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THE “HEART OF THE MATTER”

Controlling Police Officer Use of Force

Learning Objectives

After reading this chapter, you should be able to answer the following questions:

1. What were the key findings of James Fyfe’s study of the new 1972 deadly force policy in the New York City Police Department?
2. What are the key elements of administrative rulemaking?
3. How can tactical decision making reduce police officer use of force?
4. How can meaningful controls over police use of force change the police subculture?

INTRODUCTION

The Central Role of Use of Force in American Policing

Police officers hold awesome powers—powers that are not granted to any other public or private officials. They have the power to deprive people of their liberty through arrest, to intrude into their privacy through a stop and frisk, to use force against people, and ultimately, to take human life through the use of deadly force. It is essential in a free society that these powers be used only when absolutely necessary and legally justified.¹

Looking back over police history, it is astonishing how comparatively recently police departments have developed formal policies to control officers’ use of their powers. As late as the early 1970s, departments sent their officers out onto the streets with hours of training in how to fire their weapons but no meaningful guidelines

on *when* use of deadly force is appropriate. In 1965, for example, the American Bar Foundation praised the Milwaukee Police Department's policy that permitted shooting in cases of "any felony" (which included larceny) for the simple reason that it was a *written* policy. Departments typically kept few records on officers' use of force and made no effort to learn about which officers used force more than others.²

The law and police policies have changed dramatically since those days. This chapter examines the developments in law and policy related to police officer use of force. It is titled "The Heart of the Matter" because of the importance of use of force in police work. The chapter looks at current developments regarding police policies on when officers can and cannot shoot; requirements that officers complete reports on each use of force; review of officer force reports by their sergeants; and review of patterns of force incidents by higher-level command officers. The result is a *systematic* approach to the control of officer uses of force, with several different components. The chapter also examines the emergence of de-escalation as a strategy for reducing the need for officers to use force. It also covers the role of supervisors in properly directing officers under their command, and recent developments in police training designed to reduce force incidents. In short, the chapter illustrates the PTSR Framework discussed in Chapter 1, the relationship between policy, training, supervision, and review in police operations. Finally, the discussion argues that the new systematic approach to officer use of force has the effect of changing the norms and practices of the traditional police subculture.³

Turning Point: The New Deadly Force Policy in New York City, 1972

Police practices in officer uses of force changed dramatically in August 1972. New York City Police Commissioner Patrick V. Murphy issued Temporary Order of Procedure (TOP) 237, a new policy governing police use of deadly force. The policy greatly limited when officers could fire their weapons, abolishing the fleeing felon rule; limiting shootings to situations where there was an imminent threat to someone's life; and prohibiting warning shots, shots to wound a suspect, and shots at or from moving vehicles.⁴

Commissioner Murphy's new policy on police use of deadly force in 1972 was a historic turning point in police accountability. While a few departments had already begun to develop more restrictive policies in the 1960s, police officer discretion on deadly force and all other police actions was essentially ungoverned up to that time.⁵ The new approach begun by Commissioner Murphy established the model that continues to develop and become more systematic today.

The NYPD's policy did not emerge out of thin air. In response to the riots of the 1960s, there was growing public demand for controls over police shootings. Lorie Fridell identified four factors contributing to the movement for new deadly force policies: the broader movement to control police discretion, demands for racial justice arising from the disproportionate number of African Americans shot and killed, court rulings that expanded municipal liability for unjustified police shootings, and the growing social science research on officer-involved shootings

that documented the racial disparities in shootings.⁶ The President's Crime Commission in 1967 recommended "The Development of Guidelines for Police Action," and the following year the Kerner Commission cited "The Need for Policy Guidelines" that would cover a short but important list of police actions.⁷ Law enforcement agencies gradually followed those recommendations.

The Scope of the Policy

NYPD policy TOP 237 had the basic elements that have shaped use of force policies for over 40 years. First and most important, the policy abolished the traditional and very permissive *fleeing felon rule*, which allowed officers to shoot for the purpose of arrest any person they believed had committed a felony and was fleeing arrest. There were no limits regarding the age of the suspect, whether there was an immediate danger to the officer, or the seriousness of the fleeing person's alleged offense. Edward Garner, in the landmark 1985 *Tennessee v. Garner* case, for example, was 15 years old, unarmed, and suspected of a burglary. Additionally, the decision that the person was a fleeing felon rested entirely with the officer, with nothing to guide or check officer decisions. The NYPD policy replaced the fleeing felon rule with the far more restrictive *defense of life* rule, allowing officers to use deadly force only in the defense of life, either their own lives or the life of another person. Additionally, the policy stated that "in all cases, only the minimum amount of force will be used consistent with the accomplishment of the mission" and "every other reasonable means will be utilized for arresting . . . before a police officer resorts to the use of his firearm." (Exceptions are typically made for fleeing persons who have already committed a violent felony and who the officer believes might commit another crime.)⁸

The new NYPD policy also specified a number of prohibitions on officers firing their weapons: no shots "where lives of innocent persons may be endangered," and no warning shots, shots to "summon assistance," or shots "at or from a moving vehicle." All these prohibitions were designed to enhance public safety. A police officer, for example, has no idea where a warning shot might land and who might be accidentally injured. Shots that wound a fleeing person are effective only in the movies. (And it must be said that such movie scenes have a terrible impact on public understanding of police use of firearms.) Consider the circumstances of a fleeing person incident: most often it is at night, giving the officer poor visibility of the person; a gun is a heavy object, making it difficult to aim precisely in an emergency situation; and both the officer and the fleeing person are often moving, making hitting the target extremely difficult. A moving vehicle with an alleged suspect or suspects is also a difficult target (whether the officer is firing at the driver or at a tire). The officer, moreover, might miss the person or the vehicle altogether and thereby risk hitting a bystander. In short, the restrictions in the NYPD policy recognized that all discharges are potentially dangerous—to the officer and others—and that the control of firearms requires a complete picture of firearms usage.

The requirement that an officer complete a use of force report in the new NYPD policy was also an important innovation. The policy required officers to complete a written report after any firearms *discharge*, regardless of the circumstance or outcome of the firing. This included accidental discharges and shots to kill dangerous animals. It is important for supervisors to know if some officers have

high rates of accidental discharges through sheer incompetence and are in need of retraining. Reporting accidental discharges also serves to prevent officers from covering up shootings that are in violation of department policy (e.g., reporting a shot to wound as an “accident”). As an additional accountability measure, the new policy required an automatic review of each report by a new Firearms Discharge Review Board, which would determine whether the “discharge was in accordance with law and department policy” and was “justifiable.”⁹

Evaluation and Impact

The 1972 NYPD policy was evaluated by James J. Fyfe, a former NYPD officer who was then a PhD student at SUNY Albany. He found that the policy reduced the weekly mean of officers who discharged their firearms by 30% over the next 3 1/2 years following its adoption. Most important, the number of persons shot and killed or shot and wounded fell significantly. The officer-reported reasons for firing their weapons also changed. Shots to “prevent or terminate crime” (not a defense of life situation) fell by two-thirds. There was some increase in the number of reported accidental discharges, to 9% of all discharges, which suggested there may have been some attempt at evading the policy in this regard (by reporting a discharge outside of policy as an “accident”), but there was no massive evasion of the policy. Finally, Fyfe found that the new restrictions on firearms discharges did not lead to increases in officer injuries or deaths or to an increase in crime.

