't, General Order G03–02–01, The Use of Force Model, Illustration No. 1 (2012), <http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-cec11383d806e05f.html?ownapi=1> [https://perma.cc/H3BU-UT2L] (illustrating a highly detailed force matrix).

5. Aggressive Physical Resistance: physically attacking the officer; and
6. Aggravated Physical Resistance: physically attacking the officer in a way likely to cause death or great bodily harm.<sup>266</sup>

The potential responses to resistance are similarly categorized into different levels:

1. Officer Presence: the officer's body language, demeanor, and attitude;
2. Verbal Commands: the use of authority, non-physical force;
3. Empty-Hand Techniques: the use of soft (grabbing and holding) or hard (punching and striking) bodily force;
4. Intermediate Techniques: the use of less-lethal weapons—such as a baton, chemical spray, or TASER—or bodily weapons that are more serious than empty-hand techniques but unlikely to cause serious bodily harm or death; and
5. Lethal Force: the use of weapons or techniques that are substantially likely to cause serious bodily harm or death.<sup>267</sup>

Although there can be significant variation, the “incremental” model of force matrices starts with the physical presence of an officer at the lowest level of the force matrix and culminates with the use of deadly force at the highest level.<sup>268</sup> An officer's force options are then aligned with a certain type or types of resistance. For example, a force matrix might indicate that officers can use “verbal communication” and a “soft assisting touch,” but not physical force, after giving the suspect a lawful order.<sup>269</sup> There is no universal agreement on the number of levels in either the force or resistance continua—five or six are the most com-

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<sup>266</sup> Lake City Police Dep't, General Orders Manual 4–5 (May 21, 2010), <http://www.lcfla.com/documents/Police/Use%20of%20Force.pdf> [<https://perma.cc/2C4H-68G6>].

<sup>267</sup> The Use-of-Force Continuum, supra note 262.

<sup>268</sup> Alpert et al., supra note 187, at ch. 2 (describing the development and formulation of incremental matrices); see also Orthmann et al., supra note 264, at 242–43 (providing an example of an incremental force matrix and a situational force continuum); The Use-of-Force Continuum, supra note 262 (providing a non-graphical representation of a force continuum).

<sup>269</sup> Lake City Police Dep't, supra note 266, at 5.

mon<sup>270</sup>—or on where different weapons or actions are placed on the matrix. For example, there is tremendous variation in where agencies put Electric Control Weapons such as the TASER: Some agencies allow it to be used against active (but nonviolent) resistance, while others restrict it to situations involving violent resistance.<sup>271</sup>

Regardless of how any particular force matrix is depicted or the exact nature of its content, they are intended as a guide for officers. An officer on the street neither engages in the “totality of the circumstances” balancing that accompanies judicial review of excessive-force claims nor acts out of blind instinct with the hope that his reaction fortuitously coincides with the constitutional standard of reasonableness. Instead, officers rely on what is, at many law enforcement academies and agencies, relatively thorough training that identifies in advance the types of resistance an individual may offer and details a range of appropriate responses. Indeed, police departments adopt and use force matrices not to specify the appropriate level of force for all possible situations, but rather as a method of conceptualizing the dynamic nature of officer-involved violence and as a foundational part of officer training.<sup>272</sup>

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<sup>270</sup> Most five-level matrices consist of Officer Presence, Verbal Commands, Empty-Hand Techniques, Intermediate Weapons/Less-Lethal Techniques, and Lethal Force. Six-level matrices follow the same format, but either split Empty-Hand Techniques into Soft Techniques (such as pain compliance techniques and joint manipulations) and Hard Techniques (such as punches and kicks) or split the Intermediate Weapons/Less-Lethal Techniques category into two different categories that can include either different weapons or different ways of using a single weapon. See, e.g., The Use-of-Force Continuum, *supra* note 262 (five-level matrix); Lake City Police Dep’t, *supra* note 266, at 4–5 (six-level matrix).

<sup>271</sup> James M. Cronin & Joshua A. Ederheimer, U.S. Dep’t of Justice, Office of Cmty. Oriented Policing Servs. & Police Exec. Research Forum, *Conducted Energy Devices: Development of Standards for Consistency and Guidance* 23–24 (2006), [https://www.bja.gov/Publications/ced\\_standards.pdf](https://www.bja.gov/Publications/ced_standards.pdf) [<https://perma.cc/9MXL-YM22>]. Regarding inconsistency among law enforcement agencies in how TASERs are placed in the force continuum or matrix, see U.S. Gov’t Accountability Office, *GAO-05-464, Taser Weapons: Use of Tasers by Selected Law Enforcement Agencies* 9–10 (2005).

<sup>272</sup> Alpert et al., *supra* note 187, at ch. 2 (“In what were, and often still are, called ‘defensive tactics’ classes, officers were learning *how* to use different types of force – the mechanics of how to strike someone with a baton, for example, or deploy pepper spray. Through the various continua and models, police trainers were looking for ways to educate officers about *when* to use different types of force.”); John C. Desmedt, *Use of Force Paradigm for Law Enforcement*, 12 *J. Police Sci. & Admin.* 170 (1984); James Marker, *Teaching 4th Amendment-Based Use-of-Force*, 7 *AELE Monthly L.J.* 501, 502 (2012) (describing the creation of the first force continuum “as an instructional aide, designed to assist criminal justice trainers throughout the country”); Gregory J. Connor, *Use of Force Continuum: Phase 11*, 39 *Law & Ord.* 30 (1991); Franklyn Graves & Gregory Connor, *The FLETC Use-of-Force Model*, 59 *Police Chief* 56 (1992).

As a training tool, every force matrix must balance two competing priorities: They must be clear enough for an officer to understand and implement effectively while also being broad enough to provide useful guidance for the innumerable scenarios in which an officer may use force. Most force matrices accommodate these objectives by identifying the particular types of permissible force with more detail at the lower end of the force continuum, where the officer initiates violent contact to overcome some nonviolent resistance, but providing correspondingly less detail in cases of more extreme force, where the civilian initiates violent contact.<sup>273</sup> As a result, a force matrix provides a more detailed list of appropriate responses to an officer responding to low levels of resistance than it does to an officer who is being violently attacked by an armed aggressor.

It is important to note the limits of force matrices. They apply without reference to the underlying justifications for the police-civilian encounter or the relative importance of the state interest at stake; once a legitimate law enforcement purpose has been established, a force matrix guides the officer's response to resistance occasioned during the pursuit of that purpose. The matrix "guides" an officer's response to resistance, but it does not clearly regulate it. The force options in a force matrix are not intended to be exclusive. Officers may use reasonable alternatives that correspond with the applications of force designated in the matrix even when those alternatives are not included.<sup>274</sup> And while a force matrix is progressive in the sense that many adopt a hierarchical approach to categorizing resistance and force by severity, it emphatically does not

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<sup>273</sup> See *infra* Section II.E.

<sup>274</sup> Merle Stetser, *The Use of Force in Police Control of Violence: Incidents Resulting in Assaults on Officers* 41 (2001). For example, a flashlight may be deployed as a weapon of necessity subject to the same restrictions that apply to batons. See, e.g., Andrew Blankstein & Richard Winton, *LAPD Manual Doesn't Bar Flashlight as Weapon*, *L.A. Times* (June 30, 2004), <http://articles.latimes.com/2004/jun/30/local/me-flashlights30> [<https://perma.cc/L2KE-58BJ>]. Notably, the Los Angeles Police Department developed and purchased smaller, less weapon-like flashlights precisely to make weapons of necessity less available to officers after a 2004 incident where officers beat suspected car thief Stanley Miller with an older model metal flashlight. Richard Winton, *Police Panel Endorses Limits on Use of Flashlights*, *L.A. Times* (Dec. 15, 2004), <http://articles.latimes.com/2004/dec/15/local/me-poxcom15> [<https://perma.cc/BG59-554U>]; Doug Wyllie, *IACP Special: LAPD Builds a Flashlight*, *PoliceOne.com* (Nov. 25, 2008), <http://www.policeone.com/police-products/duty-gear/flashlights/articles/1759367-IACP-Special-LAPD-builds-a-flashlight/> [<https://perma.cc/X8T5-H3DD>].

impose any requirements of sequential progression.<sup>275</sup> Officers can use force that correlates to contemporaneous resistance without starting at the lowest option and “building up” to a particular application of force.<sup>276</sup> Relatedly, force matrices do not in and of themselves require officers to use the least severe of permissible force options in any given situation.<sup>277</sup> While some agencies have adopted minimum-force policies, such policies are separate and apart from a force matrix.<sup>278</sup>

In their attempt to provide useful guidance to officers, force matrices can be too simple, failing to provide context-dependent guidance and training at the correct level of specificity. Active resistance by a person trying to roll away from police in a wheelchair looks very different than active resistance by an Olympic marathon runner who is fleeing from officers on foot. Under the plain terms of a force matrix, though, the two are treated equally because both would constitute “active” resistance. The same can be said for a more common example: An individual who pulls away from officers is, for the purposes of a force matrix, the equivalent of a handcuffed suspect who pulls away from officers. Force matrices, then, are overinclusive to the extent that they apply the same standard to individuals who are elderly, frail, obese, and physically disa-

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<sup>275</sup> See Stetser, *supra* 274, at 41; The Use-of-Force Continuum, *supra* note 262.

<sup>276</sup> However, most officers still begin encounters by giving verbal commands or initiating relatively low-level force. Geoffrey P. Alpert & Roger G. Dunham, *Understanding Police Use of Force: Officers, Suspects and Reciprocity* 90–91 (2004). Confusion engendered by the sequential appearance of many traditional force matrices has led some agencies to adopt non-linear depictions. Alpert et al., *supra* note 187, at ch. 2; see, e.g., Brenda Zanin, *RMCP Use of Force and the Law*, 70 *Royal Canadian Mounted Police Gazette* 14, 14–15 (2009), <http://www.rcmp-grc.gc.ca/gazette/vol70n4/vol70n4-eng.pdf> [<https://perma.cc/GB6V-J9K7>].

<sup>277</sup> Whether this is a component of Fourth Amendment reasonableness has divided courts. Compare *Griffith v. Coburn*, 473 F.3d 650, 658 (6th Cir. 2007) (requiring officers to effectuate seizures using “the least intrusive means reasonably available” (quoting *St. John v. Hickey*, 411 F.3d 762, 774–75 (6th Cir. 2005) (internal quotation marks omitted)), with *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010) (holding availability of a less-intrusive alternative does not make use of deadly force unreasonable (citing *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994))).

