

HOW POLICE CULTURE AFFECTS THE WAY POLICE DEPARTMENTS VIEW AND UTILIZE DEADLY FORCE POLICIES UNDER THE FOURTH AMENDMENT

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Police are an important part of our criminal justice system. When people begin to lose faith and trust in the police, chaos inevitably erupts. Although we are not at a breaking point yet, recent controversies and examinations of police departments have found that there are disparities in police use-of-force strategies that allow some police officers to get away with using excessive force. Police departments are reluctant to share their policies for fear of judgment, and some citizens are beginning to lose trust in law enforcement. One of the major reasons for this problem is the lack of clear regulations and guidelines from Congress and the Supreme Court. Congress has been reluctant to step in and create some baseline uniform policies, and the Supreme Court has provided vague guidelines that give police departments a lot of leeway to do as they please. Police departments across the country have been under intense scrutiny, and many of these departments have attempted to come up with new policies in response to perceived problems. Some of these policies show signs of progress while others are yet untested. This Note examines three major U.S. police departments that have recently shifted their use-of-force policies and reviews some of the strengths and weaknesses in those policies under the Fourth Amendment. This Note focuses on deadly use of force, but it also has ramifications for general use-of-force policies.

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INTRODUCTION

“If you make a mistake, another mistake, there’s a very severe possibility that you’re . . . going to get shot.”¹ “[Y]ou are not to move If you move, we are going to consider that a threat, and we are going to deal with it, and you may not survive it.”² These were some of the warnings given by an Arizona police officer while he dealt with a man suspected of waving a gun out of a hotel-room window.³ The police officer ended up shooting and killing this suspect after he made what was perceived as a threatening movement.⁴ The body-camera footage of this incident illustrates some of the strong emotions and tensions that can arise during a police encounter.⁵ On one side, you have a suspect who is confused and unclear on the police officer’s directions. On the other side, you have a police officer concerned

1. For body-worn-camera footage and discussion of this incident, see German Lopez, *An Ex-cop from Arizona was Acquitted for Shooting an Unarmed, Sobbing Man*, VOX (Dec. 8, 2017, 4:20 PM), <https://www.vox.com/policy-and-politics/2017/12/8/16752914/police-arizona-philip-brailsford-daniel-shaver>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.*

for his safety and the general welfare of the public. This police encounter is merely one of the many encounters recently seen in the media.⁶

Names such as Eric Garner, Michael Brown, Tamir Rice, Philando Castile, Freddie Gray, and Alton Sterling represent some of the other recent victims of police shootings.⁷ These deaths have sparked a public outcry and motivated people to speak out and advocate for changes in police use-of-force policies. Some of the more notable and controversial advocates include members of the Black Lives Matter Movement⁸ and Colin Kaepernick,⁹ former San Francisco 49ers quarterback. But, is police use of force as prevalent as it seems?¹⁰ Technology and easier access to social media may account, at least partially, for some of the increased attention to police use of force.¹¹ Nevertheless, even if police use of force is not as prevalent as it appears, research suggests that police use-of-force policies are not as efficient or fair as they could or should be.¹² Police officers who use excessive force often receive

6. See, e.g., *Controversial Police Encounters Fast Facts*, CNN (July 21, 2017, 6:35 PM), <https://www.cnn.com/2015/04/05/us/controversial-police-encounters-fast-facts/index.html>.

7. *Id.*

8. See, e.g., Janell Ross & Wesley Lowery, *Black Lives Matter Shifts From Protests to Policy Under Trump*, CHI. TRIB. (May 4, 2017, 7:41 PM), <http://www.chicagotribune.com/news/nationworld/ct-black-lives-matter-trump-20170504-story.html>.

9. Colin Kaepernick began taking a knee during the national anthem at NFL football games in order to raise awareness of police use of force and lack of police accountability. See Mark Sandritter, *A Timeline of Colin Kaepernick's National Anthem Protest and the Athletes Who Joined Him*, SB NATION (Sept. 25, 2017, 10:28 AM), <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl>. Recently, more NFL players have followed in his footsteps and begun taking a knee during the national anthem. See Michael Baumann, *The Only Side of the NFL Protest Debate*, RINGER (Sept. 26, 2017, 8:30 AM), <https://www.theringer.com/nfl/2017/9/26/16365282/protest-debate-colin-kaepernick-alejandro-villanueva-police-brutality>.

10. See David G. Bolgiano, *Understanding the Ethical, Legal, and Tactical Realities of Deadly Force Encounters*, MD. B.J., May/June 2017, at 28, 36; see also RICHARD R. JOHNSON, *DISPELLING THE MYTHS SURROUNDING POLICE USE OF LETHAL FORCE 5–6* (July 2016), https://www.dolanconsultinggroup.com/wp-content/uploads/2016/07/Dispelling_the_Myths_July18.pdf.

11. Body-worn camera footage and cellphones are making it easier for the public to see footage of police encounters. See, e.g., Denise Johnson, *Social Media's Impact on Incidents Involving Police Use of Deadly Force*, CLAIMS J. (Oct. 13, 2016), <https://www.claimsjournal.com/news/national/2016/10/13/274204.htm>; see also Elliot C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015, 7:26 AM), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html>. See generally German Lopez, *How Video Changed Americans' Views Toward the Police, From Rodney King to Alton Sterling*, VOX (July 6, 2016, 11:05 AM), <https://www.vox.com/policy-and-politics/2015/12/10/9886504/police-shooting-video-confidence>. One of the problems with some of this footage is that the public might lack context or other information that the police officer has at the time of the encounter.