In short, Fyfe’s study found that officer use of firearms could be effectively reduced through a restrictive policy, danger to citizens was reduced, and there were no unintended adverse consequences. Additionally, as the first-ever study of the use of deadly force using official police department use of deadly force reports, Fyfe’s study was a breakthrough in terms of police departments opening sensitive data to academic researchers. A rich body of research has developed as a result. Finally, as the first study of the control of officer discretion by administrative rulemaking, Fyfe’s pointed in the direction of controlling officer discretion in other aspects of police work as well.¹⁰

A national consensus quickly emerged on the basic elements of the 1972 NYPD policy, and departments across the country began adopting similar policies. A 1977 report on police use of deadly force by the Police Foundation endorsed the mandatory reporting and review requirements.¹¹ The U.S. Civil Rights Commission’s influential 1981 report, *Who Is Guarding the Guardians*, recommended that “unnecessary police use of excessive or deadly force could be curtailed by . . . strict procedures for reporting firearms discharges.”¹² By the time of the Supreme Court’s 1985 decision in *Tennessee v. Garner*, most big-city police departments had already adopted deadly force policies that were more detailed and restrictive than the *Garner* decision.¹³

By the 1990s, national data on persons shot and killed by the police suggested a significant reduction in fatal shootings by police as more police departments adopted the defense of life policy. In the first thorough study of the subject, Geller and Scott found a “sharp reduction” in persons shot and killed by the police in the nation’s “big cities.” The number fell from 353 in 1971 to 172 in 1984. (Keep in mind that

these data were not a complete national estimate and were based on official FBI data, which we now know seriously underestimate fatal shootings and were probably even less reliable in those years because of more recent improvements in police reporting systems.)¹⁴ Equally significant, the racial disparity in persons shot and killed narrowed from a ratio of 6 or 8 African Americans for every white person shot and killed in the mid-1970s to a ratio of 3 to 1 by the late 1990s. A study of shootings by Memphis police officers found that under the old fleeing felon rule there had been 13 African Americans but only 1 white person shot and killed in the “unarmed and non-assaultive” category. After a new defense of life policy had been put in place, there were no fatal shootings of unarmed persons of either race. In short, the defense of life rule not only achieved its intended goal of eliminating fleeing felon shootings but had the collateral positive effect of reducing racial disparities in persons shot and killed.¹⁵

Given the national crisis of the fatal shooting of African American men that began with the fatal shooting of Michael Brown in August 2014, many people find the positive trends between the 1970s and early 1990s hard to believe. Nonetheless, the available data are very clear on these trends.

The positive impact of the initial restrictive deadly force policies, in fact, is easy to understand when we look at the state of policing before the early 1970s. As we pointed out, police departments traditionally sent their police officers out onto the streets trained in *how* to fire those weapons but with absolutely no guidance on *when* to shoot. A 1961 survey found that about half of departments surveyed relied on an “oral policy.”¹⁶ The 1963 edition of O. W. Wilson’s influential textbook *Police Administration* said nothing about the use of deadly force.¹⁷ A 1999 report by the Philadelphia Police Department’s Integrity and Accountability Office quoted officers who recalled the 1970s as the “wild west,” where it was “open season” and a “free for all” for officers using deadly force. Warning shots and shots at fleeing suspects (two actions now prohibited by all departments) “occurred with alarming frequency.”¹⁸ In short, given the near total lack of controls over shootings, one could reasonably expect that the introduction of even minimal controls would have a significant impact.

In addition to the lack of written policies, prior to the 1970s most police officers did not have to complete detailed reports about use of force incidents. A 1968 book on the Los Angeles Police Department pointed out that for years the LAPD conducted an automatic investigation when an officer damaged a patrol car but did not begin requiring investigations of officer shootings of people until May 1965.¹⁹

ADMINISTRATIVE RULEMAKING: THE BASIC MODEL FOR CONTROLLING OFFICER CONDUCT

The new 1972 NYPD deadly force policy was based on the principle of administrative rulemaking, which is now a basic element of police management. The problem of police discretion was not “discovered” until the American Bar Foundation Survey in the 1950s and the public policy debates sparked by Supreme

Court decisions in the 1960s (see Chapter 1).²⁰ Professor Herman Goldstein played a major role in advocating for administrative rulemaking as a strategy for controlling discretion in the 1960s. The real turning point was law professor Kenneth C. Davis's trailblazing 1975 book *Police Discretion*.²¹

The Framework for Administrative Rulemaking: Confine, Structure, and Check Discretion

The framework for administrative rulemaking in policing developed by Davis in *Police Discretion* consists of three elements: confining, structuring, and checking discretion.²²

Confining Discretion

Confining discretion involves a written policy that clearly defines what an officer can and cannot do in a particular situation. Examples of confining police discretion include the following:

- Use of deadly force policies that prohibit shooting at fleeing felons
- Domestic violence policies that mandate an arrest where there is evidence of a felonious assault²³

Structuring Discretion

Discretion is structured in the Davis model by allowing officers to exercise a certain amount of discretion but guiding it by specifying the factors an officer should consider in making a decision. The admonition to “use good judgment” is too vague and does not give officers meaningful guidance on when they can and cannot shoot. For example:

- Vehicle pursuit policies that instruct officers to consider road conditions and the potential risk to pedestrians or other vehicles before initiating a pursuit²⁴
- A domestic violence policy that directs officers to determine which person was the principal aggressor in the conflict²⁵

Confining and structuring discretion does not seek to abolish discretion altogether. In each of the examples above, officers retain considerable discretion in choosing their course of action, but their response is guided by factors that embody a clear social policy and minimize risk to the public. The goal is to narrow the range of situations where a police officer can exercise judgment about the best course of action. In the criminal justice system, there have been periodic suggestions that discretion be abolished (e.g., in policing, plea bargaining, and sentencing).²⁶ None of these suggestions ever won much support. Experts

recognized that it is virtually impossible to abolish discretion as a practical matter and also that, properly guided, discretion can serve useful purposes.²⁷ Davis put it bluntly: Discretion “cannot be eliminated. Any attempt to eliminate it would be ridiculous.”²⁸ Administrative rulemaking is designed to prohibit certain actions and then guide the exercise of discretion where some police officer action is necessary.

Checking Discretion

Discretion is checked by requiring officers to complete reports of each incident (a firearms discharge, a vehicle pursuit), having those reports reviewed by the officer’s sergeant, and then having them reviewed by higher-level command officers. In the original 1972 NYPD deadly force policy, reports were reviewed both by an officer’s immediate supervisor and by a departmental use of force review board. Examples of checking discretion include:

- a requirement that sergeants critically review officer incident reports for missing information, vagueness, and inconsistencies;²⁹
- use of force review boards, which review incident reports not for purposes of discipline but to identify problematic patterns of officer conduct that have become increasingly prevalent in American policing (see Chapter 1);³⁰ and
- an early intervention system (see Chapter 6) that tracks officer performance on a number of indicators and allows supervisors to identify officers who have an unusually high rate of problematic incidents, such as uses of force or public complaints.³¹

The last two checking procedures described above involve a commander or committee of supervisors of higher authority than an officer’s immediate supervisor. This approach recognizes the fact that in policing, sergeants develop close relations with the officers under their command and as a result might not be completely objective when evaluating whether an officer violated the law or department policy. Robin Engel’s research on supervisors, for example, found that almost a quarter (23%) played a “supportive” role, seeking to protect officers under their command from “unfair” discipline and acting as a “buffer” between them and upper management.³² Sergeants’ knowledge that their reviews of use of force reports will in turn be reviewed by higher-ranking officers serves to keep them from excusing unacceptable actions by officers under their command.

The Contributions of Rulemaking

The administrative rulemaking process makes several important contributions to police accountability and professional policing.

Darrel Stephens on Guiding Officer Conduct

A police department's policies "must not only be written in clear, understandable language but must also be reinforced in daily operations." A vehicle pursuit "in conflict with the department's policy" but for which there is no discipline "sets the stage for confusion and contributes to questions about consistency and fairness in the disciplinary process."