<sup>278</sup> See, e.g., Samuel Walker, *The New World of Police Accountability* 51 (2005) (describing minimum-force policies as the “prevailing standard”); *Police Use of Force*, U.S. Dep’t of Justice, Nat’l Inst. of Justice (Apr. 13, 2015), <http://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/welcome.htm> [<https://perma.cc/364K-N22C>]. Minimum-force policies remain contested in law enforcement circles, with critics claiming that such requirements lead to a “trial and error process” that increases the risk of escalation and injury that may have been avoided if officers were free to use more serious force to establish control at the outset of an encounter. See, e.g., Fed. Law Enforcement Training Ctr., *supra* note 259.



bled as they do to Olympic athletes in their physical prime. The *Graham* decision, focused as it was on setting out a reasonableness standard, similarly provides no guidance. Indeed, Graham was not only disabled, but he broadcasted the specific nature of the disability to the officers he was interacting with, and he was not resisting arrest. The force applied—pushing him onto and then throwing him in the squad car—occurred after he was already restrained.<sup>279</sup>

In their attempt to acknowledge the nuance of use-of-force situations, however, force matrices can also be overly complicated. Conceptually, an officer's use of physical force is either assertive or defensive.<sup>280</sup> The vast majority of police violence involves the use of assertive force,<sup>281</sup> which, as the name implies, is used to assert or enforce an officer's legal authority to apprehend or subdue someone whose actions may frustrate legitimate goals of the criminal justice institution,<sup>282</sup> but which do not present a violent threat to the officer or anyone else. For example, a passive protestor who refuses an officer's orders to vacate the driveway of an abortion clinic, an arrestee who grabs a pole and refuses to release it as an officer attempts to put her in handcuffs, and a shoplifting suspect who runs away after being commanded to stop are all engaged in resistance, but nonviolent resistance. Police training and policy, including the force matrices discussed above, typically recognize that threats of institutional frustration are of less concern than threats of physical violence, and they restrict officers' ability to use force accordingly.<sup>283</sup> The threat of institutional frustration is a legitimate concern, however; pas-

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<sup>279</sup> This is an important observation, because courts far more readily find liability in the situations in which no policy or training would permit use of heightened force—when an individual is already restrained. See, e.g., *Tracy v. Freshwater*, 623 F.3d 90, 100 (2d Cir. 2010); *Orem v. Rephann*, 523 F.3d 442, 448–49 (4th Cir. 2008).

<sup>280</sup> Handcuffing falls into an uncomfortable grey area in our practical and legal understanding of force interstice in the force and resistance continua that make up most force matrices. Law enforcement officers may apply handcuffs with the minimum possible violence, yet locking someone's hands behind their back is clearly not a communicative element of an officer-civilian encounter the way a "guiding touch" can be.

<sup>281</sup> See Tom McEwen, U.S. Dep't of Justice, Bureau of Justice Statistics, National Data Collection on Police Use of Force 34 (1996), [bjs.ojp.usdoj.gov/content/pub/pdf/ndcopuof.pdf](https://bjs.ojp.usdoj.gov/content/pub/pdf/ndcopuof.pdf) [<https://perma.cc/MJP4-LDF4>].

<sup>282</sup> For a discussion on what counts as a legitimate law enforcement interest, see Harmon, *supra* note 21, at 1150–55.

<sup>283</sup> As the Supreme Court stated in *Garner*, "It is not better that all felony suspects die than that they escape." 471 U.S. at 11.

sive resistance can make official actions more difficult,<sup>284</sup> while active resistance presents a risk of escape.<sup>285</sup> For that reason, most force matrices permit an officer to use take-downs and pain compliance techniques, sometimes including chemical irritants and electronic control weapons, in response to passive resistance,<sup>286</sup> although there are some exceptions.<sup>287</sup> While the classification of TASERs and other conductive energy weapons as pain compliance techniques has generated both legal scholarship<sup>288</sup> and significant media attention,<sup>289</sup> there has been relatively little written in legal journals about the use of pain compliance gener-

<sup>284</sup> Passive resistance in the law enforcement context is a concept familiar to federal courts. See, e.g., *Shreve v. Jessamine Cty. Fiscal Ct.*, 453 F.3d 681, 687 (6th Cir. 2006) (finding “passive resistance” an inadequate justification for significant force); *United States v. Hollis*, 447 F.3d 1053, 1055 (8th Cir. 2006) (holding passive protest does not constitute the use of force against an officer for the purposes of state law); *United States v. Goodwin*, 440 F.2d 1152, 1154 (3d Cir. 1971) (finding that assault and resisting arrest require more than passive resistance); *Mavromatis v. United Greek Shipowners Corp.*, 179 F.2d 310, 313 (1st Cir. 1949) (noting it did not clearly appear from facts whether protestors refusing to leave ship offered “more than passive resistance”).

<sup>285</sup> See, e.g., Las Vegas Metro. Police Dep’t, *Use of Force*, at sec. 5, <https://cops.usdoj.gov/pdf/Use-of-Force.pdf> [<https://perma.cc/MJP4-LDF4>]. This division is widely recognized by law enforcement. See also Edmund Zigmund, *Police Use of Force: The Problem of Passive Resistance*, 72-3 *Police Chief Mag.* (2005), [https://web.archive.org/web/20111215062102/http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=print\\_display&article\\_id=563&issue\\_id=42005](https://web.archive.org/web/20111215062102/http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=print_display&article_id=563&issue_id=42005) [<https://perma.cc/PE4H-ZM4Q>] (describing the distinction between active and passive resistance). The Supreme Court explicitly acknowledged active resistance—and evasion of arrest by flight, perhaps the most extreme example of active resistance—as one of the “facts and circumstances” courts must consider in determining whether a seizure is reasonable under Fourth Amendment. *Graham*, 490 U.S. at 396.

<sup>286</sup> See Kären Matison Hess et al., *Police Operations: Theory & Practice* 94 (6th ed. 2014); Wolf, *supra* note 264, at 748 (listing “Compliance hold,” “Takedown,” and “Chemical agent” as appropriate responses to passive resistance).

<sup>287</sup> For examples of force matrices that do not appear to permit physically forceful responses to passive resistance, see Merle Stetser, *The Use of Force in Police Control of Violence: Incidents Resulting in Assaults on Officers* 36–40 (2001) (limiting the response to passive resistance to “firm grip” control).

<sup>288</sup> See, e.g., Sam W. Wu, “When Can I Tase Him, Bro?": *Bryan v. McPherson* and the Propriety of Police Use of Tasers, 40 *Golden Gate U. L. Rev.* 361 (2010); Jeff Fabian, Note, Don’t Tase Me Bro!: A Comprehensive Analysis of the Laws Governing Taser Use by Law Enforcement, 62 *Fla. L. Rev.* 763 (2010); Elizabeth Seals, Comment, *Police Use of Tasers: The Truth is “Shocking,”* 38 *Golden Gate U. L. Rev.* 109 (2007).

<sup>289</sup> See, e.g., UCLA Police Use Stun Gun on Student, NBC News (Nov. 16, 2006), [http://www.nbcnews.com/id/15752233/ns/us\\_news-crime\\_and\\_courts/tucla-police-use-stun-gun-student/](http://www.nbcnews.com/id/15752233/ns/us_news-crime_and_courts/tucla-police-use-stun-gun-student/) [<https://perma.cc/M5MA-AVV2>].

ally as a response to passive resistance.<sup>290</sup> Police policy and training typically authorizes the use of more severe assertive physical force, including “hard” techniques<sup>291</sup> and intermediate (or “less-lethal”) weapons such as batons, as a response to active resistance.

In addition to the more common assertive force, officers also use force defensively. Sometimes a suspect abandons any attempt to escape and instead turns to attack the officer, or refuses to obey an officer’s commands to stop attacking another civilian. In such circumstances, officers use force not to prevent the frustration of institutional goals, but to prevent physical injury to themselves or others. Actions that may be physically threatening but which are unlikely to cause great bodily harm or death are often termed “aggressive” resistance,<sup>292</sup> while resistance that presents a substantial risk of such injury or death are called “aggravated” or “deadly force” resistance.<sup>293</sup> Law enforcement policy and training in the context of defensive force is far more permissive about the use of weapons and techniques that create a substantial risk of bodily harm or death.

Generic force matrices standing alone do not help officers make judgments concerning the particular individual they are confronting; sound policy and training requires additional guidance on how to approach certain classes of vulnerable individuals. Professor Michael Avery has argued that the “totality of the circumstances” relevant to a use of force is very different when police encounter emotionally disturbed people.<sup>294</sup> In the context of assessing the “totality of the circumstances” concerning interrogations and their voluntariness, the Supreme Court has emphasized how whether a person is a juvenile, or intellectu-

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<sup>290</sup> For two exceptions, see Michael D. Mitchell, Note, *Forrester v. City of San Diego: Is Pain Compliance An Appropriate Police Practice Under the Fourth Amendment?*, 40 Vill. L. Rev. 1177, 1181 (1995), and Benjamin I. Whipple, Comment, *The Fourth Amendment and the Police Use of “Pain Compliance” Techniques on Nonviolent Arrestees*, 28 San Diego L. Rev. 177, 201 (1991).

<sup>291</sup> Hard hand or hard empty-hand techniques include punches and other strikes performed with a closed fist. See, e.g., *The Use-of-Force Continuum*, supra note 262.

<sup>292</sup> See, e.g., Michael E. Miller, *Taser Use and the Use-of-Force Continuum: Examining the Effect of Policy Change*, 77 *Police Chief* 72, 73 (2010).

<sup>293</sup> *Id.*

<sup>294</sup> See Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 *Colum. Hum. Rts. L. Rev.* 261, 266–67 (2003).

ally disabled, or mentally ill, all affects the analysis.<sup>295</sup> The Supreme Court has yet to address the related question whether use of force must take into account vulnerability of the person encountered, and the different behavior that a reasonable officer would expect such a person to engage in during an encounter. Contemporary police training could help the Court come to an informed opinion on those issues.

### *E. Empirical Evidence on Current Police Policies*

What policies do agencies actually adopt today, and on which of the subjects just discussed? There is some evidence that agencies adopt highly varied policies, many of which are quite minimal and must be extensively supplemented by training and supervision on law and practice. Many agencies, for example, do not include in their written policies a description of the force matrix that we have described in the prior section, although the use of such a continuum is often implied, or indicated through a brief narrative. Many say very little at all beyond a constitutional floor of “reasonableness.”<sup>296</sup> The constitutional floor then becomes their ceiling. Few policies speak to any overall view that the need to use force should be minimized and that force should be avoided, when it is possible to do so, through de-escalation and other police tactics.<sup>297</sup>

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<sup>295</sup> See *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014) (noting intellectually disabled persons “face a special risk of wrongful execution because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel” (quoting *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002)) (internal quotation marks omitted)); *J.D.B. v. North Carolina*, 564 U.S. 261, 281 (2011) (recognizing vulnerability of juvenile suspects during questioning). Model police policies also reflect those differences. See Brandon L. Garrett, *Interrogation Policies*, 49 U. Rich. L. Rev. 895, 898 (2015) (noting that many law enforcement agencies issue either very little or no guidance on how to interrogate juveniles or intellectually disabled individuals); see generally Int’l Ass’n of Chiefs of Police, *Reducing Risks: An Executive’s Guide to Effective Juvenile Interview and Interrogation* (2012) (promulgating a detailed policy concerning questioning of juveniles).