12. For a brief overview of suggestions and changes for fairer police use-of-force policies, see *Create Fair and Effective Policing Practices*, OPPORTUNITY AGENDA,

little to no punishment due to the way use-of-force cases are analyzed under the Fourth Amendment, and this can lead to a lack of police accountability.¹³

While some people in our society do not see a problem with current police-department policies¹⁴ and others advocate for a complete overhaul of police departments,¹⁵ issues with use-of-force policies have not been sufficiently addressed by academic scholars or the U.S. Supreme Court. The Court has treated police use of force as a “seizure” governed only by a reasonableness standard under the Fourth Amendment.¹⁶ But, this standard comes with many drawbacks and limitations.¹⁷ The reasonableness standard sets a very low constitutional floor for what is permissible police behavior, and the standard seems to be much more deferential toward police officers and their safety rather than the public welfare.¹⁸ Police officers face many dangers in their line of work, and their protection is important in order to ensure that there is law and order in our society.¹⁹ However, the current reasonableness standard seems to allow the “bad seeds” of different police departments to abuse their authority and tarnish the reputation of police officers in general.²⁰

This Note examines three major police departments across the United States that are undergoing changes in their use-of-force policies: Los Angeles, Baltimore, and Chicago.²¹ This Note will examine the strengths and weaknesses of these departments’ approaches to *deadly* use-of-force situations. However, the research in this Note has ramifications for general use-of-force policies as well. The goal of this Note is to provide a more in-depth look at current approaches that can

<https://transformingthesystem.org/criminal-justice-policy-solutions/create-fair-and-effective-policing-practices/> (last visited Sept. 26, 2018).

13. *See id.*

14. *See, e.g.,* German Lopez, *American Policing is Broken. Here’s How to Fix It.*, VOX (Sept. 1, 2017, 10:53 AM), <https://www.vox.com/policy-and-politics/2016/11/29/12989428/police-shooting-race-crime> (discussing how different racial groups differ on how effective they think police departments are).

15. *See supra* text accompanying note 8.

16. *See infra* text accompanying note 48.

17. *See generally* Brandon L. Garrett & Seth W. Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211 (2017).

18. *Id.* at 285–86; *see also* John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. CIV. LIBERTIES & CIV. RTS. 155, 161 (2016) (noting that part of the Supreme Court’s deference to police officers is based in large part on inaccurate assumptions regarding the nature of policing).

19. *See* Timothy Roufa, *Does Society Still Need Law Enforcement? If so, What is it Worth?*, BALANCE CAREERS (Sept. 23, 2016), <https://www.thebalance.com/does-society-need-law-enforcement-and-worth-3975273>.

20. While “bad seeds” are inevitable in any profession, it seems like the vague standard set by the Supreme Court perpetuates this behavior because individual officers, even those with blatantly bad intentions, may not be liable for excessive use of force. *See* Ron Cassie, *Who Wants to be a Cop Now?*, BALTIMORE MAG. (Apr. 10, 2017), <http://www.baltimoremagazine.com/2017/4/10/who-wants-to-be-a-cop-now-the-baltimore-police-department-reforms-its-culture>. Some have suggested that a lack of oversight and accountability within police departments allow this to happen. *See id.*

21. These three departments were chosen because they have recently been in the news and are located in big cities throughout different parts of the country.

serve as a steppingstone for academic debate and national reform. In order to positively change police policies pertaining to deadly use of force, federal legislation needs to be enacted that requires certain minimum-training requirements for police departments throughout the country.²² Additionally, the Fourth Amendment reasonableness standard needs to be analyzed from a different perspective by the Court.²³ Two suggestions include comparing the officer's conduct to what a reasonable, *well-trained* officer would have done under the circumstances or allowing the jury to consider whether the officer could have deescalated the situation *before* the critical moment where a snap decision had to be made.

Part I explains the legal history and Supreme Court decisions that have led to the current reasonableness standard in police use-of-force cases. Part II briefly discusses reasons why police departments may be reluctant to change their use-of-force policies to provide some context into the way the Fourth Amendment reasonableness standard is being interpreted. Part III examines and compares the police cultures and the deadly use-of-force strategies in three different police departments across the United States: Los Angeles, Baltimore, and Chicago. Part IV discusses some of the strengths and weaknesses in these policies and suggests some takeaways from their approaches. Part V concludes with a two-pronged solution designed to serve as a model for change in police use-of-force strategies.

I. HISTORICAL DEVELOPMENT OF POLICE USE-OF-FORCE STRATEGIES

A. Background

Despite the fact that law enforcement has always existed in our society, issues of police use of force have only recently appeared in Supreme Court decisions.²⁴ The fact that use-of-force policies are a relatively new issue for courts may explain why there is a lot of ambiguity surrounding the court decisions that have dealt with this problem.²⁵ The lack of clear decisions and guidelines may also explain why police culture and policies are slow to change.²⁶ Police culture is defined as “[t]he attitudes and behavior prevalent among the police force.”²⁷

22. *See infra* Section V.A.

23. *See infra* Section V.B.

24. Some scholars have gone as far as to argue that the Supreme Court is fed up with dealing with use-of-force cases. Part of the reason may be that the Justices do not think that courts are an effective venue for resolving questions around policing and force. *See* Noah Feldman, *Supreme Court has had Enough with Police Suits*, BLOOMBERG (Jan. 9, 2017, 1:08 PM), <https://www.bloomberg.com/view/articles/2017-01-09/supreme-court-has-had-enough-with-police-suits>.

25. *See infra* Sections I.B–E.

26. *See* German Lopez, *The Failure of Police Body Cameras*, VOX (July 21, 2017, 10:00 AM), <https://www.vox.com/policy-and-politics/2017/7/21/15983842/police-body-cameras-failures> (discussing how bad apples in police departments tend to stick together and how the vagueness of the reasonableness standard contributes to a lack of change in police culture amongst some); *see also* Gross, *supra* note 18, at 157–71.

27. *Police Culture*, OXFORD DICTIONARIES, https://en.oxforddictionaries.com/definition/police_culture (last visited Apr. 14, 2018).