Source: Darrel W. Stephens, *Police Discipline: A Case for Change* (Cambridge, MA: Harvard University, 2011), 3–4.

Guiding Officer Conduct

Detailed policies on use of force, vehicle pursuits, and other actions guide officer conduct, making sure that it is lawful, consistent with the department's goals and values, and consistent among all officers. From a historical perspective, the cruelest thing Americans ever did to police officers was send them out on the street with essentially no guidance on how they should do their jobs, and in particular how to use their awesome powers.³³ The rampant brutality and excessive force that prevailed in the past was not really the fault of the officers themselves but the fault of their departments for failing to give them proper guidance. Lack of good guidance continues today in policies that are vague and unclear. A 2015 report by the inspector general for the NYPD, for example, found that the department's use of force policy was "vague and imprecise, providing little guidance to individual officers on what actions constitute force."³⁴

Rules as Statements of Values

Rules governing police actions in critical incidents are statements of values. Use of force policies typically begin with the statement about the importance of protecting human life. The 2017 Use of Force Policy of the Metropolitan Police Department of Washington, DC, for example, states:

The policy of the Metropolitan Police Department (MPD) is to value and preserve the sanctity of human life at all times, especially when lawfully exercising the use of force. Therefore, MPD members 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 the lives of the member or others.³⁵

The 2012 Las Vegas Collaborative Reform Process report found that the Las Vegas Metropolitan Police Department's policy on deadly force was good in many respects but lacked a statement on respect for the sanctity of human life, and recommended that one be added.³⁶

The typical defense of life policy affirmation of the value of life stands in sharp contrast to the values that were inherent in the old fleeing felon rule. That rule gave priority to making arrests and communicated the message that if someone was mistakenly or unnecessarily shot and killed, that was just an unfortunate consequence of enforcing the law. The defense of life standard reverses the order of priority, communicating the message that the possible escape of a genuine felon is a price we are willing to pay to ensure the protection of life.

Rules as the Basis for Training and Supervision

Policies on critical incidents serve as the basis for effective officer training. As we explained in Chapter 1 regarding the PTSR Framework, inadequate training can completely undermine a state-of-the-art policy. In the successful challenge to the NYPD's stop-and-frisk practices, the federal court found that the NYPD training program was giving its officers incorrect information about the law of stops and frisks.³⁷ Darrel Stephens argues that "high quality, entry-level, field and in-service training programs are key to ensuring that officers not only understand the department's expectations but have the skill level to meet them."³⁸

As Stephens points out, police training takes several different forms. Preservice academy training is only one part of a comprehensive training program. The Washington, DC, police department, for example, maintains a Roll Call Training program, which involves short sessions at roll call to supplement other training programs, to provide "an open forum for discussion" of various issues, and "to keep members up-to-date" about new issues (e.g., a recent court decision).³⁹ Academy training is easily forgotten once an officer hits the streets. In fact, policing has been notorious for veteran officers telling the new recruit, "Forget all that academy crap; this is how we really do it."

Regular annual in-service training for all officers is particularly important. All but a few states mandate in-service training by law (although they vary considerably in terms of the number of required hours of training). The California POST program recognizes the special legal and social significance of certain policies, and has a required in-service component labeled "Perishable Skills." Every 2 years, officers are required to complete 12 hours of training, with 4 hours each on arrest and control, driver training/awareness, and tactical firearms or force options.⁴⁰ This requirement recognizes that under the pressure of routine police work, officers' skills can erode, with officers beginning to cut corners in various ways. Annual in-service training is designed to correct this problem.

Rules as the Basis for Appropriate and Consistent Discipline

Clear policies on critical incidents provide the basis for appropriate and consistent discipline of officers. Common sense tells us that it is impossible to properly discipline any employee, regardless of the occupation, if there are no clear rules on what actions are not allowed. Clear rules also provide for consistent discipline, so that two officers do not receive substantially different discipline even though their actions were the same.⁴¹

Darrel Stephens points out that police discipline focuses too much on punishment, under the assumption that it will “deter future misconduct.” He argues that the disciplinary process needs to develop an “alternative course of action that would lead to behavioral change” among officers.⁴² Early intervention systems (Chapter 6) provide nondisciplinary interventions, such as retraining and professional counseling (on substance abuse or anger management, for example), designed to improve officers’ performance problems.

Rules as a Public Contribution to Openness and Transparency

The President’s Task Force on 21st Century Policing recommended that to build trust and legitimacy “law enforcement agencies should make all department policies available for public review” by posting them on their websites.⁴³ As we learned in Chapter 1, in the professionalization era of police history, departments became closed, secretive bureaucracies, isolated from the communities they served. Today, openness and transparency are recognized as the foundation of public trust and confidence in the police. An increasing number of police departments today place their policies and procedures on their websites.

Making public a department’s policies on use of force or domestic violence, for example, helps people understand why officers acted as they did in a controversial incident or see how a particular officer violated department policy. With policies public, moreover, it is then possible for community activists, civic leaders, and elected officials to engage in an informed debate over whether a revised policy is needed. In the Los Angeles Sheriff’s Department, the Office of Independent Review recommended placing the *Manual of Policies and Procedures* on the department website, because “the public has an interest in being able to know the internal rules that govern the actions of the Sheriff’s Department.”⁴⁴

CONTROLLING POLICE USE OF DEADLY FORCE

The Elements of Deadly Force Policies

Police department policies on the use of deadly force today contain a number of different elements. They usually begin with a statement of values and then clearly describe the situations where officers can legitimately use deadly force and those situations where it is prohibited. The Minneapolis, Minnesota, police department policy, for example, opens with the declaration that “sanctity of life and the protection of the public shall be the cornerstones of the MPD’s use of force policy.” It then embraces the U.S. Supreme Court’s standard that in any situation, the use of force must be “objectively reasonable.” The court in *Graham v. Connor* (1989) established a three-part test of reasonableness. The test involves “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of

the officers or others, and; whether he [the person involved] is actively resisting arrest or attempting to evade arrest by flight.”⁴⁵ Although it is the prevailing constitutional standard on police officer use of force, the *Graham v. Connor* decision has been severely criticized; see our discussion in Box 3-3.

Deadly force policies typically allow some limited exceptions to the strict defense of life rule, authorizing the use of deadly force where the officer believes a suspect has committed a felony involving the use of deadly force and is likely to commit another violent crime. The Minneapolis police department’s policy is typical in this regard: “To effect the arrest or capture, or prevent the escape, of a person who the officer knows or has reasonable grounds to believe has committed or attempted to commit a felony if the officer reasonably believes that the person will cause death or great bodily harm if the person’s apprehension is delayed.”⁴⁶

By creating an exception to the general rule, the policy structures it by specifying that there must be reasonable grounds to believe there is a serious potential threat to someone’s life (“will cause . . . if . . .”). It does not represent a return to the old fleeing felon rule.