<sup>296</sup> For an example of such a policy, see Indianapolis Metro. Police Dep’t, General Order 1.30, *Use of Force* (July 6, 2012), <http://interactives.indystar.com/static/PDF/IMP/IMP/IMP%20use%20of%20force%20policy.pdf> [https://perma.cc/3UU2-4NQZ] (“[O]fficers shall use only that amount of force that is reasonable, given the facts and circumstances known by the officer at the time of the event.”). See Madeline Buckley, *Read IMPD’s Use of Force Policies*, Indianapolis Star (Aug. 10, 2015), <http://www.indystar.com/story/news/2015/08/10/read-impds-use-force-policies/31407073/> [https://perma.cc/DB5J-52QY] (posting Indianapolis use-of-force policy online).

<sup>297</sup> For criticism of such practices, and recommendations that such traditional policies be updated, see Police Exec. Research Forum, *supra* note 1, at Policy 2.

The largest-scale empirical study of police use-of-force policies was completed with funding by the National Institute of Justice. In 2011, Professors William Terrill, Eugene A. Paoline III, and Jason Ingram sent a survey to a stratified, random sample of over 1,000 agencies across the country and conducted a more detailed examination of eight agencies. They found that “it was difficult to identify a standard practice that is used by police departments across the country.”<sup>298</sup> On the one hand, over eighty percent of respondents did use some type of force continuum.<sup>299</sup> However, there was no typical or common “tactical placement in terms of force continuum policies,” the authors found; there were a “total of 123 different permutations” of force progressions, “ranging from three to nine different levels.”<sup>300</sup> Agencies varied in whether citizen resistance was relevant to the force officers use, and, as described above, there was wide variation in where chemical spray, hard hands, and conducted energy devices (“CEDs”) were placed in the continua. Some presented degrees of uses of force in a linear continuum, while some used a “wheel” model with a range of options for the officer but no progression of force.<sup>301</sup> Even the most commonly used force progressions were used by less than twenty percent of all departments, while the next most common was used by only ten percent.<sup>302</sup> The authors noted how, apparently, “[d]epartments pick and choose, and tweak and adapt, in a multitude of ways - all unfortunately, with no empirical evidence as to which approach is best or even better than another.”<sup>303</sup>

We wondered whether policies are more uniform among the largest agencies that can dedicate more resources to studying best practices and developing detailed policies. We also wondered whether the largest agencies were keeping pace with modern recommendations by including policies that direct officers to use sound tactics, to seek to avoid the need to use force through de-escalation when it is possible to safely do so, and to use the minimum amount of force necessary under the circumstances, as well as establishing mandatory reporting and data collection for use-

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<sup>298</sup> William Terrill, Eugene A. Paoline III & Jason Ingram, Final Technical Report Draft: Assessing Police Use of Force Policy and Outcomes iii (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/237794.pdf> [<https://perma.cc/UG4U-ZGCP>].

<sup>299</sup> Id. at 16.

<sup>300</sup> Id. at ii, 18.

<sup>301</sup> Id. at 1–2.

<sup>302</sup> Id. at 27.

<sup>303</sup> Id. at 28.

of-force incidents.<sup>304</sup> We have added to the sparse empirical literature on this subject by conducting an analysis of the force policies of the fifty largest policing agencies in the United States.<sup>305</sup>

We start by noting that there is a real public accountability and transparency problem in this area. Many police departments do not make their written policies public or easily available online or even upon request. Only seventeen of the fifty largest agencies made their policies and patrol manuals available online. We were surprised that so many large agencies do not make their policies available online, especially on a subject as fundamental as the use of force and deadly force upon the public. All but one of the fifty agencies' policies were obtained, typically by requesting them directly from the agencies.<sup>306</sup> However, we had to make multiple requests at several agencies, and several agencies heavily redacted their policies, making basic information about the contours of their use-of-force policies difficult to understand. We are also cognizant, of course, that there can be a distinction between the policies on the books and practices on the street. Our argument, however, centers on encouraging more judicial attention to how police agencies formally regulate the use of force. It is outside the scope of this article to address the degree to which formal regulation informally recognizes, and may be built around, the fact that actual practice deviates to some extent from policy.

What we found was that even the largest agencies, which one might expect to be the most sophisticated and attentive to best practices, have widely varying force policies, many of which were quite minimalistic. Quite a few of the largest departments, for example, do not have force-continuum or matrix-type descriptions included in their policies that set out some type of progression from the least intrusive, to the intermediate types of force, to the use of deadly force. (Of the forty-nine responding largest agencies, thirty-one included some form of a force continuum or matrix and six included a graphic representation of it.) Those that did so varied quite a bit in the level of detail and the number of levels that they provided. The Los Angeles Police Department ("LAPD") contains noth-

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<sup>304</sup> Surveys examining the content of use-of-force policies have been rare. For an exception, see one such national survey discussed in Alpert & Dunham, *supra* note 276, at 156–57.

<sup>305</sup> See *infra* Appendix.

<sup>306</sup> Several agencies did not provide the requested policies until receiving multiple separate requests.

ing of the sort in its policy, for example.<sup>307</sup> Chicago, in contrast with the LAPD, provided detailed descriptions of what force is appropriate at various levels of encounters, noting the overall principle in its 2003 policy: “The Use of Force Model employs the progressive and reasonable escalation and de-escalation of member-applied force in proportional response to the actions and level of resistance offered by a subject.”<sup>308</sup> Chicago since updated this policy, in 2016, to provide still more detail and to introduce “the concept of Force Mitigation,” or techniques designed to avoid and minimize the need to use force.<sup>309</sup> The Columbus Police Division set out eight levels of force.<sup>310</sup>

Just under half, or twenty-four, of these large agencies counseled minimizing the need to use force, or that officers use the minimum force necessary. Additional departments stated that officers should only use necessary force without admonishing that force be minimized.<sup>311</sup> We note that some agencies state that force should be minimized or that only necessary force should be used, without providing more guidance, or even later providing inconsistent guidance counseling that officers use whatever force is reasonable under the circumstances. For example, the Metropolitan Police Department in Washington, D.C., adopts a policy stating an odd sort of mixture of the *Graham* standard and a minimization approach: Officers “shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting

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<sup>307</sup> L.A. Police Dep’t, LAPD Manual, at sec. 556.10: Policy on the Use of Force, [http://www.lapdonline.org/lapd\\_manual/volume\\_1.htm](http://www.lapdonline.org/lapd_manual/volume_1.htm) [<https://perma.cc/V38N-X3LC>] (verified no policy as of March 2017).

<sup>308</sup> Chi. Police Dep’t, General Order G03-02-01, The Use of Force Model (May 16, 2012), <http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-cec11383d806e05f.html> [<https://perma.cc/D7W7-6FTF>].

<sup>309</sup> Chi. Police Dep’t, General Order G03-02-02, Force Options (Jan. 1, 2016), <http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-9001-1d970b87782d543f.pdf?hl=true> [<https://perma.cc/C38K-Y9KE>].

<sup>310</sup> Columbus Police Div., Directive 2.01, Use of Force (June 30, 2014), <http://www.columbuspolice.org/FormsPublications/Directives/Directives/DirectivesNew2015/2.01.pdf> [<https://perma.cc/G3CM-2AWB>].

<sup>311</sup> See *infra* Appendix. Regarding the need to counsel minimizing the use of force, see ALI Draft Principles, *supra* note 1 (“Officers should use the minimum force necessary to perform their duties safely. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.”). See also Police Exec. Research Forum, *supra* note 1, at Policy 3 (“Police use of force must meet the test of *proportionality*.”).

the lives of the [officer] or others.”<sup>312</sup> We did credit such agencies as having policies regarding minimization or proportionality, but we note that this coding was generous and that just because an agency has a policy on point does not mean that it is a clear or effective one. The most detailed and perhaps the most forceful policy of this type was the Seattle Police Department policy, which begins by stating that the “community expects and the Seattle Police Department requires that officers use only the force necessary to perform their duties”—officers are to perform their duties with “minimal reliance upon the use of physical force,” and any force used must be “proportional.”<sup>313</sup> The Newark Police has a policy updated in 2013 stating up front that as a matter of policy, officers “are charged with the responsibility of using minimum force necessary to affect [sic] a lawful arrest.”<sup>314</sup> The Dekalb County, Georgia, department policy states: “Officers must exhaust every means available of non-lethal force, prior to utilizing deadly force,” and the policy adds: “When non-lethal force is utilized, officers should only use that force which is minimal and reasonable to effect control of a non-compliant subject.”<sup>315</sup>

Most of the largest departments did require or encourage verbal warnings before using lethal force. Thirty-two of the policies obtained encourage or require the use of verbal warnings before using deadly force, typically stating that such warnings be given where feasible rather than requiring their use.<sup>316</sup> The LAPD, for example, did not require verbal warnings. Some agencies were vague on the subject. The Columbus Police Division policy states that warnings should be given before using deadly force only “[i]f reasonable,” but provides no guidance on how reasonableness might be assessed.<sup>317</sup> Fewer agencies—only about half—

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<sup>312</sup> D.C. Metro. Police, General Order RAR 901.07, Use of Force 2 (Dec. 1, 2016), [https://go.mpdonline.com/GO/GO\\_901\\_07.pdf](https://go.mpdonline.com/GO/GO_901_07.pdf) [<https://perma.cc/7L2C-VQH>].

<sup>313</sup> Seattle Police Dep’t, Manual, Title 8, 8.000, Use of Force Core Principles (Sept. 1, 2015), <http://www.seattle.gov/police-manual/title-8--use-of-force/8000--use-of-force-core-principles> [<https://perma.cc/HMD5-L7T4>].

<sup>314</sup> Newark Police Dep’t, General Order 63-2, Use of Force by Police Officers 1 (Mar. 4, 2013).

<sup>315</sup> Dekalb Cnty. Police Dep’t, Employee Manual 4-6, 1 (2014).

<sup>316</sup> See *infra* Appendix; see also ALI Draft Principles, *supra* note 1 (“Officers should provide clear instructions and warnings whenever feasible before using force.”); IACP National Consensus Policy on Use of Force, *supra* note 1, at 4 (“Where feasible, the officer shall identify himself or herself as a law enforcement officer and warn of his or her intent to use deadly force.”).

<sup>317</sup> Columbus Police Div., Directive 2.01, *supra* note 310, at 3.



encourage or require verbal warnings before using *non-lethal* (less-lethal or less-than-lethal) force. One would expect that in nonlethal situations, especially when officers are using force assertively rather than defensively, there may often be more time for an officer to provide warnings.