Moreover, police culture is “often characterized by solidarity and resistance to change and [is] sometimes alleged to be discriminatory and intolerant.”²⁸ Officers may be reluctant to change the way they do things because generations of law-enforcement officers have become accustomed to policing in a certain way.²⁹ Police officers and police departments may not appreciate judicial or legislative intrusion because they do not want people outside of the law-enforcement community telling them how to do their jobs.³⁰

One of the main ways courts currently evaluate police conduct is in civil suits alleging excessive force.³¹ Citizens can sue police officers and police departments for using excessive force in several ways.³² The most common type of lawsuit is a claim under 42 U.S.C. § 1983.³³ However, this approach has not been particularly effective because plaintiffs have to climb an uphill battle to overcome an officer’s qualified immunity, and that makes it difficult for plaintiffs to win.³⁴ Qualified immunity is provided to public officials, and the Supreme Court has stated that qualified immunity is supposed to protect public officials from *frivolous*³⁵ lawsuits that result from their official actions.³⁶ In order to prevail, a plaintiff suing

28. See *id.*; see also Radley Balko, *When the ‘Reasonable Police Officer’ Standard isn’t Reasonable at all*, WASH. POST (Dec. 17, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/12/17/when-the-reasonable-police-officer-standard-isnt-reasonable-at-all/?utm_term=.4c4c590feee1 (discussing the dangers of a reasonable-police-officer standard constrained by the culture of policing).

29. See David Lester, *Officer Attitudes Toward Police Use of Force*, in AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 177, 182–83 (William A. Geller & Hans Toch eds., 1995).

30. *Id.*

31. Michael Tarleton, *Suing the Police for Excessive Force*, NOLO, <https://www.nolo.com/legal-encyclopedia/suing-the-police-excessive-force.html> (last visited Sept. 26, 2018).

32. Citizens can also sue cities, but these lawsuits have not been very effective. See *e.g.*, *City of Canton v. Harris*, 489 U.S. 378 (1989); *Connick v. Thompson*, 563 U.S. 51 (2011).

33. 42 U.S.C. § 1983 (1996). Plaintiffs seeking relief in use-of-force cases often go after officers: “Because it is so difficult to sue government entities, most victims’ only recourse is to sue the officers involved.” See Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), <https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html>.

34. See Chemerinsky, *supra* note 33; see also *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting) (noting how “the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield”).

35. But some scholars worry that even nonfrivolous lawsuits are weeded out by qualified immunity. See generally Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

36. See Mike Callahan, *Protecting Cops from Frivolous Lawsuits: Qualified Immunity, Explained*, POLICEONE (Apr. 29, 2016), <https://www.policeone.com/legal/articles/176707006-Protecting-cops-from-frivolous-lawsuits-Qualified-immunity-explained/>.

someone with qualified immunity must allege that the person with qualified immunity engaged in conduct that violated clearly established federal law.³⁷

Another major approach that may provide justice for victims of police use of force is equitable relief under 34 U.S.C. § 12601.³⁸ This statute, formerly 42 U.S.C. § 14141, authorizes the Attorney General to bring actions on behalf of the U.S. government against police departments engaged in a pattern or practice of unconstitutional misconduct, including excessive use of force.³⁹ Many of these § 12601 cases result in consent decrees between police departments and the Department of Justice (DOJ).⁴⁰ In a consent decree, the court orders injunctive relief against the losing party and maintains jurisdiction over the case to ensure the agreement is followed.⁴¹

While these are two common approaches to contesting use-of-force cases, their effectiveness has been questioned, and some argue that these approaches are tremendously constrained by the Supreme Court's interpretation of "reasonableness" under the Fourth Amendment.⁴² The following four Supreme Court cases demonstrate how police use-of-force cases have been analyzed under the Fourth Amendment.⁴³

B. Garner and the Fourth Amendment Reasonableness Standard

In 1985, the Supreme Court considered the use of deadly force in *Tennessee v. Garner*—a case involving the lethal shooting of a fleeing, unarmed suspect.⁴⁴ Police officers responded to a report of a possible burglary in progress at a residence, and one of the officers shot and killed an unarmed teenager in the backyard after

37. See Feldman, *supra* note 24.

38. 34 U.S.C. § 12601 (1994). Because lawsuits can only be brought by the Attorney General under § 12601, the amount of justice victims can receive seems somewhat limited and is ultimately not within a victim's control.

39. The idea is that the Attorney General steps in and provides incentives for police departments to make reforms. See Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 117 (2016). Some scholars have also suggested that consent decrees would be more effective if they involved some form of community-engagement provisions. See Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793 (2016).

40. See Noah Kupferberg, *Transparency: A New Role for Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 131–33 (2008). A consent decree is "[a] settlement of a lawsuit or criminal case in which a person or company agrees to take specific actions without admitting fault or guilt for the situation that led to the lawsuit." *Consent Decree*, FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/consent+decree> (last visited Apr. 14, 2018).

41. See *Consent Decree*, *supra* note 40.

42. See generally Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL'Y 53 (2016).

43. While there are other cases pertaining to police use of force, these are some of the most important, cited, and discussed cases involving the Fourth Amendment reasonableness standard.

44. 471 U.S. 1, 1 (1985).

seeing him flee from the residence.⁴⁵ The father of the teenage suspect filed a wrongful-death action under the federal civil-rights statute, 42 U.S.C. § 1983,⁴⁶ against the police department and the police officer who fired the gun.⁴⁷ However, this suit was unsuccessful at the trial-court level because, at the time of the shooting, there was a Tennessee statute that allowed police officers to use deadly force against fleeing felons.⁴⁸ This statute resembled the common-law rule designed to prevent felons from fleeing when police officers attempted to arrest them.⁴⁹

The *Garner* Court ultimately held that police officers could no longer use deadly force against fleeing, unarmed suspects.⁵⁰ More importantly, the *Garner* Court established the foundation for police use-of-force cases.⁵¹ The Supreme Court held that, under the Fourth Amendment, use of force by a police officer constitutes a seizure that must undergo a reasonableness analysis.⁵² In these types of cases, courts need to “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”⁵³ Officers should only use force proportionate to the threat faced by the officers.⁵⁴

C. *Graham and Split-Second Decisions*

The Supreme Court revisited police use of force in 1989, in *Graham v. Connor*.⁵⁵ In *Graham*, a diabetic man filed a § 1983 lawsuit, claiming that officers applied excessive force on him when the officers thought the man had committed a crime at a store.⁵⁶ The officers later discovered that the suspect had not actually

45. *Id.* at 3–4.