The Washington, DC, policy on use of force confines officer discretion with several specific prohibitions. They include no warning shots, no shots “into a crowd,” no shots in cases involving a suspected misdemeanor, no shots “solely to protect property interests,” and no shots at a fleeing person where there is “mere suspicion of a crime.”⁴⁷

An important new issue that has been gaining support among police experts is that judgments about whether an officer was justified in using deadly force should take into account the officer’s pre-shooting tactics, which set the officer on a course of action that increased the likelihood of using deadly force. In 2013 the California Supreme Court, in *Hayes v. County of San Diego*, held that an officer was liable “if the tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of circumstances, that the use of deadly force was unreasonable.”⁴⁸

A collateral issue regarding police use of firearms involves an officer displaying a firearm in encounters with citizens. Displaying a handgun has two undesirable effects. First, it increases the risk of an accidental discharge that could result in the injury or death of a citizen or another police officer. Second, displaying a handgun in a contact with a citizen is an intimidating expression of police power. Some departments now explicitly prohibit the display of an officer’s handgun. The Washington, DC, police department use of force policy, for example, directs that no officer “shall draw and point a firearm at or in the direction of a person” unless a substantial risk of harm exists. Additionally, officers are required to complete a use of force report for drawing and pointing their weapon at another person.⁴⁹

POLICE USE OF LESS LETHAL FORCE

In an effort to reduce the use of deadly force, police departments some years ago adopted various forms of less lethal force. These include chemical sprays and conducted energy devices (CEDs, popularly known by the trademarked

name Taser).⁵⁰ Providing alternatives to the use of deadly force had the laudable goal of reducing officer-involved shootings and saving lives. The Department of Justice in 2003, for example, faulted the Detroit police for having only “a limited array of [nonlethal] force options available,” providing only firearms and chemical spray.⁵¹

The new less lethal devices, however, introduced new issues regarding their use that needed to be addressed. As a result, they too are now covered by written policies governing their proper use.

When first introduced into policing, CEDs were greeted with both enormous popularity among police departments and much public controversy. Aggressively promoted by their manufacturers, they were quickly adopted by police departments. The two most popular CED models were introduced in 1999 and 2003, and by 2011 over 11,000 law enforcement agencies in the United States had adopted them, covering all but the very smallest police departments. Very quickly, however, there were a number of deaths of people against whom police CEDs had been used. Civil rights groups, including the ACLU and Amnesty International, protested their use. In a 2008 report, Amnesty International identified 334 deaths in the United States between June 2001 and August 2008, and concluded that CEDs are “inherently open to abuse,” in large part because of the “low threshold” police departments adopted for their deployment. Consequently, it recommended that police departments either suspend the use of CEDs immediately or establish a higher threshold for their deployment.⁵² In most of the initial publicized cases, however, it was not clear whether the victim’s death was *directly caused* by the CED or was the result of other medical factors. Recognition of the potential lethality had one important effect on generally used terminology. Initially, CEDs and other weapons had been referred to as “less-than-lethal” weapons, suggesting that they were not potentially lethal. The commonly used terminology today is “less lethal” weapons, in recognition that they can result in death in certain circumstances.⁵³

Initially, the major problem with CEDs was that many police departments quickly adopted them without detailed policies governing their use. In response to the resulting public controversy, formal policies are now standard and a national consensus over the content of those policies has emerged. The model policy developed by the Police Executive Research Forum (PERF) and the COPS office appears in Box 3-2.

Following the principles of administrative rulemaking, the policy *confines* CED use by limiting it to incidents involving active resistance or active aggression (Point #1), and also by limiting use to only one officer per incident (Point #2). Use against pregnant women, the elderly, children, and frail persons is also prohibited (Point #7). The model policy *structures* the use of CEDs by specifying various procedures to be followed when they are used, requiring, for example, that activation should be limited to “one standard cycle” (Point #3). CED deployment is *checked* by requiring an officer report on every usage and also by creating a special out-of-chain-of-command review for any deployment that results in death (Point #32).⁵⁴

Model CED Policy (Excerpts)

1. CEDs should only be used against persons who are actively resisting or exhibiting active aggression, or to prevent individuals from harming themselves or others. CEDs should not be used against a passive suspect.
2. No more than one officer at a time should activate a CED against a person.
3. When activating a CED, law enforcement officers should use it for one standard cycle and stop to evaluate the situation (a standard cycle is five seconds)
7. CEDs should not generally be used against pregnant women, elderly persons, young children, and visibly frail persons unless exigent circumstances exist.
8. CEDs should not be used on handcuffed persons unless they are actively resisting or exhibiting active aggression, and/or to prevent individuals from harming themselves or others.
12. Officers should avoid firing darts at a subject's head, neck, and genitalia.
13. All persons who have been exposed to a CED activation should receive a medical evaluation. Agencies shall consult with local medical personnel to develop appropriate police-medical protocols.
16. Following a CED activation, officers should use a restraint technique that does not impair respiration.
18. Agencies should create stand-alone policies and training curriculum for CEDs and all less-lethal weapons, and ensure that they are integrated with the department's overall use-of-force policy.
32. Every instance of CED use, including an accidental discharge, should be accounted for in a use-of-force report.

*Source: James M. Cronin and Joshua A. Ederheimer, *Conducted Energy Devices: Development of Standards for Consistency and Guidance* (Washington, DC: Department of Justice and the Police Executive Research Forum, 2006).*

One of the main concerns regarding CED deployment is that instead of being an alternative to a firearm, they become a substitute for lower levels of force, with the result that more serious force (the CED) is used than would be the case if CEDs were not available. One example would be using a CED against a suspect who becomes passively resistant by going into a fetal position. The model policy limits CED use to incidents of aggressive resistance. Nonetheless, the national survey of CED use found that almost half of all agencies permitted the use of CEDs against persons who only passively resisted an officer's commands.⁵⁵ Concerns about

inappropriate use of CEDs were confirmed by a 2011 Justice Department investigation of the Portland, Oregon, police department that found a pattern of inappropriate CED use against mentally disturbed people. “These practices,” the report concluded, “engender fear and distrust in the Portland community,” which adversely affects the department’s “ability to police effectively.”⁵⁶ On the positive side, the national survey of CED use found that CED deployment incidents involved far fewer injuries to both citizens and officers than did officer use of physical force. Citizens were injured in 25.1% of CED incidents, compared with 48.9% of incidents where an officer used physical force. Officers, meanwhile, experienced injury in 7.6% of CED incidents, compared with 21.2% of physical force incidents.⁵⁷

CONTROLLING POLICE USE OF PHYSICAL FORCE

The Problem of Officer Use of Physical Force

Allegations of “police brutality”—meaning the use of excessive physical force—have long been a volatile civil rights issue and, along with police shootings, have long been a major source of tension in police–community relations. The National Advisory Commission on Civil Disorders in the mid-1960s found that 43% of people in the predominantly African American community of Harlem in New York City believed that police brutality existed; a nationwide survey in 1965 found that 35% of African American men believed that it existed in their communities.⁵⁸

Recent Justice Department investigations of local police departments have found serious patterns in the inappropriate use of force. The 2014 Justice Department Findings Letter on the Baltimore, Maryland, police department found multiple problems, including inadequate policies to control use of physical force and officers using “overly aggressive tactics” that “unnecessarily escalate encounters” with people. Encounters involving “loitering,” for example, escalated into a “failure to obey” accusation by an officer and then a use of force. Officers also used force unreasonably against people who were experiencing a mental health crisis. Baltimore officers also used unreasonable force against juveniles, ignoring “widely accepted [alternative] strategies for police interactions with youth.” Officers often used unreasonable force “against people who are not a threat to officers or to the public” and against people who were already restrained by handcuffs.⁵⁹

The Justice Department investigation of the Portland, Oregon, police department, focusing specifically on mental health–related incidents, found that “encounters between PPB officers and persons with mental illness too frequently result in a use of force when force is unnecessary, or in the use of a higher level of force than necessary or appropriate, up to and including deadly force.”⁶⁰

Systematic studies of police officer activities, however, have consistently found that police use of force of any kind is a relatively rare event in policing. The consistent finding is that officers use force in only between 1% and 2% of all

citizen encounters. The Police-Public Contact Survey (PPCS), the most systematic national survey, for example, found that officers used or threatened force in 1.6% of all encounters between the years 2002 and 2011.⁶¹ (Combining threats with actual uses of force muddies the water somewhat, because a threat is not an actual use.) Many people have difficulty believing the 1% to 2% estimate, thinking it is much too low considering all the publicity about police use of excessive force. The estimate needs to be placed in the context of the nature of all citizen encounters. The majority of encounters involve routine matters of order maintenance and service to the public, which are generally problem-free. Even most traffic stops and arrest situations are free of overt conflict between the officer and the member of the public.