Most of the largest departments also included no specific rules or guidance relating to emotionally disturbed persons, for whom both the dangers posed and the consequences of the escalation of the use of force may be completely misunderstood by officers lacking explicit guidance or specialized training. Only eight departments included specific policies on the subject. Here, too, there was variation. Cities like San Diego, for example, established special teams (in San Diego, it is a Psychiatric Emergency Response Team (“PERT”)) specifically to handle potentially violent situations involving mentally ill or disturbed individuals, with policy on how and when to call such a team to intervene.<sup>318</sup>

In general, about half of the policies did not discuss tactics or provide officers with guidance on how to approach a situation, nor did they discuss de-escalation or other techniques that could be used to diffuse a violent threat or avoid the need to use force.<sup>319</sup> Twenty-seven agencies included policies that discussed tactics or how to approach a situation in which the need to use force may be present.<sup>320</sup> Of those, twenty-four agency policies discussed de-escalation specifically.<sup>321</sup> Most detailed was the Seattle Police Department policy, which contained a separate stand-alone section on the topic of de-escalation that described a range of techniques that can be used to avoid the need to use force, including using distance, cover, concealment, verbal persuasion, avoidance of con-

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<sup>318</sup> San Diego Police Dep’t, Department Procedure 6.28, Psychiatric Emergency Response Team (PERT) 3 (Nov. 22, 2013) (“PERT is intended to provide humane and beneficial outcomes for persons with mental illness who have come to the attention of law enforcement.”); see also Grand Jury Report, Psychiatric Emergency Response Team 2 (May 23, 2016), <http://www.sandiegocounty.gov/content/dam/sdc/grandjury/reports/2015-2016/PERTReport.pdf> [<https://perma.cc/XJ2D-MAMQ>] (describing history and goals and evaluating performance of PERT team).

<sup>319</sup> See Police Exec. Research Forum, *supra* note 1, at Policy 5 (stating that, “The Critical Decision-Making Model provides a new way to approach critical incidents,” and describing a decision-making framework for “critical incidents and other tactical situations”).

<sup>320</sup> See *infra* Appendix.

<sup>321</sup> See ALI Draft Principles, *supra* note 1 (“Officers should actively seek to avoid using force by using tactics such as de-escalation, as circumstances permit.”); IACP National Consensus Policy on Use of Force, *supra* note 1, at 3 (“An officer shall use de-escalation techniques and other alternatives to higher levels of force consistent with his or her training whenever possible and appropriate before resorting to force and to reduce the need for force.”).

frontation, calling extra resources, and other tactics.<sup>322</sup> The Philadelphia Police Department policy stood out by directing officers to avoid officer-created jeopardy and providing guidance about tactical restraint:

Police officers shall ensure their actions do not precipitate the use of deadly force by placing themselves or others in jeopardy by taking unnecessary, overly aggressive, or improper actions. It is often a tactically superior police procedure to withdraw, take cover or reposition, rather than the immediate use of force.<sup>323</sup>

The Newark Police briefly notes that “an alternative to the use of deadly force” shall be used, if the officer reasonably believes it will avert the imminent danger “at no increased risk to the officer or another person.”<sup>324</sup>

In contrast with the detailed tactical guidance described in the policies above, some policies simply ape the Fourth Amendment standard. Take, for example, the policy from Cook County, Illinois, the second-most populous county in the country and home to Chicago, the third-most populous city in the country. That policy states, as a general matter, that “[o]fficers shall use an amount of force reasonable and necessary based on the totality of the circumstances,” and goes beyond the constitutional litmus test only by noting that officers may use multiple types of force in a given encounter—“the progressive and reasonable escalation and de-escalation of officer applied force in proportional response to the actions and level of resistance offered by a subject”—and prohibiting certain uses of force, including warning shots and firing into crowds or buildings.<sup>325</sup> Departments were also quite varied in whether or which types of force they outright prohibited. A series of departments prohibited chokeholds, neck holds, hogties, or using a range of non-approved weapons like “blackjack[s], sap[s], nunchaku[s], kempo stick[s], brass knuckle[s], or weighted glove[s]” but others did not.<sup>326</sup> Almost all pro-

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<sup>322</sup> Seattle Police Dep’t, Manual, Title 8, 8.100, De-Escalation (Sept. 1, 2015), <http://www.seattle.gov/police-manual/title-8--use-of-force/8100--de-escalation> [<https://perma.cc/87DC-92J7>].

<sup>323</sup> Phila. Police Dep’t, Directive 10.1, Use of Force – Involving the Discharge of Firearms 6 (Sept. 18, 2015).

<sup>324</sup> Newark Police Dep’t, Order 63-2, *supra* note 314, at 6.

<sup>325</sup> Cook Cty. Sheriff’s Office, Sheriff’s General Order 11.2.1.0, Response to Resistance/Use of Force Policy 1, 8 (May 23, 2011).

<sup>326</sup> See D.C. Metro. Police, Use of Force, *supra* note 312 at 13; see also, e.g., Seattle Police Dep’t, Manual, Title 8, 8.300, Use of Force Tools (Sept. 1, 2015),

hibited use of warning shots, and most sharply restricted using firearms from moving vehicles except in highly exigent circumstances. The choice to permit a type of use of force at all can, in our view, create reasonableness concerns. Take for example, vehicle pursuits, where, according to a 2008 study by the IACP, the majority of police agencies allow officers to initiate a vehicle pursuit for any civil or criminal offense or are only slightly more restrictive in that they permit vehicle pursuits for any criminal offense (including misdemeanors, but excluding civil traffic offenses), even though between twenty and forty percent of all vehicle pursuits end in injury or property damage.<sup>327</sup>

In sum, even the largest police agencies have varying policies, however most counsel the minimization of force and provide guidance on key tactical lessons, such as the principles of conflict avoidance and de-escalation that can protect the lives of officers and members of the public.<sup>328</sup>

The Supreme Court's Fourth Amendment doctrine exerts real pull on these police policies. About half of the policies relied upon language from *Graham* and the Supreme Court's Fourth Amendment cases when setting out their general requirements for the use of force. The policies often paraphrase *Graham* to say that reasonableness of force must be assessed based on the "totality of the circumstances" known to the officer, who must make a split-second decision. Only departments that adopt a minimization or a de-escalation approach include additional factors and otherwise qualify the "split-second approach" drawn from the constitutional case law. Police training, similarly, may often mirror the constitutional baseline and give short shrift to tactics intended to avoid or minimize the use of force, with some use-of-force instructors advocating against the adoption of detailed force policies because, they argue, such policies are inconsistent with the Fourth Amendment standards.<sup>329</sup> Be-

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<http://www.seattle.gov/police-manual/title-8--use-of-force/8300--use-of-force-tools> [<https://perma.cc/RS7G-AL8X>] (permitting use of improvised weapons and disfavoring but not barring the use of neck and carotid restraints when deadly force would be justified).

<sup>327</sup> See, e.g., Cynthia Lum & George Fachner, *Police Pursuits in an Age of Innovation and Reform: The IACP Police Pursuit Database* 37, 57 (2008), <http://www.theiacp.org/Portals/0/pdfs/Publications/Police%20Pursuit.pdf> [<https://perma.cc/FD8S-YZPM>].

<sup>328</sup> The Police Executive Research Forum now recommends adoption of de-escalation as formal policy. Police Exec. Research Forum, *supra* note 1, at Policy 4.

<sup>329</sup> John Bostain, *Use of Force: Are Continuums Still Necessary?*, 4 *FLETC J.* 33, 33–34 (2006) (arguing that models and continuums about what force cannot be used have detriments and in many cases do not adhere to case law).

cause *Graham* described Fourth Amendment reasonableness as incapable of “precise definition or mechanical application,” the argument goes, providing more detailed guidance through training or policy is an attempt to do what is legally impossible.

The Supreme Court case law sets a (low) floor, but not a ceiling on how agencies handle use of force internally. Increasingly agencies provide detailed rules for reporting and reviewing all uses of deadly force and many other types of uses of force, as well. On reporting uses of force, while the vast majority make clear in written policies that supervisory review of uses of force and reporting of uses of force is mandatory, the policies do differ on the categories of force that must be reported, and on what procedures are followed next. Many of the more recent policies included systematic data collection and review of uses of force, including by some kind of review board that periodically analyzes data on uses of force. Thirty-one of the agencies included procedures for conducting systematic review of use-of-force data.<sup>330</sup>

#### *F. Department of Justice 14141 Consent Decrees*

Some of the most detailed use-of-force policies can be found at agencies that have settled consent decrees entered pursuant to Section 14141<sup>331</sup> with the DOJ. For example, in 2003, Detroit, Michigan, entered into a consent judgment with the DOJ that included detailed provisions concerning witness identification and questioning policies, stop-and-frisks, arrests, foot pursuits, data collection, as well as the use of force.<sup>332</sup> Regarding the use of force, the consent decree required detailed procedures for investigating all uses of force, as well as a command-level review of all critical firearms discharges.<sup>333</sup> The consent decree incorporated a new use-of-force continuum that would detail each level of force. On police tactics, the new policy would state that “de-escalation, disengagement, area containment, surveillance, waiting out a subject, summoning reinforcements or calling in specialized units are often the appropriate response to a situation.”<sup>334</sup> The consent decree required the Detroit Police Department to “select an intermediate force device, which

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<sup>330</sup> See *infra* Appendix.

<sup>331</sup> 42 U.S.C. § 14141 (2012).

<sup>332</sup> Consent Judgment, *United States v. City of Detroit*, No. 03-72258 (E.D. Mich. July 18, 2003).

<sup>333</sup> *Id.* at 13–14.

<sup>334</sup> *Id.* at 7.

is between chemical spray and firearms on the force continuum,” and to establish policy and training on such a device.<sup>335</sup> The policy on chemical spray was altered to require officers to provide a verbal warning “and time to allow the subject to comply” before using such spray.<sup>336</sup> The firearm policy would now require biannual qualification to use firearms, and it prohibited firing at or from moving vehicles, or placing oneself in the path of a moving vehicle.<sup>337</sup> The use-of-force policy would have to prohibit chokeholds unless deadly force was justified.<sup>338</sup> Each of these provisions in combination called for a far more nuanced policy than had existed beforehand, resulting in a set of policies designed to minimize the need to use force and to guide its use when appropriate, as well as to collect data and study the use of force over time.

The New Orleans Police Department (“NOPD”) consent decree, entered in July 2012, is perhaps the most expansive such decree that has been entered into with the DOJ.<sup>339</sup> Its provisions touch on a range of subjects, including not just the use of force but also custodial interrogations, crisis interventions, photographic line-ups, and community engagement. Regarding the use of force, the changes ranged from creation of a use-of-force review board, avoiding gender bias, new training, and new policy provisions regarding intermediate use of force, such as canines, electronic control weapons, and chemical spray. The NOPD also adopted a uniform reporting system for all uses of force, dividing all uses of force into four levels.<sup>340</sup> With regard to our focus in this article—tactics and the avoidance of the need to use force in the first instance—the consent decree ordered the NOPD to draft a comprehensive use-of-force policy that would make clear that “officers shall use advisements, warnings, and verbal persuasion, when possible, before resorting to force” and “force shall be de-escalated immediately as resistance decreases,” and “when feasible” officers “will use disengagement; area containment; surveillance; waiting out a subject; summoning reinforcement; and/or calling in specialized units, in order to reduce the need for force and increase officer and civilian safety.”<sup>341</sup> That precise language

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<sup>335</sup> Id. at 8–9.

<sup>336</sup> Id. at 9.

<sup>337</sup> Id. at 8.

<sup>338</sup> Id.