46. *Id.* Section 1983 is one of the most common types of suits filed against police officers and police departments because this statute allows citizens to sue law-enforcement officers for claims of constitutional-rights violations. *See supra* text accompanying note 33. Over time, this statute has also been interpreted to provide qualified immunity to law-enforcement officials under certain circumstances. *See supra* text accompanying notes 31–36.

47. *Garner*, 471 U.S. at 5.

48. *Id.* at 4–5.

49. *Id.* at 12.

50. The officer in this case admitted that he did not think that the suspect was armed, and his reason for shooting was guided by his belief that he was authorized by law to shoot a fleeing felon, regardless of whether the felon was armed or not. *Id.* at 21. The dissent in *Garner* raised concerns that this holding would hinder law-enforcement goals because there would not be a way to deter felons from fleeing. *Id.* at 23 (O’Connor, J., dissenting).

51. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 394–96 (1989); *Scott v. Harris*, 550 U.S. 372, 381–83 (2007).

52. *Graham*, 490 U.S. at 396–98; *Scott*, 550 U.S. at 381–83.

53. *Garner*, 471 U.S. at 7 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

54. *Id.* at 11.

55. *Graham*, 490 U.S. at 386.

56. *Id.*

committed a crime and was actually suffering from an insulin reaction like he had claimed.⁵⁷

The *Graham* Court focused on clarifying how police use-of-force cases should be analyzed, and it did not assess in-depth why the particular actions in this case were reasonable.⁵⁸ The *Graham* Court found that courts analyzing police use of force must consider that “officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”⁵⁹ The *Graham* decision suggested that police use-of-force cases need to be analyzed according to the split-second atmosphere of police encounters rather than the critical moments before this split-second atmosphere develops.⁶⁰ The *Graham* Court also held that reasonable use of force by police officers “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁶¹ This meant that the subjective motivations of police officers were now irrelevant in police use-of-force cases because the standard was that of an objective, reasonable officer.⁶²

This objective approach is imperative to the current state of affairs of police use-of-force policies. Under the present law, a suspect does not need to present an imminent threat to the officer or the public for the officer to use force.⁶³ All that is necessary is that “the officer’s belief that the suspect [presents an imminent threat is] objectively reasonable under the circumstances.”⁶⁴ Many scholars have analyzed and critiqued *Garner* and *Graham*. Some scholars have argued that taking the aforementioned approach has made it relatively easy for defense teams to make arguments that justify the officer’s actions and win over the jury in the few cases where this issue does end up being decided by a jury.⁶⁵

57. *Id.*

58. Garrett & Stoughton, *supra* note 17, at 231.

59. *Graham*, 490 U.S. at 397.

60. *Id.*

61. *Id.* at 396.

62. Garrett & Stoughton, *supra* note 17, at 232.

63. *See, e.g.*, Chemerinsky, *supra* note 33. While an ordinary citizen can also use self-defense when there is no actual imminent threat, the objectively-reasonable-person standard seems more troubling in police use-of-force cases because of the high authority officers possess and their safe-keeping role in our society.

64. Bolgiano, *supra* note 10, at 28, 36; *see also* The Times Editorial Board, *Raise the Standard for Police Use of Deadly Force in California? Proceed With Caution*, L.A. TIMES (Apr. 5, 2018, 4:10 AM), <http://www.latimes.com/opinion/editorials/la-ed-use-of-force-20180405-story.html> (criticizing the objective-reasonableness standard because “[i]n practice, that somewhat tautological reasoning means that if officers encounter a man in a backyard at night holding something that could conceivably be believed to be a gun, even if in actuality it is a cellphone, and they believe they or others are in imminent danger — as the officers may have believed when they encountered Clark—they may use force. They may shoot”).

65. *See, e.g.*, Celisa Calacal, *These Two Supreme Court Cases Protect Police Who Use Excessive Force*, SALON (Aug. 12, 2017, 6:59 AM), https://www.salon.com/2017/08/12/these-two-supreme-court-cases-protect-police-who-use-excessive-force_partner/.

Other scholars have argued that the reasonableness standard is too nearsighted and focuses too much on the split-second moment the officer uses deadly force, rather than the overall interaction with the suspect.⁶⁶ Others have argued that the *Garner* Court went too far and held the law-enforcement interests far too high.⁶⁷ Whatever perspective is taken, what is clear is that a lot of concerns have risen due to the *Garner* and *Graham* decisions, and these concerns have largely been left unresolved by the Supreme Court. The *Graham* decision seems to imply that officers are always involved in split-second judgments, but this might not always be the case, and there may be cases where it might be better to consider the thoughts and actions of the officer before the critical split-second decision arises.⁶⁸

D. Scott and the Lack of Officer Training

The Supreme Court reexamined the *Garner* decision in 2007 in *Scott v. Harris* and looked at whether an officer's training played a role in the Fourth Amendment analysis.⁶⁹ The *Scott* Court made clear that *Garner* was simply one application of the Fourth Amendment's reasonableness test in a police use-of-force case.⁷⁰ In *Scott*, police officers were engaged in a high-speed pursuit of a fleeing suspect when the lead officer asked for permission to use the Precision Intervention Technique (PIT) maneuver to stop the suspect.⁷¹ Despite the fact that the officer was not trained in this technique, his supervisor allowed him to use the technique anyway.⁷² The officer did not end up using the PIT maneuver due to the dangerous road conditions, but he still bumped the suspect's car from behind, which forced the car off the road and left the suspect quadriplegic.⁷³ The suspect filed a civil-rights lawsuit under 42 U.S.C. § 1983, suing the law-enforcement officer for using excessive force.⁷⁴

The Court examined whether the officer's motion for summary judgment was appropriate.⁷⁵ The *Scott* Court found that summary judgment was appropriate under these circumstances because no reasonable jury would find that the officer used excessive force.⁷⁶ The *Scott* Court focused on whether the officer made an objectively reasonable decision and did not consider the training, or lack thereof, of

66. Jelani Jefferson Exum, *Nearsighted and Colorblind: The Perspective Problems of Police Deadly Force Cases*, 65 CLEV. ST. L. REV. 491, 493 (2016).