All studies have found patterns of racial and ethnic disparities in the use of force. The PPCS report found that African Americans experience a threat or actual use of force in 3.5% of all encounters with police, compared with 2.1% of Hispanics and 1.4% of whites. Additionally, observational studies of police patrol have estimated that about one-third of all uses of force involve excessive force.⁶²

Although statistically an infrequent event, incidents of excessive force have enormous social and political consequences, particularly with respect to race. The police are symbols of power, enhanced by the uniform, the badge, and the gun. For many African Americans, police shootings and uses of physical force represent the exercise of coercive power by government against politically powerless communities.⁶³ Additionally, as criminologist Albert J. Reiss pointed out years ago, among low-income males “police misconduct cumulates” over time such that a significant number of people in those neighborhoods “experience misconduct at one time or another.”⁶⁴ That situation is true today, and in poor and African American neighborhoods it enhances the perception of people in those neighborhoods that they are being targeted for abuse by the police.

Controlling Officer Use of Physical Force

Controlling police use of force is a necessary step in building better community relations and developing trust and confidence in the police. Current efforts to control police use of physical force seek to reduce the incidence of all forms of force, not just excessive force. In important respects, physical force is more difficult to control than deadly force. It includes a wide range of actions, from “soft empty hand” control of a person to hitting someone with a police baton. Additionally, the number of routine physical force incidents in any given year far exceeds the number of shooting incidents. The PPCS survey estimates that there are about 43 million contacts between the police and the public each year. If force is used in 2% of all contacts, that means there are 860,000 incidents of police use of physical force annually, or 16,538 each week.⁶⁵ The sheer volume of such incidents greatly complicates the challenge of controlling them.

Perhaps the most difficult aspect of incidents where a person claims that “excessive force” was used is that “excessive” force is typically a matter of *perception*. What the officer regards as a necessary act to overcome a suspect’s resistance, the person involved often regards as excessive and unnecessary. In one revealing

study that compared officer and citizen perspectives on force incidents, 33.4% of officers reported either active aggression or a deadly threat by the citizen, whereas no citizen reported engaging in such behavior. None of the officers, meanwhile, reported that they faced no resistance or passive resistance, while 76.7% of the citizens reported that they did not resist.⁶⁶

The 2017 Washington, DC, police department *confines* officer discretion in using non-deadly force “(a) To protect life or property; (b) To make a lawful arrest; (c) To prevent the escape of a person in custody; (d) To control a situation or subdue and restrain a resisting individual; or (e) To effect a lawful stop of a fleeing individual.”⁶⁷ Use of force is not justified, for example, in response to a person’s rude language or verbal insults directed at an officer. Nor is force justified for retaliation against a person, for whatever reason. The prevailing standard is that an officer may use only the amount of force necessary to bring a situation under control.

The 2015 Seattle Police Department Use of Force Policy as a Case Study

The 2015 Use of Force Policy in the Seattle, Washington, police department provides an excellent case study of an up-to-date policy. It was developed as a result of a Justice Department consent decree with the department and had input from both the consent decree monitor and the newly created Seattle Community Police Commission. The policy embodies the principles described earlier regarding administrative rulemaking.⁶⁸

The policy begins with a statement of “Use of Force Core Principles.” The first item states (in boldface type, for emphasis) that “every member of the Seattle Police Department is committed to upholding the Constitution and laws of the United States and the State of Washington, and defending the civil rights and dignity of all individuals, while protecting human life and property and maintaining civil order.” This acts as both a statement of purpose and a statement of the department’s values. Interestingly, the second core principle states that when “time and circumstances permit, officers shall use de-escalation.” Placing a requirement (“shall use”) to first consider de-escalation defines the department’s priority: avoiding the use of force whenever possible. This is a significant statement and will be discussed later, in the section on de-escalation.⁶⁹

Interestingly, the third core principle directs officers to “recognize that their conduct prior to the use of force . . . may be a factor which can influence the level of force necessary in a given situation.” This is a very new kind of statement, not seen in a police department use of force policies until recent years. Yet, as noted earlier, the California Supreme Court has held that police departments can legitimately take into account an officer’s tactical decisions before using deadly force. The statement embraces the new thinking in policing about tactical decision making and the recent developments in police training. The concept of tactical decision making recognizes that most police officer encounters with members of the public are not “split-second” decisions but scenarios that play out over time. Officers have the capacity to influence the outcome of encounters through the tactical decisions they

make. Getting too close to a person who is emotionally out of control increases the opportunity for the person to attack the officer, who will then respond with a use of force. The Seattle policy also directs officers to “continually reassess the situation” and change their response to an incident accordingly. Consider, for example, a 911 call involving a man experiencing a mental health crisis, yelling at people in his front yard. The officer may learn from neighbors that he usually carries a handgun with him, and readjust his or her plan of action accordingly. Alternatively, neighbors might tell the officer that these episodes happen fairly regularly but they usually pass after 15 or 20 minutes. In that case, the officer can adjust his or her plan of action in a different direction.⁷⁰

The fourth core principle states that officers will “only” use the amount of force that is “objectively reasonable,” necessary, and “proportional to the threat or resistance of a subject.” In this way, the force policy both confines and structures officer use of force. Officers may use force when they are threatened, but they may not use more than is necessary to “effect a lawful purpose,” given the circumstances. Any level of force above that limit becomes “excessive force.”⁷¹

Officers are authorized to use force only if it is “reasonable, necessary, and proportionate” (to the immediate resistance or threat encountered). The Seattle policy then structures officer discretion in using force by listing 13 factors to be considered in making a decision to use force. They include, but are not limited to, the seriousness of the crime, the level of threat or resistance posed by the person, whether there is an “immediate threat,” the potential for injury to any person (including the officer), and the availability of other resources (e.g., backup from other officers).⁷²

Issues Related to Use of Force Policies

Clarity

Use of force policies need to be very clear on all the critical elements. An investigation of the NYPD’s policies, by the inspector general for the department, found that the “NYPD’s current use-of-force policy is vague and imprecise, providing little guidance to individual officers on what actions constitute force.” The department’s Patrol Guide, the basic document for patrol operations, was “completely silent on what actions constitute ‘force.’”⁷³ In 2002, meanwhile, a Justice Department investigation of the Detroit Police Department found that its policy “does not define ‘use of force’ nor adequately address when and in what manner the use of less-than-lethal force is permitted.”⁷⁴

Continual Revision

Policies also need to be continually revised. The “state of the art” in policing is continually changing as new issues and perspectives develop. De-escalation, for example, is a relatively new issue and has only recently been added to use of force policies. The Washington, DC, police, for instance, issued a revised policy on November 3, 2017, which replaced the policy issued only 11 months earlier.⁷⁵

Additionally, the issue of use of force typically appears in other department policies, and they need to be kept consistent with each other. As we already noted, the inspector general for the New York City Police Department found inconsistencies among various NYPD policies.⁷⁶

Is Handcuffing a Use of Force?