<sup>339</sup> Consent Decree Regarding the New Orleans Police Department at 1, *United States v. New Orleans*, No. 12-1924 (E.D. La. July 24, 2012).

<sup>340</sup> Id. at 14–20, 23–33.

<sup>341</sup> Id. at 14–15.

was then incorporated into the NOPD's policies.<sup>342</sup> Those "use of force principles" alone are a remarkable shift from traditional policies that offered no guidance on any of those tactical tools that can be used to avoid the need to use force.

### *G. Race and Force*

As noted in the Introduction, we would be remiss if we did not acknowledge the troubling racial dynamics of police violence, although a full examination of the topic is outside the scope of this piece. While 2008 data suggest that police used force in 1.4% of encounters with civilians, officers reportedly used force far more often against people who identify as Black or African-American (3.4% of most-recent encounters) than against people who identify as Hispanic (1.6%) or White (1.2%).<sup>343</sup> The disparity is even more apparent in the context of deadly force: Although Blacks make up about 13.2% of the population, they make up 26.7% of the individuals killed by police in 2015 (306 of 1,146). Whites, who make up 77.4% of the population, make up 50.7% of the individuals killed by police in that year (581 of 1,146).<sup>344</sup> And Blacks are killed while unarmed at an even higher rate: 25.8% (79 of 306) of Blacks killed by police in 2015 were unarmed, while that was true for only 17.9% of Whites (104 of 581).<sup>345</sup> Unfortunately, the best data that we

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<sup>342</sup> New Orleans Police Dep't, New Orleans Police Department Operations Manual, Chapter 1.3, Use of Force 6 (Dec. 6, 2015).

<sup>343</sup> Eith & Durose, *supra* note 150, at 12. More recent data on TASER use in Connecticut also supports the assertion that officers use force more frequently against Black suspects than they do against White suspects. See Dave Collins, Racial Disparities Seen in Police Stun Gun Use, *Seattle Times* (Jan. 26, 2016), <http://www.seattletimes.com/nation-world/apnewsbreak-racial-disparities-in-connecticut-stun-gun-use/> [<https://perma.cc/2ZX8-6BHU>].

<sup>344</sup> People Killed by Police, *supra* note 155.

<sup>345</sup> *Id.* It is not clear from this data whether the officers knew the individuals were unarmed, but there are troubling implications regardless of how that question is answered. On the one hand, if officers are aware that the individuals are unarmed, the data may suggest that officers are more likely to use deadly force against Blacks whom they do not believe to be armed than they are against Whites whom they do not believe to be armed. On the other hand, if officers believe that the individuals are armed, the data may suggest that officers may be more likely to mistakenly conclude that an unarmed Black suspect is armed than they are that an unarmed White suspect is armed. Either conclusion has important implications for police training. For additional recent work examining the role of race and police use of force, see Roland G. Fryer, An Empirical Analysis of Racial Differences in Police Use of Force 1–6 (Nat'l Bureau of Econ. Research, Working Paper No. 22399, 2016), <http://scholar.harvard.edu/fryer/publications/empirical-analysis-racial-differences-police->

have cannot support any reliable estimate of how many times officers use deadly force, whether by using a firearm or some other means, that does not result in someone's death, but we can speculate that the statistics would retain their disparity.

Perhaps the most troubling aspect of that disparity is that it is so longstanding, even if there is less disparity now than there has been in the past.<sup>346</sup> In 1988, Fyfe wrote that “every study that has examined this issue [has] found that blacks are represented disproportionately among those at the wrong end of police guns.”<sup>347</sup> There are undoubtedly multiple factors contributing to that disparity, many of which have been suggested or tested—the increased officer presence and number of community contacts in high-crime Black neighborhoods, officers' increased perception of risk in that environment,<sup>348</sup> the implicit bias that leads officers to perceive Black male suspects as more threatening than other suspects, and so on—but the potential relationship between race and police tactics has been largely overlooked.<sup>349</sup> Studies that test the role of race in an officer's deadly-force decision making<sup>350</sup> may ignore the role that race plays in an officer's tactical decision to approach a situation in a particular way, even when the officer's tactical approach may ulti-

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use-force [<https://perma.cc/U6HJ-L5PH>]; Ctr. for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force* 4–6 (July 8, 2016), [http://policingequity.org/wp-content/uploads/2016/07/CPE\\_SoJ\\_Race-Arrests-UoF\\_2016-07-08-1130.pdf](http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf) [<https://perma.cc/47L4-Q3GA>].

<sup>346</sup> Laurence Miller, *Why Cops Kill: The Psychology of Police Deadly Force Encounters*, 22 *Aggression & Violent Behav.* 97, 105–06 (2015) (stating 49% of the people killed by police in 1978 and 35% of the people killed by police in 1998 were Black).

<sup>347</sup> James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 *Just. Q.* 165, 189 (1988).

<sup>348</sup> Of the 563 officers feloniously killed by offenders in the ten-year period from 2005 to 2014, 39.8% were killed by Black suspects and 54.9% by White suspects. Fed. Bureau of Investigation, *supra* note 166.

<sup>349</sup> Paul J. Hirschfield, *Lethal Policing: Making Sense of American Exceptionalism*, 30 *Soc. F.* 1109, 1111 (2015) (discussing the racial disparity in police killings and noting, “much more elaborate analyses would be necessary to determine whether race decisively influenced why black victims were confronted and how they were treated”).

<sup>350</sup> See, e.g., Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 *J. Personality & Soc. Psychol.* 1006, 1006, 1015 (2007) (finding that police officers exhibit bias but perform better than civilians across a range of factors when deciding to shoot); Lois James et al., *Results from Experimental Trials Testing Participants Responses to White, Hispanic and Black Suspects in High-Fidelity Deadly Force Judgment and Decision-Making Simulations*, 9 *J. Exp. Crim.* 189, 205 (2013) (finding that that officers were more likely to hesitate before shooting a Black suspect than a White suspect and, correspondingly, were less likely to shoot an unarmed Black suspect than an unarmed White suspect).

mately play a significant role in whether and how an officer makes a decision to use lethal force.<sup>351</sup> Still more problematic is the role that larger agency strategies, such as proactive policing and stop-and-frisk policies, may play in disproportionately generating situations in which force is used.

### III. TOWARD A TACTICAL FOURTH AMENDMENT

To what extent does any of the research and policy that we explored in Part II find its way into case law under the Fourth Amendment? Despite U.S. Supreme Court rulings that are almost entirely disconnected from the reality of modern-day policing, some of the police policy and tactics do actually inform the case law, in several surprising ways that we highlight in this Part. However, there is also a negative feedback loop that can be observed between the Supreme Court's rulings on the Fourth Amendment and police policy and training, and not all of it is productive or along the lines the Justices would have anticipated.

Influential criminologist Carl Klockars, writing about the difficulty of defining "excessive force" at a useful level of specificity, wrote that for policing to develop meaningful guidance, "it must go to the same source where every other profession finds standards: within the skills of policing itself, as exemplified in the work of its most highly skilled practitioners."<sup>352</sup> He sought to define excessive force as "the use of more force than a highly skilled police officer would find necessary to use in that particular situation."<sup>353</sup> Unfortunately, in developing training and policies to govern the use of force, many police agencies have turned not to

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<sup>351</sup> Officers' risk assessments and their determinations of when and how to use their authority are based in part on race, and it seems no great stretch to suggest that the way an officer approaches a situation and interacts with civilians depends in part on the civilians' race. See, e.g., Chris Cooper, *Meditation in Black and White: Unequal Distribution of Empowerment by Police*, in *Not Guilty: Twelve Black Men Speak Out on Law, Justice & Life* 125, 125–28 (Jabari Asim ed., 2001) (noting that police respond differently to disputes between Whites, where officers permit parties to mediate between themselves, than they do to Blacks, where officers are more likely to impose a solution rather than encourage or permit the parties to mediate); Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 37 *Eur. J. Soc. Psychol.* 1102, 1107 (2007) (studying reaction to "shoot/don't shoot" scenarios and finding that implicit associations between race and danger can affect an individual's decision to shoot).

<sup>352</sup> Carl B. Klockars, *A Theory of Excessive Force and Its Control*, in *Police Violence: Understanding and Controlling Police Abuse of Force* 1, 8 (William A. Geller & Hans Toch eds., 1996).

<sup>353</sup> *Id.* (emphasis omitted).



their own best practices or tactics, but to the more flexible and forgiving legal standard adopted by the Supreme Court. In recent years, some police agencies have responded to the Supreme Court's decisions by not using the term "use of force," but rather "response to resistance" training, reflecting that there is a continuum of force required, depending on the circumstances. Some policies, as already described, quote or paraphrase the *Graham v. Connor* standard. Some trainers also advocate using the *Graham* three-part test itself as part of police training, suggesting that it is appropriate to educate officers about those Fourth Amendment decisions that directly impacts police practices.<sup>354</sup> Some agencies have altered their use-of-force training, adopting a more "flexible" approach toward the use of force in reaction to Supreme Court rulings and not necessarily based on best practices or tactics. For example, the New Mexico State Police and Albuquerque Police Departments recently abandoned the "Reactive Control Model" for training on force in favor of a more flexible approach that closely resembles the Fourth Amendment "objective reasonableness" standard.<sup>355</sup> Indeed, those departments have "come under scrutiny" for "a rash of officer-involved shootings,"<sup>356</sup> so one wonders whether the less-restrictive training may be a cause of or a response to potential criticism and liability for the shootings. To the extent that police agencies rely on Supreme Court rulings to inform use-of-force and tactics training, we view such approaches as ill advised. We view emerging approaches that take account of police tactics as far more promising.

### A. Rethinking *Graham*

#### 1. Segmenting of Force Encounters

Although decisions like *Graham* place heavy emphasis on the split-second decisions that an officer must make in use-of-force situations, the Supreme Court did not clearly rule out consideration of the reasonableness of the officer's actions leading up to the decision to use deadly

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<sup>354</sup> Karen M. Blum & John J. Ryan, Recent Developments in the Use of Excessive Force by Law Enforcement, 24 *Touro L. Rev.* 569, 581–82 (2008).

<sup>355</sup> Uriel J. Garcia, New Police Training Puts Fewer Limits on Use of Force, *Santa Fe New Mexican* (Feb. 16, 2014), [http://www.santafenewmexican.com/news/local\\_news/new-police-training-puts-fewer-limits-on-use-of-force/article\\_4ad9bdf1-f301-591c-ad09-e5fb6731c6d1.html](http://www.santafenewmexican.com/news/local_news/new-police-training-puts-fewer-limits-on-use-of-force/article_4ad9bdf1-f301-591c-ad09-e5fb6731c6d1.html) [https://perma.cc/FTA2-Q5KX].

<sup>356</sup> *Id.*

force (and as noted, in *Graham*, the Court had no occasion to actually discuss a split-second decision, or apply any such standard to a situation involving any split-second decision making). While the Court has not clearly addressed to what extent its dicta emphasizing deference to split-second decisions govern, and in what situations, some circuits continue to find that preshooting conduct is relevant in limited circumstances to the Fourth Amendment inquiry.<sup>357</sup> To be sure, other courts of appeals have rejected such an approach; as the Fourth Circuit has explained, “[T]he *Graham* decision contradicts appellants’ argument that, in determining reasonableness, the chain of events ought to be traced backward to the officer’s misconduct of failing to comply with the standard police procedures . . . .”<sup>358</sup> We, as noted, disagree with any such interpretation of *Graham*.