67. See Garrett & Stoughton, *supra* note 17, at 211.

68. See STEVEN E. BARKAN & GEORGE J. BRYJAK, FUNDAMENTALS OF CRIMINAL JUSTICE: A SOCIOLOGICAL VIEW 293 (2011).

69. *Scott v. Harris*, 550 U.S. 372, 381–83 (2007).

70. *Id.* at 382 (“*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force.’ *Garner* was simply one application of the Fourth Amendment's ‘reasonableness’ test, to the use of a particular type of force in a particular situation.”).

71. *Id.* at 375.

72. *Id.*

73. *Id.* at 375–76.

74. *Id.*

75. *Id.* at 376.

76. *Id.*

this particular officer.⁷⁷ The *Scott* decision raised concerns that police officers with little to no training could get away with poor decisions if their actions were deemed to be objectively reasonable.⁷⁸ “Objectively reasonable” in use-of-force cases refers to actions that would be considered appropriate from the perspective of a reasonable officer on the scene.⁷⁹ Scholars have suggested that the *Scott* decision is proof that the reasonableness standard needs to be improved so that officers make safer decisions for themselves and the general public.⁸⁰

E. Mullenix and Minutes of Deliberation

In 2015, the Supreme Court once again interpreted police use of force in *Mullenix v. Luna*.⁸¹ In *Mullenix*, Texas police officers were pursuing a fleeing man suspected of driving under the influence.⁸² The suspect was driving at high rates of speed and threatening to shoot officers.⁸³ Some of the officers in this pursuit deployed tire spikes along a highway in an attempt to stop the suspect’s car.⁸⁴ However, one of the officers, Chadrin Mullenix, decided that he would use his rifle to shoot the engine block of the suspect’s car, despite the fact that his supervisor told him to wait to see if the tire spikes would work.⁸⁵ Officer Mullenix fired six rifle shots and killed the suspect after hitting him four times.⁸⁶ The Supreme Court ignored the *minutes* of deliberation prior to the shooting and focused on the split-second environment mentioned in *Graham*.⁸⁷ Justice Sotomayor’s dissenting opinion suggested that in doing so the Court essentially “sanction[ed] a ‘shoot first, think later’ approach to policing.”⁸⁸ *Mullenix* is one of the most recent Supreme Court cases discussing police use of force and the Fourth Amendment reasonableness standard.

77. *Id.* at 381.

78. Garrett & Stoughton, *supra* note 17, at 232–37; *see also* Shaun King, *King: Until These Two Supreme Court Cases Are Successfully Challenged, Police Brutality Will Continue*, N.Y. DAILY NEWS (June 22, 2017, 2:00 PM), <http://www.nydailynews.com/news/national/king-2-supreme-court-rulings-change-police-brutality-article-1.3269247> (discussing how *Garner* made it easy for officers to use force, as long as they could articulate a reason to believe that a suspect posed a threat).

79. *See supra* text accompanying notes 58–62.

80. *See* Garrett & Stoughton, *supra* note 17, at 232–37; *see also* Rachel A. Harmon, *When is Police Violence Justified?*, 102 Nw. U. L. REV. 1119, 1119–20 (2008) (suggesting that the Supreme Court failed to provide clarity for use-of-force cases in *Scott v. Harris*).

81. 136 S. Ct. 305, 310 (2015).

82. *Id.* at 306.

83. *Id.*

84. *Id.*

85. *Id.* at 306–07. Officer Mullenix disputed hearing his supervisor’s instruction to wait over the radio. *Id.*

86. *Id.* at 307.

87. *See id.* at 309–11; *see also id.* at 316 (Sotomayor, J., dissenting) (“The majority recharacterizes Mullenix’s decision to shoot at [the suspect’s] engine block as a split-second, heat-of-the-moment choice, made when the suspect was ‘moments away.’”).

88. *Id.* at 316 (Sotomayor, J., dissenting).

II. WHAT PREVENTS POLICE DEPARTMENTS FROM CHANGING?

Part I demonstrates that the few use-of-force cases analyzed by the Supreme Court have created vague standards in this area of the law that allow police departments to continue following old, vague, and inconsistent policies. Many different theories have been developed to explain why police departments are reluctant to change, and most of these theories suggest that the culture surrounding police departments contributes to an environment that is resistant to change.⁸⁹ Some theories take an incentive-based approach and argue that inconsistencies across police departments and a low constitutional floor provide little to no incentive for police departments to change their policies.⁹⁰ Because police departments do not have to abide by many constitutional requirements or disclose their policies, it is relatively easy for departments to continue to deal with problems internally or avoid dealing with them altogether.⁹¹

Other theories argue that the absence of change can be attributed to a lack of sufficient accountability among police departments and their officers.⁹² The absence of strict guidelines and policies for police departments has left police officers with vague use-of-force standards that allow police departments a lot of room to decide how they want to approach their trainings and policies.⁹³ Even when police departments have tried to implement new use-of-force policies, either by choice or by consent decree, they have been unsuccessful because habits entrenched within police departments have contributed to a police culture that is reluctant to change.⁹⁴ These theories represent a few of the many different theories accounting for police reluctance to change. While an in-depth analysis of these theories is outside the scope of this Note, a basic understanding of some of the theories explaining this behavior is crucial.

Furthermore, police departments may also be reluctant to change because plaintiffs are unlikely to prevail against them on § 1983 claims under the current standards.⁹⁵ Many of these § 1983 cases never get to a jury because they get dismissed at the summary-judgment phase or the costs are too high for plaintiffs.⁹⁶ Additionally, police departments may not fear being sued under § 1983 because many departments have insurance to cover litigation costs for these types of cases.⁹⁷

As a whole, these findings suggest that the current objective standard used by the Court to analyze reasonableness under the Fourth Amendment is not doing

89. See generally Ryan Cohen, *The Force and the Resistance: Why Changing the Police Force is Neither Inevitable, Nor Impossible*, 20 U. PA. J. L. & SOC. CHANGE 105 (2017).