Policies related to handcuffing differ in departments across the country. The Washington, DC, policy requires that when a handcuffed person complains of pain or injury from being handcuffed, the officer is required to “notify an official [in the department].” The official is then to investigate, document the complaint in a prisoner illness/injury report, and if force was used to apply the handcuff, complete a use of force investigation.⁷⁷

THE REPORTING AND INVESTIGATION OF USE OF FORCE

Officers’ Responsibilities

The requirement that all officers who use force, or who witness a force incident, report it is the foundation of a comprehensive policy on use of force. The Seattle force policy *structures* the requirements for officers reporting use of force incidents. First, it clearly defines four levels of use of force, setting different requirements for each level. De minimis acts include separating people without causing pain or injury. Type I uses of force are those causing “transient pain” or disorientation, or involving pointing a firearm or other device at a person. Type II incidents are those that involve physical injury or a person’s complaint of an injury, the use of a CED or OC spray, or a medium-level injury caused by a department canine. Type III incidents involve use of deadly force, great or substantial bodily harm to a person, loss of consciousness, neck or carotid holds on a person, and any misconduct by the officer.⁷⁸

Except for de minimis incidents (the lowest level of force), all uses of force are required to be reported by the officer who used force, witness officers, and the sergeant responsible for the officers. In the case of Type II uses of force, the involved officer is required to complete a force report (on the department’s computerized Blue Team system) “by the conclusion of the current shift.”⁷⁹

Requiring a prompt officer force report challenges a long-standing practice (which still exists in some departments) of allowing officers more time to file their force reports. In some departments, officers are granted 48 hours by the union contract; in other departments it is a matter of custom.⁸⁰ Delaying officer reports impedes accountability, because time allows memories to fade, and the delay also creates the opportunity for officers to collude and create a cover story designed to justify the use of force.

The Seattle policy also requires officers to provide “detailed” descriptions of the circumstances of the incident, the “words, actions, or behaviors” of the person that “precipitated the use of force,” and any force used by other officers.

Sergeants’ Responsibilities

The second important component in use of force reporting involves the sergeants’ review of those reports. Justice Department investigations of troubled police departments typically found that sergeants just signed their officers’ use of force reports without critically reviewing them.⁸¹ Critically reviewing officer use of force reports involves spotting vagueness, lack of detail, inconsistencies, and “canned” phrases (such as “the person was threatening”) that make it impossible to determine if the level of force the officer used was necessary, proportional, and within the department’s policy. If sergeants fail to do their duty at this critical point, it undermines a department’s accountability system regarding officer use of force.

Sergeants have more responsibilities in use of force incidents than just reviewing officers’ force reports, most of which relate directly to holding officers accountable for their actions. The new Seattle policy, for example, requires sergeants to confirm that medical aid is rendered to anyone needing it, secure the scene, attempt to locate witnesses to the incident, attempt to locate any private video recordings of the scene (as in private security video systems), conduct “separate interviews of officers involved” in the incident, review the force report of the officer who used force “to make sure the account is full and accurate,” notify command officers if any officer misconduct is suspected or if there are concerns about tactics used, and complete a summary of the incident, accompanied by supporting documents.⁸² Until fairly recently, most police departments did not spell out all the various responsibilities of sergeants (which most likely meant that they did not perform all those tasks).

The Force Investigation Team: A New Approach to Investigating Force Incidents

A new procedure for improving the quality of use of force investigations involves a special unit, usually called the Force Investigation Team (FIT). The FIT is mobilized in the case of officer-involved shootings and, in some departments, incidents involving a serious use of physical force. The 2016 Newark consent decree, for example, required the creation of a Serious Force Investigation Team (SFIT), with its own specialized “training curriculum and procedural manual,” whose function is “to ensure that uses of force that are contrary to law and policy are identified and appropriately resolved.” Additionally, FIT reports are required to be sufficiently detailed so as to allow the use of force review board (see Chapter 1) to “identify trends or patterns of policy, training, equipment, or tactical deficiencies.”⁸³

A FIT is designed to improve the quality of investigations in two ways. First, investigations will be conducted by officers who have training, experience, and expertise related to the task. Second, it removes from an investigation the officer's immediate supervisor, who may have developed a close personal relationship with the officer in question and, thereby, might be less independent than FIT officers. The creation of FIT units became an increasingly common feature of Justice Department consent decrees covering local police departments.⁸⁴

A Comment on *Graham v. Connor*

The Supreme Court decision in *Graham v. Connor* (1989) established the current legal standard of “objectively reasonable” regarding police officer use of force. The court held that a use of force is objectively reasonable depending on the seriousness of the incident, whether the suspect poses an immediate threat to the officer, and whether he or she is actively resisting arrest.⁸⁵ A convenient shorthand for the standard is the acronym SITRA (for Seriousness of the incident, ImmEDIATE Threat, and Resisting Arrest). Many police department use of force policies explicitly cite and quote from the *Graham v. Connor* decision.⁸⁶

PERF has strongly criticized the “objectively reasonable” standard in the *Graham* decision, however. Its report on *Guiding Principles on Use of Force* argues that while the decision says “what police officers *can legally do* in possible use-of-force situations . . . it does not provide specific guidance on what officers *should do*,” in terms of avoiding the use of force in the first place. As a result, PERF argues, the “objectively reasonable” standard has become an inflexible straitjacket. The then chief of the Washington, DC, police department put it this way: “The question is not ‘Can you use deadly force?’ The question is ‘Did you absolutely have to use deadly force?’”⁸⁷ In too many cases, the proper answer is no, the officer did not absolutely have to. The result is many force incidents that are “lawful but awful”; that is, they comply with the *Graham* standard but were completely unnecessary.⁸⁸

The PERF report argues that police departments can and should go beyond the *Graham* decision and through better policies and training provide guidance to officers that will serve to reduce the use of force and as a result prevent injuries, save lives, and reduce the number of incidents that inflame police–community relations. Many departments have already adopted this course of action through policies and practices discussed in this book: de-escalation, tactical decision making, and disengagement. The *Graham* decision does not forbid officers from using de-escalation, and department policies and training on de-escalation can prevent many encounters from escalating to the point where force, including deadly force, is likely to be used. The PERF critique of *Graham* is remarkable in one important respect. It is almost certainly the first time a police chiefs’ organization recommended that police departments move to a higher standard in reducing police use of force than the one set by the Supreme Court.

BOX 3-3

DE-ESCALATION AS A STRATEGY FOR LIMITING USE OF FORCE

The idea of de-escalating encounters with people that have the potential for conflict has emerged as a best practice in policing. The President's Task Force in 2015 recommended that police departments "should emphasize de-escalation . . . in situations where appropriate."⁸⁹ A PERF report on de-escalation concluded that officers do not have to take any formal action in all encounters with people. "If an officer can walk away from a situation and no negative outcome results, . . . that can be a more effective response than thinking that an arrest or other intervention must be made."⁹⁰

A long-standing problem in American policing has been the tendency of officers to escalate an encounter in response to their perception of disrespect or lack of cooperation on the part of a citizen. Law professor Christy Lopez has labeled the practice "contempt of cop," meaning that in response to disrespect or noncooperation, officers too often respond with verbal abuse, use of force, and/or an arrest.⁹¹ Research on police-citizen interactions has consistently found that citizen disrespect increases the probability of an officer using force and/or making an arrest.⁹² The Justice Department investigation of the Seattle Police, for example, found that officers used excessive force against citizens who "talk back" to officers and express their discontent with the situation.⁹³

If officers consistently de-escalate and respond to mere verbal disrespect by simply ignoring it or talking about something else, uses of force will be greatly reduced. The benefits of reducing uses of force are many. There will be fewer injuries to people, fewer protests and less adverse media coverage of the department, fewer lawsuits, fewer citizen complaints, fewer internal affairs investigations of force incidents (which are costly in terms of department personnel), and fewer disciplinary actions. The savings in terms of departmental personnel time and bad feelings will be enormous. And especially important, there will be fewer incidents that inflame police-community relations and undermine trust and confidence in the police.