Adopting a related approach, some courts of appeals follow an approach that segments or divides the encounter into distinct parts, asking whether the officer’s conduct was reasonable during a given part (particularly where there are multiple uses of force).<sup>359</sup> Such approaches are

<sup>357</sup> The First, Third, Ninth, and Tenth Circuits have adopted such an approach. See, e.g., *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995) (“[C]ourt[s] should examine the actions of the government officials leading up to the seizure.”); *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) (“A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect.”); *Alexander v. City & Cty. of San Francisco*, 29 F.3d 1355, 1366–67 (9th Cir. 1994); *Sevier v. City of Lawrence*, 60 F.3d 695, 699–700 (10th Cir. 1995) (holding that whether defendant officer’s reckless or deliberate conduct created the need to use force was relevant for determining its reasonableness); see also Aaron Kimber, Note, Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer’s Pre-Seizure Conduct in an Excessive Force Claim, 13 Wm. & Mary Bill Rts. J. 651, 655 (2004). The Supreme Court has accepted certiorari on a Ninth Circuit case raising a related question whether police may engage in “provocation” that makes force unjustified. See *Los Angeles Cty. v. Mendez*, 137 S. Ct. 547 (Dec. 2, 2016), granting cert. to *Mendez v. Cty. of Los Angeles*, 815 F.3d 1178 (9th Cir. 2016).

<sup>358</sup> *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991). The Fourth, Sixth, and Eighth Circuits are among those that reject such an approach. See, e.g., *Dickerson v. McClellan*, 101 F.3d 1151, 1160–62 (6th Cir. 1996) (limiting inquiry to moments preceding the shooting); *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995) (looking to time of seizure to determine if reasonable); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (looking to information possessed by officer at time of seizure). Distinct from considering pre-seizure conduct is the question whether police should have reasonably considered or used alternative methods of responding to the subject, and some courts have rejected doing so in certain circumstances. See, e.g., *Reynolds v. Cty. of San Diego*, 84 F.3d 1162, 1169 (9th Cir. 1996) (stating standard is whether action is reasonable on the whole, given difficulties facing and snap judgments required by police officers).

<sup>359</sup> *Claybrook v. Birchwell*, 274 F.3d 1098, 1105 (6th Cir. 2001); *Bates v. Chesterfield Cty.*, 216 F.3d 367, 371–72 (4th Cir. 2000); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir.

far more consistent with police training, supervision, and policy than are unsegmented approaches. After all, the use-of-force continua and matrices are structured to emphasize how force is not an on/off switch; instead, force must be considered and reconsidered at stages during an encounter. What is reasonable when first approaching a compliant suspect is very different from what is reasonable if that suspect responds aggressively. And what is reasonable for an officer, working alone, to use to defend himself from a violent suspect's punches is very different from what is reasonable for officers to use to control the same suspect while he is being held down by multiple officers.

## *2. Rulings Reflecting Police Training*

Is a reasonable officer a “reasonably trained” police officer, who would be expected to make decisions about the use of force not as a civilian, but as a police officer properly trained in tactics? Or is a reasonable officer the hypothetical “reasonable man,” a civilian but for the uniform, untrained in tactics and the use of force? We believe the former is the appropriate understanding, but there is tension in the Fourth Amendment case law on this point. In the use-of-force context, for example, the Court recently held in a per curiam opinion that an officer's decision to shoot at a fleeing vehicle from a highway overpass was not clearly unreasonable (for qualified immunity purposes) even though doing so contradicts clear and long-standing police best practices, the officer had not been trained to do so, the officer's direct supervisor instructed him not to do so immediately before the shooting, and properly trained officers had already set up spike strips as an alternative means of ending the pursuit.<sup>360</sup> From the Court's perspective, it was essentially irrelevant that the officer did what any reasonably well-trained officer would not have done for a variety of reasons.

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1993); *Hopkins v. Andaya*, 958 F.2d 881, 886–88 (9th Cir. 1992) (per curiam). The *Claybrook* court, for example, broke the encounter down into: “first, the officers' approach and confrontation of [the suspect]; second, the initial firefight . . . ; and third, the shots fired after [the suspect's] move to a position behind the concrete steps.” *Claybrook*, 274 F.3d at 1105.

<sup>360</sup> The officer was attempting to shoot at the vehicle to disable it, but, perhaps in part because of a lack of training, he struck and killed the driver of the vehicle instead. *Mullenix v. Luna*, 136 S. Ct. 305, 306–07 (2015) (per curiam); see also *id.* at 313 (Sotomayor, J., dissenting) (“Chadrin Mullenix fired six rounds in the dark at a car traveling 85 miles per hour. He did so without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it.”).

Compare how, in the context of recognizing a good-faith exception to the suppression of otherwise suppressible evidence, the Court changed the referent, asking whether a “reasonably well trained police officer could have believed that there existed probable cause to search [defendant’s] house.”<sup>361</sup> As a result, lower courts have similarly asked whether “an objectively reasonable, well-trained officer would have known that the search violated the Fourth Amendment.”<sup>362</sup> The Court has hewed to such language in other cases, as well.<sup>363</sup> Indeed, in some contexts the Court has established doctrines based explicitly on the special training that officers receive.<sup>364</sup> Those cases do not typically discuss the content of the training that such a reasonable officer would have received to inform the officer’s conclusion, decision, or action. One reason, which the Court emphasized in the search context, is that the relevant training would chiefly consist of legal training, meaning training that “requires officers to have a reasonable knowledge of what the law prohibits.”<sup>365</sup>

In *United States v. Leon*, however, the Supreme Court also quoted Professor Jerold Israel on the importance of police training more broadly:

The key to the [exclusionary] rule’s effectiveness as a deterrent lies, I believe, in the impetus it has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits. [An objective

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<sup>361</sup> *United States v. Leon*, 468 U.S. 897, 926 (1984).

<sup>362</sup> *United States v. Zimmerman*, 277 F.3d 426, 436 (3d Cir. 2002).

<sup>363</sup> See, e.g., *Malley v. Briggs*, 475 U.S. 335, 345 (1986) (“The analogous question in this case is whether a reasonably well-trained officer in petitioner’s position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.”).

<sup>364</sup> *Ryburn v. Huff*, 132 S. Ct. 987, 988–89, 991 (2012) (per curiam) (explaining how trained officers can identify lawful conduct as potentially dangerous); *Davis v. Washington*, 547 U.S. 813, 829 (2006) (crediting officers with an “almost instinctive[]” ability to distinguish between questions related to officer safety and questions intended to obtain testimonial evidence (quoting *New York v. Quarles*, 467 U.S. 649, 650 (1984))); *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (describing how, by virtue of their “experience and specialized training,” officers can “make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’” (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981))); *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (describing how trained officers can identify lawful conduct as indicative of criminality). For further discussion of the Court’s references to, and frequently deference to, officers’ training and experience, see generally Seth Stoughton, *Evidentiary Rulings as Police Reform*, 69 U. Miami L. Rev. 429, 450 (2015).

<sup>365</sup> *Leon*, 468 U.S. at 919 n.20 (citing *United States v. Peltier*, 422 U.S. 531, 542 (1975)).

good-faith exception] is not likely to result in the elimination of such programs, which are now viewed as an important aspect of police professionalism. Neither is it likely to alter the tenor of those programs; the possibility that illegally obtained evidence may be admitted in borderline cases is unlikely to encourage police instructors to pay less attention to fourth amendment limitations.<sup>366</sup>

In *Malley v. Briggs*, the Court re-emphasized the same point: “Police departments and prosecutors have an obligation to instill this understanding in officers, and to discipline those found to have violated the Constitution.”<sup>367</sup> Indeed, the Court has typically not credited concerns about officers abusing their authority or working around constitutional rules.<sup>368</sup> Lower courts have not always carefully explored the relationship between an objective standard and the content of police training, much less discussed that language in any substantive way. Some, however, have emphasized the importance of training and policy, as to both Fourth Amendment reasonableness, and reasonableness for purposes of qualified immunity. Indeed, circuits, such as the Eighth Circuit, which rejects consideration of pre-seizure conduct, do consider whether police department guidelines were followed to be relevant to the question of reasonableness.<sup>369</sup>

However, the importance of training should be far more salient in the context of police use of force. As one district court has put it, the “pertinent inquiry is confined to the objectively ascertainable question of whether a reasonably well-trained officer would know that the . . . use of force . . . [was] illegal.”<sup>370</sup> Or as another district court has put it, “[t]he central legal question is whether a reasonably well-trained officer in the defendant’s position would have known that shooting the victim was unreasonable in the circumstances.”<sup>371</sup> Other courts, however, have rejected consideration of police tactics and training where the question is

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<sup>366</sup> *Id.* (alterations in original) (quoting Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 *Mich. L. Rev.* 1319, 1412–13 (1977)).

<sup>367</sup> *Briggs*, 475 U.S. at 353 n.9 (Powell, J., concurring in part and dissenting in part).

<sup>368</sup> *Stoughton*, *supra* note 92, at 861–63.

<sup>369</sup> *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) (“Although these ‘police department guidelines do not create a constitutional right,’ they are relevant to the analysis of constitutionally excessive force.” (citation omitted)).

<sup>370</sup> *Davis v. Costello*, 1995 WL 562282, at \*4 (D. Del. Sept. 19, 1995) (alterations in original) (quoting *Schwab v. Wood*, 767 F. Supp. 574, 588 (D. Del. 1991)).

<sup>371</sup> *Carpenter v. City of Bean Station*, 2011 WL 5025883, at \*10 (E.D. Tenn. Oct. 21, 2011).

whether police should have used other methods to respond to the suspect, confining the inquiry more closely to the moment in time when the force was used.<sup>372</sup>

### 3. Rulings Reflecting Tactics

In other respects, lower federal courts have been more sensitive to the importance of police tactics, in both systematic and more sporadic and implied ways. The treatment of warnings before using force has been far more systematic. The Supreme Court stated in *Garner* that warnings should be given “where feasible” before using deadly force against a fleeing suspect.<sup>373</sup> As a result, federal courts have often cited to the need to provide warnings before using force, both deadly and nondeadly.<sup>374</sup> Such rulings explain why police agencies adopt policies that state that warnings must be provided “where feasible.”

The treatment of concepts of necessity and proportionality have been more sporadic, but still persistent in the case law. Federal courts have asked whether force was “necessary” at all, in order to prevent escape or accomplish an arrest.<sup>375</sup> Lower courts have approvingly noted that officers appropriately used “measured and ascending responses” to force, following a proportionality approach,<sup>376</sup> although the factors they use to de-

<sup>372</sup> E.g., *Billington v. Smith*, 292 F.3d 1177, 1184 (9th Cir. 2002).