90. See Garrett & Stoughton, *supra* note 17, at 285–86.

91. *Id.* (discussing how the Supreme Court case law sets a low floor but no ceiling for how police departments internally deal with use of force).

92. See *supra* text accompanying notes 12–13.

93. See *supra* text accompanying notes 24–26.

94. See *infra* Part IV.

95. See also *supra* text accompanying notes 31–37.

96. See generally Schwartz, *supra* note 35.

97. See Garrett & Stoughton, *supra* note 17, at 237.

enough to protect citizens from police officers who overstep their authority because police departments are not changing their policies quickly enough.⁹⁸

III. POLICE STRATEGIES IN THREE MAJOR POLICE DEPARTMENTS

A. Los Angeles Police Department (LAPD) Use-of-Force Policies

The Los Angeles Police Department (LAPD) recently changed its use-of-force policy to address public concerns of ineffective policing. In response to *Hayes v. County of San Diego*,⁹⁹ where the California Supreme Court implied that police departments could be liable in wrongful-death lawsuits, the LAPD revised its use-of-force policy in 2014 to include the consideration of officers' tactical conduct and decisions leading up to the use of deadly force when evaluating the objective reasonableness of an incident.¹⁰⁰ Shortly after, the LAPD began releasing comprehensive and detailed publications on its use-of-force statistics in 2015.¹⁰¹ As of 2016, the LAPD was 1 of 53 cities that chose to release this data.¹⁰² The data release was meant to increase transparency, increase accountability, and allow management to better utilize resources.¹⁰³ This was a conscious decision by the LAPD intended to build trust and improve the public's perception of law enforcement.¹⁰⁴

In March 2016, the Los Angeles Board of Police Commissioners unanimously voted to revise the LAPD's use-of-force policy by including an emphasis on deescalation.¹⁰⁵ "Deescalation" refers to training methods and techniques—that do not rely on force—that officers can use to defuse potentially dangerous situations.¹⁰⁶ The rationale behind deescalation is that incorporating more of these techniques should lower the number of deaths resulting from police use of force by providing officers with different methods and alternatives that do not require deadly use of force.¹⁰⁷ The Board and many other officials stated that they hope that incorporating a deescalation approach will help restore public trust and

98. See *supra* text accompanying note 39.

99. 305 P.3d 252 (Cal. 2013) (discussing whether police officers should be liable in wrongful-death lawsuits for their actions).

100. This approach is narrower than the reasonableness standard used by the Supreme Court.

101. Charlie Beck, *Los Angeles Police Department Use of Force Year-End Review*, L.A. POLICE DEP'T 7 (2016), <http://assets.lapdonline.org/assets/pdf/2016-use-of-force-year-end-review-small.pdf> (hereinafter 2016 LAPD Year-End Review). These statistics were released after President Barack Obama signed an executive order establishing the Task Force on 21st Century Policing. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 9.

106. See Curtis Gilbert, *Not Trained to Not Kill*, APM REP. (May 5, 2017), <https://www.apmreports.org/story/2017/05/05/police-de-escalation-training> (discussing how many states have failed to adopt deescalation techniques and the wide disparities among police departments).

107. *Id.*

improve relationships between the police and the Los Angeles community.¹⁰⁸ However, the Board has acknowledged limitations to this approach:

Not every situation can be de-escalated De-escalation, however, is very important in situations where there is the time and space to accomplish it. We must continually teach officers to distinguish between the two scenarios and give them the tools and training to effectively de-escalate a situation whenever possible.¹⁰⁹

The LAPD currently trains its officers through a model known as PATROL.¹¹⁰ The LAPD's approach to policing represents a more restrictive interpretation of the Fourth Amendment reasonableness standard than the broader state and federal interpretations.¹¹¹ One of the ways the LAPD plans on using this model to improve police training is by incorporating better tactical training for officers, including deescalation techniques focused on empathy, open-ended questions, and appeals to reasonableness.¹¹² The rationale behind the LAPD model is to ensure that its officers are aware of other techniques available to them—besides deadly use of force—so that officers are better prepared to respond and react to situations involving split-second judgment calls.¹¹³ The LAPD has also stated that it intends to focus on improving training at multiple stages of a police officer's career, including the police academy and on-the-job training after the academy.¹¹⁴

Moreover, the LAPD has begun providing racial-bias training to its police officers in response to claims that police officers are biased or prejudiced against members of certain races.¹¹⁵ This training is intended to teach officers about implicit

108. Kate Mather & Cindy Chang, *Fewer Shootings by Police — That's the Goal of New Rules Adopted by the L.A. Police Commission*, L.A. TIMES (Apr. 18, 2017, 8:00 PM), <http://www.latimes.com/local/lanow/la-me-ln-lapd-commission-force-20170418-story.html>.

109. *Commissioner Sandra Figueroa-Villa Comments Regarding LAPD's Use of Force Policy*, LAPD (Oct. 11, 2016), http://www.lapdonline.org/police_commission/content_basic_view/61369.

110. PATROL is an acronym that stands for planning, assessment, time, redeployment and/or containment, other resources, and lines of communication. *See* 2016 LAPD Year-End Review, *supra* note 101, at 21.

111. *Id.* at 122–25.

112. *Id.* at 14–15.

113. *Id.* at 123.

114. *Id.* at 19–22. A potential concern with starting training at the academy level is that tension may arise between newer officers and experienced officers who have been trained differently. While this concern is valid, true systemic change in officer training would have to occur at all levels of training, and it is better to train the newer officers in deescalation techniques sooner rather than later. *See generally* James Hart, *The Management of Change in Police Organizations*, NAT'L CRIM. JUST. REFERENCE SERV. (1996), <https://www.ncjrs.gov/policing/man199.htm>.