The Seattle De-Escalation Policy

The de-escalation policy for the Seattle, Washington, police department represents a state-of-the-art policy. As we noted earlier, the department's general use of force policy states as its second core principle that when circumstances permit, an officer "shall use de-escalation tactics."⁹⁴

The Seattle policy *structures* officer discretion in using de-escalation by listing circumstances regarding why a person is not complying with an officer's request: a mental condition or impairment, developmental disability, a physical limitation, language barrier, drug interaction, or other behavioral crisis. Instead of responding to a lack of compliance as resistance or "contempt of cop," the policy directs officers to determine if one of these circumstances exists and, if so, to choose a de-escalation alternative.⁹⁵

One of the key elements of de-escalation involves slowing down a situation and buying time to reassess it and, if appropriate, call in additional officers or resources. The Seattle policy directs officers, when appropriate, to “slow down or stabilize the situation so that more time, options and resources” can become available. The policy also *structures* officer discretion by providing a list of possible actions they can take to de-escalate. These include verbal techniques such as simply listening and explaining (the department maintains a special LEED training program, for Listen and Explain with Equity and Dignity);⁹⁶ using verbal persuasion, advisements, and warnings; avoiding physical confrontations with people, which can be achieved by keeping one’s distance and moving to a safe position (e.g., with a barrier between one’s self and uncooperative people); and calling for more officers (particularly trained Crisis Intervention Team officers) for mental health–related situations.⁹⁷

Does De-Escalation Work?

But does de-escalation work? There is still a shortage of evaluations, but there are some valuable insights in the April 2017 report of the Seattle Police Monitor, the court-appointed official charged with overseeing the Justice Department consent decree. Previously, officers failed to de-escalate in 19% of all incidents that resulted in a use of force.⁹⁸ A 2018 department report on uses of force, however, found that officers de-escalated in about 99% “of those cases where that duty [to de-escalate] was applicable.” This conclusion was reached after examining the reports on use of force incidents for the period and making judgments about whether de-escalation was appropriate from the description in the officer force reports. In short, officers had been trained on de-escalation, embraced it, and were using it on the street. There is supporting evidence in the police department’s 2018 annual report on *Use of Force*, which found that between 2014 and late 2017, uses of force by Seattle officers had been declining.⁹⁹ To be sure, de-escalation was certainly not the only factor contributing to that decline, but it most certainly was one important factor. In the end, de-escalation does not put officers at greater risk, as some critics have feared, and the initial evidence indicates that it can significantly reduce overall uses of force.

Components of the Seattle De-Escalation Policy

1. That officers “shall use” de-escalation
2. Factors to consider in choosing de-escalation
3. Specific de-escalation tactics

BOX
3-4

The Larger Picture: De-Escalation and Tactical Decision Making

De-escalation, tactical decision making, and tactical withdrawal are all part of the new thinking about police work and the use of force in particular. Traditionally, use of force policies have focused on the immediate circumstances of a police encounter, telling officers what they can and cannot do. The new approach takes a broader view and sees police–citizen encounters as scenarios that play out over time. A scenario may last from 1 1/2 minutes to 30 minutes, or even longer. During that time, an officer has an opportunity to continually reassess the situation and make tactical choices that are likely to reduce the possibility of using force.¹⁰⁰

In their study of police use of deadly force, Peter Scharf and Arnold Binder identified four stages in scenarios of police–citizen encounters: *Anticipation, Entry and Initial Contact, Dialogue and Information Exchange, and Final Decision*. Each stage includes actions by the citizen, the perception of those actions by the officer, the officer’s response, and the person’s response to the officer’s initial action.¹⁰¹ Although the scenario originated in a study of deadly force, it is relevant to all police–citizen encounters. Alpert and Dunham, meanwhile, went even further with a sequence of events in police–citizen encounters involving force, identifying 10 different steps in the entire sequence.¹⁰² As we have already noted, the Justice Department 2012 report on a pattern of excessive and unnecessary use of force against mentally ill persons in Portland emphasized that “properly applied, de-escalation begins long before the officer is faced with the choice of using force and will often make that decision unnecessary.”¹⁰³

HOW ACCOUNTABILITY-RELATED REFORMS CAN TRANSFORM THE POLICE SUBCULTURE

An extremely important but little recognized impact of accountability-related reforms in policing involves the extent to which they can begin transforming the traditional police officer subculture. The evidence on this point, which comes from the evaluations of several Justice Department consent decrees, is still tentative but nonetheless promising for the future of police reform and achieving greater accountability.¹⁰⁴

All police experts recognize that the traditional police subculture is a powerful factor in policing. As in other occupations, the police officer subculture involves *the informal norms and behaviors that shape employees’ day-to-day work*.¹⁰⁵ The norms of the police subculture can be defined in plain language as follows: First, they involve what officers in a particular department know *they must do* to stay out of trouble and avoid the risk of discipline; second, they involve what officers generally know *they can get away with*, without risking internal investigation and possible discipline or termination (in short, what officers know they can get away with).

How Tactical Decision Making Could Have Saved Michael Brown's Life

Michael Brown did not have to die in Ferguson, Missouri, that day.

Later, Officer Darren Wilson, who shot and killed Brown, told the grand jury (as reported in *The New York Times*) that “the only option I thought I had was my gun.” Actually, he did have alternatives. He just did not know what they were. His department failed him by not giving him the best policies and training.

When we reexamine the encounter between Brown and Wilson on August 9, 2014, we can clearly see the available alternatives. Initially, there was an encounter while Wilson was in his patrol car. There was a struggle over Wilson's gun, and it discharged. The next thing we know is that Brown was standing 30 feet away from Wilson, unarmed. When he began to approach, Wilson felt threatened, drew his handgun, and shot and killed Brown.

Officer Wilson could have done several things. He could have tried to talk to Brown to de-escalate the encounter while also calling for backup. Brown was not a direct threat at that point. An even better choice would have been for Wilson to drive a short distance away, in a tactical withdrawal, while also calling for backup. When other officers arrived they could have devised a plan to talk to Brown, attempted to de-escalate, and if that did not work, developed a coordinated plan to arrest him. With officers outnumbering Brown, it still might have been a difficult arrest but not an impossible one. Brown would have been alive, in custody, and facing criminal charges for the initial struggle in Wilson's patrol car.

The elements of the new police approaches to serious encounters discussed in this chapter would have saved Michael Brown's life and also Darren Wilson's job and a lifetime of grief. De-escalation, tactical withdrawal, buying time, calling for additional resources, and developing an arrest plan were all available. The Ferguson Police Department failed both Brown and Wilson, and the result was a tragedy.

Sources: Wesley Lowery, *They Can't Kill Us All: Ferguson, Baltimore, and a New Era in America's Racial Justice Movement* (Boston: Little, Brown, 2016). Police Executive Research Forum, *Guiding Principles on Use of Force* (2016), <http://www.policeforum.org/assets/30%20guiding%20principles.pdf>. “Experts Weigh Officer's Decisions Leading to Fatal Shooting of Michael Brown,” *New York Times* (November 26, 2014).

Virtually all police experts agree that the traditional police officer subculture, reinforced by local police unions and union contract provisions, is and has been for several decades hostile to accountability-related reforms.¹⁰⁶ Perhaps the worst manifestation has been the “code of silence,” under which officers do not report misconduct by other officers. The San Francisco Blue Ribbon Panel found that the police union refused to let officers testify to it by themselves and officers could testify only with a union representative accompanying them. It was made clear to officers who were thinking about testifying alone that they could suffer

retaliation if they did speak on their own. The retaliation could involve being denied choice assignments, damaging evaluations that would block promotion, the “silent treatment,” and not having other officers back them up on dangerous 911 calls. In the end, several officers testified anonymously and in private to the commission.¹⁰⁷ The officer subculture has long been hostile to citizen oversight (such as the San Francisco Blue Ribbon Panel) and any “outsiders” having a voice in policing.¹⁰⁸

It is important to distinguish between the “police officer subculture” and the “organizational culture” in policing. The two overlap and interact with each other in important ways, but there are important distinctions. Most important, *organizational* culture in policing refers to officer behavior that is directly related to the policies and practices of the department itself. A department, for example, might have an aggressive traffic-stop program as a crime-fighting strategy. The traditional police officer subculture, as we have indicated, involves informal norms and behavior developed by rank-and-file officers and is often in conflict with official department policies.