<sup>373</sup> 471 U.S. at 11–12.

<sup>374</sup> See, e.g., *Mattos v. Agarano*, 661 F.3d 433, 451 (9th Cir. 2011) (en banc) (finding excessive force where failure to warn before deploying TASER “pushes this use of force far beyond the pale”); *Bryan v. MacPherson*, 630 F.3d 805, 831 (9th Cir. 2010) (finding that failure to warn the plaintiff before TASERing her “militate[s] against finding [the defendant’s] use of force reasonable”); *Floyd v. City of Detroit*, 518 F.3d 398, 409 (6th Cir. 2008) (noting in finding a constitutional violation that officers shot plaintiff “without (1) announcing themselves as police officers, (2) ordering him to surrender, or (3) pausing to determine whether he was actually armed”); *Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007) (finding that “[t]he absence of any warning” before officer used her TASER “makes the circumstances of this case especially troubling”).

<sup>375</sup> See, e.g., *Garner*, 471 U.S. at 11 (asking whether force was “necessary to prevent escape”); *Lolli v. Cty. of Orange*, 351 F.3d 410, 417 (9th Cir. 2003) (“[A] jury could conclude that little to no force was necessary or justified here.”).

<sup>376</sup> *Galvan v. City of San Antonio*, 435 F. App’x 309, 311 (5th Cir. 2010) (noting how officers “reacted with measured and ascending responses—verbal warnings, pepper spray, hand- and arm-manipulation techniques, and then the use of a Taser”; and “did not use force until [the plaintiff’s husband] attacked [an officer]”); *Jones v. Wild*, 244 F. App’x 532, 533 (4th Cir. 2007) (noting that officer “gave a verbal warning prior to releasing” a police dog); *Estate of Martinez v. City of Federal Way*, 105 F. App’x 897, 899 (9th Cir. 2004) (finding no liability, explaining that “[v]erbal warnings are not feasible when lives are in immediate danger and every second matters”).

termine whether force was proportional are not consistent.<sup>377</sup> Such rulings both reflect, and may buttress, approaches that counsel minimization and avoidance of unnecessary use of force by police.

#### *4. Expert Testimony on Tactics*

Best practices and training may also inform qualified immunity and summary judgment rulings; and in addition, expert testimony on such issues can inform the jury at trial. Such testimony may be particularly relevant if the plaintiff is not only challenging the constitutionality of the officer's conduct, but also the content of the agency's policies and training as a cause of the constitutional violation itself. Lower courts have continued to apply some of those principles, particularly in cases alleging municipal liability for excessive use of force based on grossly inadequate training, policy, or supervision. Such cases are not easy to bring or to prove under the Supreme Court's restrictive language in *City of Canton v. Harris*; the police department must have utterly failed to train on a subject of "obvious" importance to prevention of constitutional violations.<sup>378</sup>

Expert testimony can describe how competently trained officers are not just trained to make split-second decisions on whether to shoot or not—indeed, they are trained to *avoid* putting themselves into a position that requires a split-second decision. In one Denver case, for example, the Tenth Circuit described that:

Fyfe testified that "shoot-don't shoot" instruction should involve more than the decision on pulling the trigger at the critical moment, and should include training on how to avoid getting into that predicament in the first place. . . . "I have found that police officers regard ["shoot/don't shoot" training using interactive video displays] quite often as video games and that role-play situations in which instructors play the part of adversaries, burglary suspects, deranged people, robbers, and police officers . . . assigned to deal with them are much more effective. The cops become much more involved, and they're much more realistic. But one film is not [adequate] certainly."<sup>379</sup>

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<sup>377</sup> See Alpert et al., *supra* note 187, at ch. 4.

<sup>378</sup> *City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

<sup>379</sup> *Zuchel v. City & Cty. of Denver*, 997 F.2d 730, 739 (10th Cir. 1993) (second alteration in original).

As Fyfe summarized: “You can’t teach strategic judgment—judgment on strategic skills[—]in a classroom.”<sup>380</sup>

Courts generally allow experts to both offer their opinions on whether the conduct of police officers comported with accepted standards in the field of law enforcement and opine on the quality of the actual policy and training provided in the particular law enforcement agency.<sup>381</sup> As a result, such expert opinion can be highly relevant to questions concerning qualified immunity and substantive constitutional reasonableness of the use of force at the motion to dismiss stage, at summary judgment, and at trial.<sup>382</sup> Policy and training are also highly relevant to separate municipal liability claims, but as discussed in the next Sections, such claims are only available following a determination that the relevant officers violated the plaintiff’s constitutional rights. One last source of tactical information can come from manufacturers of specialized devices. A recent Fourth Circuit ruling emphasized that the makers of the TASER, TASER International, warned officers against using the weapon in “drive stun” mode (physically pushing it against the suspect’s body) against mentally disturbed individuals. After officers did so against a mentally ill suspect whom they were trying to return to a hospital, while the suspect was sitting on the ground holding a stop sign pole, the Fourth Circuit relied on the manufacturer’s guidance and guidance from policing organizations like the Police Executive Research Forum (“PERF”) in holding that it was unreasonable to use the TASER aggressively, and not just for defensive reasons.<sup>383</sup>

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<sup>380</sup> *Id.*

<sup>381</sup> See, e.g., *id.*; *Vineland v. Cty. of Murray*, 990 F.2d 1207, 1212–13 (11th Cir. 1993); *United States v. Myers*, 972 F.2d 1566, 1577–78 (11th Cir. 1992); *Samples v. City of Atlanta*, 916 F.2d 1548, 1551–52 (11th Cir. 1990); *McEwen v. City of Norman*, 926 F.2d 1539, 1543 (10th Cir. 1991); see also 3 Martin A. Schwartz, Section 1983 Litigation: Federal Evidence § 12.08 (5th ed. 2012 & Supp. 2013). But see, e.g., *Robinson v. City of West Allis*, 619 N.W. 2d 692, 699 (Wis. 2000) (finding no expert testimony necessary on the question of reasonableness of use of force and emphasizing case-by-case inquiry).

<sup>382</sup> How much weight courts or juries should accord such testimony depends, of course, on whether policy and training are relevant for understanding the reasonableness of the given encounter.

<sup>383</sup> *Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 905 (4th Cir. 2016) (“[A] police officer may *only* use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force.”).



*B. Rethinking “Reasonableness” Under Qualified Immunity*

Just as the Supreme Court has indicated in one line of cases that “reasonableness” under the Fourth Amendment should be informed by police training—that a reasonable officer is a reasonably well-trained officer—the qualified immunity analysis should similarly take account of police policy and training when deciding whether an officer’s conduct should be actionable. That said, recent rulings such as *Scott v. Harris*<sup>384</sup> and *Brosseau v. Haugen* are notable in the absence of any discussion of policy and training, instead emphasizing that the result “depends very much on the facts of each case.”<sup>385</sup> We agree, of course, that whether a particular use of force was justified in a particular situation will depend on the facts of that case. But we assert that the training that an officer has, and particularly the training that a *reasonable* officer would have received, is very much a relevant circumstance that should be considered. When an officer’s action is contrary to her training, or when it is contrary to the training that a reasonable officer would have received, the infringement of individual rights may, although not invariably, fail to meet the Fourth Amendment reasonableness standard. Thus, we disagree with the suggestion in the Supreme Court’s recent decision in *City & County of San Francisco v. Sheehan* that disregarding training and engaging in “imprudent, inappropriate, or even reckless” conduct leading up to the incident are not of constitutional relevance (although the Court did note that the relevant training for approaching mentally ill persons was itself highly “general[]” in nature).<sup>386</sup>

*C. Rethinking Pattern and Practice Litigation*

A turn in the doctrine from individual decision making to tactics and policy cannot fully occur in the context of Section 1983 suits, which as described under *Los Angeles v. Heller* and *City of Canton v. Harris*, are focused on the constitutional violation by the individual officer, and only in unusual cases on systemic practices. However, DOJ pattern and practice litigation can result in litigation directly targeting questions of

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<sup>384</sup> 550 U.S. 372 (2007).

<sup>385</sup> 543 U.S. 194, 201 (2004) (per curiam).

<sup>386</sup> *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777–78 (2015) (quoting *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)).

policy and training at law enforcement agencies.<sup>387</sup> Consent decrees, settlement agreements, and memoranda of understanding resulting from such DOJ litigation have resulted in changes to use-of-force policies at a range of agencies, and as described, some of the most detailed and tactics-oriented policies have been adopted in agencies pursuant to DOJ consent decrees.<sup>388</sup> It should be no surprise that those agreements, in their varying forms, can result in more detailed and sometimes highly publicized efforts to improve police tactical training and policy, although their varying success is the subject of ongoing study.

However, one reason we have also focused on the content of Fourth Amendment use-of-force doctrine, even if it is currently litigated so often in the individual-officer setting, is its outsized influence on police agencies. That influence may be unwarranted, but constitutional rulings have a gravitational pull in this area, in part, perhaps, because law enforcement agencies are accustomed to being highly attentive to constitutional criminal procedure generally. Also unappreciated in their impact on the potential ability of supervisors to give clear instructions to officers, decisions such as *Scott v. Harris* have suggested that, for constitutional purposes, there is no per se impermissible use of force.<sup>389</sup> While best practices may continue to gradually take hold in spite of Fourth Amendment doctrine, because tactics work to save the lives of both officers and civilians, such tactics would take hold more effectively if Fourth Amendment doctrine did not discourage their use. Legislation and DOJ consent decrees may continue to counter the warping effect of

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<sup>387</sup> For proposals to improve the use of 42 U.S.C. § 14141 in such cases, see Rachel A. Harmon, Promoting Civil Rights Through Proactive Policing Reform, 62 Stan. L. Rev. 1 (2009).

<sup>388</sup> For early examination of such litigation, see, for example, Barbara E. Armacost, Organizational Culture and Police Misconduct, 72 Geo. Wash. L. Rev. 453, 528–29 (2004), and Brandon Garrett, Remediating Racial Profiling, 33 Colum. Hum. Rts. L. Rev. 41, 92–106 (2001). For more recent analysis of trends in such agreements, see Stephen Rushin, Federal Enforcement of Police Reform, 82 Fordham L. Rev. 3189 (2014).

<sup>389</sup> As overbroad an interpretation of that language in *Harris* is not warranted; the Court was rejecting an overly rigid application of *Garner* to a particular police-pursuit setting. However, some U.S. courts of appeals have apparently already, according to Professor Karen Blum, reconsidered form jury instructions that had recognized that some totally unjustified force would be per se violative of the Fourth Amendment. On the *Harris* decision's impact on jury instructions in circuits that had held certain use of force per se impermissible, see Karen M. Blum, *Scott v. Harris*: Death Knell for Deadly Force Policies and *Garner* Jury Instructions?, 58 Syracuse L. Rev. 45 (2007). Clear rules and policy support the recognition of “*Garner*” instructions, under which some totally unjustified force (e.g., using force on a non-resistant subject) would be per se violative of the Fourth Amendment.

the current constitutional standard as well. The constitutional standard could also better stimulate sound police policy in a manner that would protect professional agencies. One possibility would be to have a safe harbor, perhaps in the form of per se lack of municipal liability for the actions of officers, if an agency had adopted sound policies. Such an approach would require expanded municipal liability and a departure from *City of Canton v. Harris*, for patterns and practices of constitutional violations, but then a safe harbor from liability for practices that reflect sound policy. The DOJ, of course, could more formally announce guidelines insulating agencies that adopt sound policies from Section 14141 litigation. Legislation at the state level could do the same. All of these approaches could better connect civil rights litigation to the substance of policies that can save lives.