115. Elizabeth Chuck, *Can 'Implicit Bias' Training Stop Police Officers From Acting on Hidden Prejudice?*, NBC NEWS (Oct. 1, 2016, 2:06 AM), <https://www.nbcnews.com/news/us-news/can-implicit-bias-training-stop-police-officers-acting-hidden-prejudice-n656071>. Implicit-bias training has also been utilized by the New York Police Department. *See id.*

biases that may affect how they perceive suspects.¹¹⁶ However, experts have acknowledged that the results of implicit-bias training vary depending on how good the instructor is and whether police departments do follow-up assessments.¹¹⁷ In order for this training to be effective, it must be taught by an expert in this area, and it must be more than a simple one-day training or presentation.¹¹⁸ Additionally, some scholars have suggested that it might be better to characterize racial-bias training as “raising awareness” rather than “training” because characterizing it as training might reinforce the biased behavior and make the situation worse.¹¹⁹

While these ideas sound good on paper, it is too soon to determine if these strategies will be implemented and effective in practice.¹²⁰ The LAPD recently rolled out this program, and it is very likely that there are going to be setbacks and challenges incorporating a new model of training.¹²¹ Some of the critics of the LAPD have questioned the proposed revised use-of-force policy by arguing that the LAPD does not do enough.¹²² The proposed LAPD policy only discussed deescalation in the preamble and did not address it elsewhere in the manual or provide specific guidelines for how officers are to use deescalation techniques.¹²³ Other critics of the LAPD argue that despite its attempts to improve use of force and relations with the community, the use-of-force numbers have not improved.¹²⁴ LAPD has responded to this criticism by arguing that even if the department’s number of use-of-force cases has stayed the same, this is due to the fact that LAPD officers now use more nonlethal use of force to deal with suspects.¹²⁵

B. Baltimore Police Department (BPD) Use-of-Force Policies

The Baltimore Police Department (BPD) is currently changing its use-of-force policies as well. The Department of Justice (DOJ) conducted a thorough investigation of the BPD in 2016 after allegations were made claiming the BPD

116. “Implicit bias describes the automatic association people make between groups of people and stereotypes about those groups. Under certain conditions, those automatic associations can influence behavior—making people respond in biased ways even when they are not explicitly prejudiced.” *Implicit Bias*, NAT’L INITIATIVE FOR BUILDING COMMUNITY TR. & JUST., <https://trustandjustice.org/resources/intervention/implicit-bias> (last visited Sept. 26, 2018); see also Tracie L. Keese, *Three Ways to Reduce Implicit Bias in Policing*, GREATER GOOD MAG. (July 2, 2015), https://greatergood.berkeley.edu/article/item/three_ways_to_reduce_implicit_bias_in_policing.

117. See *Implicit Bias*, *supra* note 116.

118. *Id.*

119. Dina Fine Maron, *How to Reduce Police Violence*, SCI. AM. (July 22, 2016), <https://www.scientificamerican.com/article/how-to-reduce-police-violence/>.

120. *Chief Beck’s Statement on 2016 Use of Force Report*, LAPD (Apr. 18, 2017), http://www.lapdonline.org/home/news_view/62185.

121. *Id.*

122. Elizabeth Chou, *LAPD Revises Use-of-Force Policy to Reduce Police Shootings*, L.A. DAILY NEWS (Apr. 18, 2017), <http://www.dailynews.com/2017/04/18/lapd-revises-use-of-force-policy-to-reduce-police-shootings/>.

123. *Id.*; see also Mather & Chang, *supra* note 108.

124. See Chou, *supra* note 122.

125. *Id.*

engaged in a pattern of unconstitutional conduct¹²⁶ stemming from systemic deficiencies.¹²⁷ The DOJ identified systemic deficiencies in “BPD’s policies, training, supervision, and accountability structures that fail[ed] to equip officers with the tools they need[ed] to police effectively and within the bounds of the federal law.”¹²⁸ Due to these deficiencies, the DOJ created a set of guidelines for BPD to follow in order to build trust between officers and the Baltimore community and achieve better crime-fighting efforts.¹²⁹

The DOJ mainly uncovered key drawbacks in BPD’s policies; training; data recorded, reported, and used; and officer accountability for misconduct.¹³⁰ After the DOJ investigation, the DOJ and BPD came up with a consent decree to reform the BPD.¹³¹ The overall goal of the consent decree was to “deliver services in a manner that respects the rights of residents, increases trust between officers and the communities they serve, and promotes public and officer safety.”¹³² Two key tasks needed to implement that goal included incorporating a more proactive, community-oriented police department and creating a system that placed a higher emphasis on using deescalation techniques.¹³³

In response to these goals, the BPD changed some of its use-of-force policies, training procedures, and department guidelines prior to the DOJ’s release of the full consent decree.¹³⁴ For example, the BPD doubled the number of mandatory training hours, from 40 hours to 80 hours, in order to train officers on deescalation techniques and give them a proper understanding of how these

126. BPD was accused of making unconstitutional arrests, discriminating against African Americans in enforcement activities, and using unreasonable force. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3–11 (2016), <https://www.justice.gov/opa/file/883366/download> [hereinafter “BALTIMORE DOJ REPORT”].

127. The systemic deficiencies identified by the DOJ later on included the BPD’s failure to adequately supervise its officers’ enforcement activities, adequately support its officers, and hold officers accountable for misconduct. *See generally id.*

128. *Id.* at 3.

129. This information was later incorporated into the 227-page, court-enforceable consent decree signed on January 2017 between the Mayor of Baltimore and the DOJ. Heavy emphasis was placed on training, stricter use-of-force guidelines, and greater transparency. *See Cassie, supra* note 20.

130. *See generally* BALTIMORE DOJ REPORT, *supra* note 126.

131. For a more in-depth description of the consent decree, see *supra* text accompanying notes 38–41.

132. Kevin Rector & Luke Broadwater, *Baltimore, U.S. Justice Department Reach Agreement on Police Reforms*, BALT. SUN (Jan. 11, 2017, 6:59 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/doj-report/bs-md-ci-consent-decree-20170111-story.html>.