Changing the Traditional Police Subculture: The Impact of Reforms

The evaluations of the Justice Department consent decrees in Los Angeles and Pittsburgh provide fascinating evidence on how new accountability-related reforms can change the informal police subculture and move it in the direction of greater respect for accountability.¹⁰⁹ The Pittsburgh evaluation involved both focus groups with officers and a written survey of their attitudes.¹¹⁰ Officers expressed “largely negative” attitudes about the consent decree, feeling they were “betrayed” by the city when it entered into the consent decree. Officers felt the consent decree had “lowered officer morale and productivity,” had made officers “hesitant to intervene” in situations of possible conflict (that is, had caused “de-policing”), and had imposed burdensome and “time-consuming” reporting requirements. The officers’ language reflected the norms of the traditional police officer subculture, particularly with respect to valuing aggressive enforcement tactics. Officers reported that all officers had “less interaction with citizens,” were “not aggressive with people who are breaking the law,” and were “more guarded in their interaction.”¹¹¹

Yet, from the perspective of the goals of the consent decree—moving a police department from a culture that values “aggressiveness” to one that values respect for people and compliance with policies that limit stops, frisks, and uses of force (that is, that limit aggressiveness)—the changes described by the Pittsburgh officers represent desirable changes. It is reasonable to assume that many of the previously aggressive interactions with citizens were unnecessarily aggressive or not even necessary at all. Many officer actions were probably illegal, as in, for example, a pedestrian stop and frisk with the absence of reasonable suspicion. A pattern of officers being “more guarded” in their interactions, on the other hand, is precisely the style of policing that consent decree reforms are designed to bring about. In fact, a number of Pittsburgh officers complied with the new rules, reporting

that they were “more sensitive to the appearance of unequal enforcement.” One Pittsburgh officer pointed out that “every incident now has a paper trail.” That, of course, is exactly what the new reporting requirements are designed to achieve: documenting officer conduct so as to enhance accountability.¹¹²

Interestingly, the focus groups with African American officers found them both “more sympathetic to the concerns of the black community” and “far more positive about the [consent] decree.” Additionally, they perceived the new disciplinary process to be more impartial than before, where “there was no discipline for white officers.”¹¹³

Most important, the Pittsburgh study also found evidence of change in the attitudes of officers, and the grudging acceptance of change in routine police practices. The report found that “the accountability mechanisms remained intact after the lifting of the decree,” suggesting that the department did not “backslide” into its old ways. There was also “some indication” among supervisors that the new mechanisms “were becoming accepted as part of the job” by rank-and-file officers. Interestingly, no officers in the focus groups openly said anything to that effect, but in the anonymous written survey “a majority of officers agreed that the reforms had increased accountability.”¹¹⁴

The Harvard evaluation of the Los Angeles consent decree found a similar pattern of officer responses to the requirements of the decree. In interviews and focus groups, officers “frequently” claimed that they would now “hesitate to intervene in difficult situations,” out of fear of discipline. Officers claimed they would “look the other way” when they observed criminal activity (that is, “de-police”). They also claimed to be “timid” and to use “kid gloves” when handling suspects.¹¹⁵ The data on officer law enforcement activities, however, did not support the officers’ statements. Both pedestrian and motor vehicle stops actually increased by 39% between 2002 (the first year of the consent decree) and 2008; arrests also increased. Additionally, the rate at which arrests resulted in felony charges increased, which the Harvard report interpreted as “suggesting indirectly at least that the quality of those arrests has improved,” according to the evaluation. That is, officers were more focused on serious crimes.¹¹⁶ Finally, the total number of use of force incidents declined by 30% between 2004 and 2008. In short, the data suggest that while officers complained about the consent decree and its requirements, they adjusted to the new rules on stops, arrests, and use of force and actually increased their enforcement efforts.

In the end, what emerges from both the Pittsburgh and Los Angeles studies is a picture of rank-and-file officers going through the difficult process of adjusting to new requirements on how they do their job, with new values and a new style of policing. That is to say, it is a picture of a changing police subculture. The evidence in these two evaluations is small and very tentative. More research, involving other departments experiencing major accountability-related reforms, is needed to determine whether the picture that emerges from these two evaluations is unique to the two departments involved or is representative of the general impact of court-mandated reforms on officer conduct.¹¹⁷

Even with these caveats, the picture that emerges is one of how new requirements can reshape the norms and behaviors of the traditional police subculture. The important point is that it is possible to change that subculture in a positive direction and begin to build a police culture that is self-policing, where officers work in a

professional, respectful, and lawful manner not because they are compelled to but because they have embraced the new values about how to police. If true, this is one of the most hopeful signs of what enforced police reform can accomplish.

Another Approach to Changing the Police Officer Subculture

A new program in the New Orleans Police Department, stimulated by the federal consent decree, challenges—and hopefully changes—the traditional police subculture in another way. The EPIC (Ethical Policing Is Courageous) program trains officers to actively intervene when they see other officers engaging in misconduct and to stop the improper conduct. The NOPD explains that “EPIC seeks to inculcate active bystandership into everything an officer does, and to provide officers with the tools and resources needed to do it well . . . EPIC strives to redefine police culture so that intervention to prevent or stop harmful action is not an exception to good teamwork; it is the very definition of good teamwork.”¹¹⁸ EPIC directly challenges the traditional norm of solidarity, which values not questioning the conduct of other officers. EPIC also challenges the “code of silence” by expecting officers to report the misconduct of other officers to supervisors.¹¹⁹ It is noteworthy that the EPIC program invokes traditional police norms—the values of “courage” and teamwork—as a strategy for making palatable a challenge to other traditional norms (e.g., the idea that challenging another officer’s behavior or reporting misconduct is being disloyal or a “rat”).

Along the same lines, several recent Justice Department consent decrees require officers observing force or misconduct by other officers to report such actions. The Cleveland consent decree, for example, requires that “all officers using *or observing* [italics added] force will report in writing, before the end of their shift, the use of force in a Use of Force Report.” Additionally, officers “who use or observe force and fail to report it will be subject to the disciplinary process.”¹²⁰ The Newark, New Jersey, consent decree similarly required that “officers observing force used by another officer will complete a supplemental narrative [to the report by the officer who used force].”¹²¹

CONCLUSION

The effective control of police officer use of force is “the heart of the matter” in terms of police accountability. As Egon Bittner argued decades ago, the capacity to use force is the defining feature of the police role in American society.¹²² Additionally, allegations of the misuse of force, in unjustified fatal shootings and use of excessive physical force, are the flash points in the continuing police–community relations problem in America, undermining public confidence and trust in the police and preventing the development of legitimacy for the police. Effectively controlling officer use of force can serve to resolve these problems. Additionally, as argued in the last section of this chapter, the procedures for controlling officer use of force can begin to change the norms of the police officer subculture.

The basic tool for controlling officer use of force is administrative rulemaking, which seeks to confine, structure, and check the exercise of officer discretion. Carefully drafted and clear rules serve several purposes that have broad impacts throughout a police department. They are statements of the department's values, guide officer conduct in difficult situations, and serve as the basis for training, supervision, and discipline while also contributing to greater openness and transparency on the part of the department.

In the next chapter, we will examine the application of administrative rulemaking to other critical incidents in policing: vehicle pursuits, the response to domestic violence incidents, and others.

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