#### CONCLUSION

The State of Ohio, following shootings like those of twelve-year-old Tamir Rice in Cleveland Park, adopted for the first time a statewide policy on police use of deadly force. It begins by stating: “[P]reservation of human life is of the highest value in the State of Ohio.” However, it ends by noting deadly force may be used by police not just to defend themselves or others from serious injury or death, but as another category of the permitted use of force, “in accordance with U.S. and Ohio Supreme Court decisions, specifically, *Tennessee v. Garner* and *Graham v. Connor*.” The addition of that language is telling. Police apparently sought it, tacitly recognizing that Supreme Court case law permits use of deadly force otherwise not justified by sound decision making or policy.<sup>390</sup> Under our approach, decision making and litigation in the wake of a shooting like the Rice shooting would be quite different. There still might be litigation, a battle of the experts, and factual disputes about what officers did and whether doing so was reasonable and whether the preferred practice is adequately supported by practice and by research. However, no prosecutor or civil attorney could blithely conclude that no legal accountability could result solely because the officers acted “reasonably” in the split-second moments during which force was used. Under our

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<sup>390</sup> Mark Gokavi, Ohio Adopts First-Ever Police Standards on Deadly Force, Dayton Daily News (Aug. 28, 2015), <http://www.daytondailynews.com/news/crime--law/ohio-adopts-first-ever-police-standards-deadly-force/kbGpuQKYFS8sOQMziXxLXO/> [https://perma.cc/FE93-QLUG].

approach, expert reports like those solicited by the prosecutor in the Rice case would be soundly ignored as irrelevant or, at best, incomplete. A tactical Fourth Amendment analysis would focus on whether officers acted contrary to sound police tactics by unreasonably creating a deadly situation, and asking whether a cautious approach could have given them time to take cover, give warnings, and avoid the need to use deadly force.

The story of modern Fourth Amendment doctrine is a story of judicial neglect of the importance of police tactics, in a context in which the structure of liability focuses judges on individual officers and not police policy, followed by a troubling translation of that ill-suited doctrine into some police policies as agencies “teach to the test” by adopting less rigorous training and policy. How did casual language from *Graham* result in erosion of an approach, which continues to be stated in other aspects of Fourth Amendment law, that a reasonable officer is a well-trained officer? Perhaps it is an unfortunate symptom of the influence of constitutional law on police departments, even where the constitutional floor is not actually designed to inform policy and decision making. Modern Fourth Amendment use-of-force doctrine has been developed in the context of civil suits seeking compensation, and authorizing, perhaps with the best intentions, an approach to police tactics emphasizing maximum flexibility for officers to make split-second decisions that needlessly endangers officers, bystanders, and suspects. The Justices for good reasons have sought to protect police discretion from burdensome liability for discretionary decisions. However, as developed in this Article, much of the case law does not and is not intended to inform that discretion. In better-considered rulings, beginning with *Garner*, but reflected in search and seizure law and in other areas, such as the law of interrogations, the Supreme Court Justices and lower courts have engaged with the quality and content of policy and training that informs well-trained officers making reasonable decisions. Officers are not trained to simply react in the moment, and police departments would be gravely remiss to fail to discipline officers that do not use sound tactics to minimize the need for force. Moreover, as developed in Part II, a substantial body of empirically supported tactics has evolved to better inform police use of force, although to be sure, some applications of tactics remain untested, and policy and training needs more careful definition in several key areas that we identify.

To reorient the Fourth Amendment doctrine, constitutional reasonableness must be grounded in tactics. Fourth Amendment reasonableness should reflect objective standards of care, and not ratify split-second decision making. A reasonable officer is a well-trained officer, and a well-trained officer has received instruction and detailed guidance on sound police tactics. When research and experience has established a clear best practice, that practice should be incorporated into Fourth Amendment analysis. While much research has yet to be done on policing, at present, a range of key improvements has been made based on police-tactics research that can promote the minimization of the use of force, including an emphasis on creating time, using distance, issuing clear verbal warnings, and engaging in de-escalation. A tactical understanding of the Fourth Amendment would do much to recover what has been lost in the decades since *Garner*, without unfairly burdening police agencies, and instead bolstering the role of sound policy, police supervision, and training.

This Article has developed a theory of use of force grounded in police-tactics research and designed to accomplish law enforcement goals while protecting the lives of officers and citizens. Only a tactical Fourth Amendment can restore the Constitution to relevance for law enforcement, and as a meaningful source of protection for the lives of citizens and police. Without an overhaul, the Fourth Amendment doctrine of use of force will fade into irrelevance as departments build on the constitutional floor, and increasing public dissatisfaction pressures lawmakers to replace constitutional doctrines with statutory standards—and as a result, the practical regulation of the use of force will increasingly come from other sources, such as Section 14141 litigation, state legislation, and police agencies themselves.

Whether federal civil rights litigation can claim an informative role remains equivocal and much depends on the Justices of the Supreme Court, but also the lower federal courts that—when confronted more directly with the facts of police use of force—have adopted more sensible approaches. Whether federal judges will heed the better angels of their nature, relying more on a concept of the reasonably well-trained officer, more police agencies will likely adhere to the hard-learned lessons of police-tactics research. Our ambition in this Article is to move practice, policy, and jurisprudence in that direction by advancing as deeply consistent with both constitutional sources and research-informed police practices, a tactical Fourth Amendment.

## APPENDIX: USE-OF-FORCE POLICIES, FIFTY LARGEST AGENCIES BY SIZE

Agency	# of sworn personnel	Force continuum or matrix	Verbal warnings required or encouraged before use of lethal force?	Minimization or proportionality?	De-escalation or tactical approach	Systemic review of force data?
New York City (NY) Police	34,454	Yes	Yes	Yes	Yes	Yes
Chicago (IL) Police	12,042	Yes	Yes	Yes	Yes	No
Los Angeles (CA) Police	9,920	No	No	Yes	No	No
Philadelphia (PA) Police	6,515	Yes	Yes	Yes	Yes	Yes
Houston (TX) Police	5,295	No	No	Yes	No	No
Washington (DC) Metropolitan Police	3,865	Yes	Yes	Yes	Yes	Yes
Dallas (TX) Police	3,478	Yes	No	No	Yes	Yes
Phoenix (AZ) Police	2,952	Yes	Yes	No	No	Yes
Baltimore (MD) Police	2,949	No	No	No	No	No
Miami-Dade (FL) Police	2,745	No	Yes	No	No	Yes
Las Vegas (NV) Metropolitan Police	2,743	Yes	Yes	Yes	Yes	Yes
Detroit (MI) Police	2,526	No	Yes	Yes	Yes	Yes
Memphis (TN) Police	2,413	N/A	Yes	No	No	No
Suffolk County (NY) Police	2,396	Yes	Redacted	Yes	Yes	Yes

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<b>Agency</b>	<b># of sworn personnel</b>	<b>Force continuum or matrix</b>	<b>Verbal warnings required or encouraged before use of lethal force?</b>	<b>Minimization or proportionality?</b>	<b>De-escalation or tactical approach</b>	<b>Systemic review of force data?</b>
Milwaukee (WI) Police	2,294	Yes	Yes	No	No	No
San Antonio (TX) Police	2,278	Yes	Yes	Yes	Yes	Yes
Nassau County (NY) Police	2,243	Policy not provided				
San Francisco (CA) Police	2,158	Yes	N/A	Yes	Yes	Yes
Boston (MA) Police	2,121	Yes	No	Yes	Yes	Yes
Honolulu (HI) Police	2,076	Yes	Yes	No	No	No
Atlanta (GA) Police	1,940	No	No	No	No	No
Columbus (OH) Police	1,849	Yes	No	No	No	No
Baltimore County (MD) Police	1,845	Yes	Yes	No	No	No
San Diego (CA) Police	1,831	Yes	Yes	Yes	Yes	Yes
Charlotte-Mecklenburg (NC) Police	1,766	Yes	Yes	No	Yes	No
Austin (TX) Police	1,673	No	No	No	No	No
Prince George's County (MD) Police	1,639	Yes	Yes	Yes	Yes	Yes
Jacksonville (FL) Sheriff's Office	1,590	No	Yes	No	No	No

<b>Agency</b>	<b># of sworn personnel</b>	<b>Force continuum or matrix</b>	<b>Verbal warnings required or encouraged before use of lethal force?</b>	<b>Minimization or proportionality?</b>	<b>De-escalation or tactical approach</b>	<b>Systemic review of force data?</b>
Indianapolis (IN) Metropolitan Police	1,589	No	Yes	No	No	No
Fort Worth (TX) Police	1,528	Yes	No	Yes	Yes	No
Cleveland (OH) Police	1,513	Yes	Yes	Yes	Yes	Yes
Denver (CO) Police	1,383	Yes	Yes	No	No	No
Kansas City (MO) Police	1,363	No	No	No	No	No
Fairfax County (VA) Police	1,360	Yes	Yes	No	No	No
Metropolitan Nashville (TN) Police	1,342	Yes	Yes	No	Yes	Yes
St. Louis (MO) Police	1,334	No	No	No	Yes	No
Seattle (WA) Police	1,285	Yes	Yes	Yes	Yes	Yes
New Orleans (LA) Police	1,261	Yes	Yes	Yes	Yes	Yes
Louisville (KY) Metro Police	1,220	No	Yes	Yes	Yes	No
Montgomery County (MD) Police	1,121	No	No	No	No	No
El Paso (TX) Police	1,067	Yes	Yes	No	No	No
Miami (FL) Police	1,035	Yes	Yes	Yes	Yes	Yes
San Jose (CA) Police	1,016	No	No	No	No	No
Newark (NJ) Police	999	Yes	Yes	Yes	Yes	Yes



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*Tactical Fourth Amendment*

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<b>Agency</b>	<b># of sworn personnel</b>	<b>Force continuum or matrix</b>	<b>Verbal warnings required or encouraged before use of lethal force?</b>	<b>Minimization or proportionality?</b>	<b>De-escalation or tactical approach</b>	<b>Systemic review of force data?</b>
Cincinnati (OH) Police	986	Yes	No	Yes	Yes	Yes
Albuquerque (NM) Police	971	No	Yes	No	Yes	Yes
DeKalb County (GA) Police	961	Yes	Yes	Yes	Yes	Yes
Tampa (FL) Police	954	No	Yes	No	No	Yes
Portland (OR) Police	952	No	Yes	Yes	Yes	Yes
Tucson (AZ) Police	951	Yes	No	No	No	No