133. *Id.*

134. Kevin Rector, *Baltimore Police Doubling In-Service Training Requirement for Officers, Commissioner Says*, BALT. SUN (Jan. 10, 2017, 5:03 PM), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-police-service-training-20170110-story.html>.

techniques work.¹³⁵ Another example included increasing the amount of time that was going to be spent training officers on ways to interact with young people, people with mental disabilities, and people in crises.¹³⁶ While the DOJ commended the BPD for moving in the right direction, it insisted that more needed to be done and provided the BPD with a 227-page consent decree.¹³⁷

Some critics have recognized that the tremendous changes in police use-of-force policies, like those being made in the BPD, may impact the amount and type of people willing to become or stay officers for the BPD because of the increased scrutiny and higher standards placed on police officers.¹³⁸ These seem like real concerns that need to be addressed in order to ensure that there are enough competent and qualified people applying to become police officers. However, this is a small price to pay if it can lead to clearer guidelines and more effective training within police departments.

C. Chicago Police Department (CPD) Use-of-Force Policies

In 2017, the Chicago Police Department (CPD) passed a new use-of-force policy focused on the sanctity of life.¹³⁹ Sergeant Mark Lemus of the CPD hopes that this new focus will help protect the lives of officers and civilians and break the code of silence prevalent among police officers.¹⁴⁰ Sergeant Lemus believes that requiring officers to intervene in and report incidents of excessive force will help ensure that the sanctity of life remains a priority.¹⁴¹

Similar to the BPD policy, the CPD policy was enacted after a DOJ investigation uncovered systemic abuses by the CPD.¹⁴² The systemic abuse did not appear to be as prevalent in the CPD as in the BPD, but there were some overlaps between the DOJ's findings. The CPD's new approach is supposed to provide more detailed policies to hold officers more accountable for their conduct.¹⁴³

135. *Id.*

136. *Id.* These groups of people are seen as high-risk groups, and the Baltimore DOJ study suggests that officers may need more narrowly tailored training designed to work with these particular groups of people. *See* BALTIMORE DOJ REPORT, *supra* note 126, at 8.

137. *See* Baltimore DOJ report, *supra* note 126, at 8.

138. *See* Cassie, *supra* note 20.

139. Kelly Bauer, *Chicago Police's New Use Of Force Policy Focuses On 'Sanctity Of Life'*, DNA INFO, (May 17, 2017, 11:37 AM), <https://www.dnainfo.com/chicago/20170517/bronzeville/chicago-police-use-of-force-policy-cpd> (describing "sanctity of life" focus as having officers only use force when absolutely necessary).

140. Cheryl Corley, *New Use-of-Force Guidelines for Chicago Police*, NPR (Oct. 14, 2017, 7:12 PM) <https://www.npr.org/2017/10/14/557832705/new-use-of-force-guidelines-for-chicago-police>.

141. *Id.*

142. These DOJ investigations are by no means exhaustive. The DOJ has investigated various police departments throughout the years regarding their use-of-force policies. *See* Marcus, *supra* note 42, at 93–97.

143. *See* *Use of Force Policy*, CHI. POLICE, http://home.chicagopolice.org/wp-content/uploads/2017/05/G03-02_Use-of-Force_TBD.pdf (last visited Oct. 10, 2018).

For example, the CPD use-of-force policy includes detailed descriptions of what force is appropriate at various levels of encounters.¹⁴⁴ Chicago Police Superintendent Eddie Johnson has also stated that he plans on encouraging the CPD to get more involved with the Chicago community in order to increase community trust and encourage community policing.¹⁴⁵ The CPD approach seems more focused on working with the community and finding ways to incorporate technology into policing so that communication between the public and police officers can be more efficient.¹⁴⁶

However, some scholars have critiqued the CPD's approach because they expected the CPD's policy to explicitly state that deadly force may only be used by a police officer as a last resort.¹⁴⁷ The new policy did not include this provision, and critics have argued that this version strayed too far from the original draft, which was more restrictive of when officers could use deadly force.¹⁴⁸ These critics argue that the policy language should be more specific and make clear that police use of force should only be used in exceptional cases and when necessary.¹⁴⁹

Although the CPD seems to be moving in the right direction, skeptics have expressed concerns that these problems are going to remain ingrained in the CPD due to decades of policing a certain way.¹⁵⁰ These skeptics argue that more than a one-day training is needed to ensure that police culture changes.¹⁵¹ These concerns explain why some argue that the best way to ensure that real systemic change is achieved in police departments like the CPD is to have some form of external oversight and monitoring, such as that provided by a federal consent decree.¹⁵²

144. Garrett & Stoughton, *supra* note 17, at 280–81.

145. See Don Babwin & Colleen Long, *Chicago Tries to Learn From New York Crime Fighting Success*, PHYS.ORG, (Mar. 8, 2017), <https://phys.org/news/2017-03-chicago-york-crime-success.html>.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. See *supra* text accompanying notes 23–27.

151. Corley, *supra* note 140.

152. See Sheila A. Bedi & Craig Futterman, *Comments on the Chicago Police Department's Proposed Use of Force Guidelines*, NW. PRITZKER SCH. L. (Mar. 14, 2017), <http://www.law.northwestern.edu/legalclinic/macarthur/projects/police/documents/Bedi%20Futterman%20Comments%20on%20CPD%20Proposed%20Use%20of%20Force%20March%202017%20F.pdf>.

D. Comparison of the Three Use-of-Force Policies

TABLE 1: Chart Comparing the Three Police Departments

	DOJ investigation last 5 years	Consent Decree in the last 5 years	Implicit-Bias Training	Deescalation	Data Release	Use-of-Force Continuum
L.A. (LAPD)	No	No	Yes	Yes	Yes	No
Baltimore (BPD)	Yes	Yes	No	Yes	Yes	No
Chicago (CPD)	Yes	Yes	No	Yes	Yes	Yes

IV. TAKEAWAYS FROM THESE POLICE DEPARTMENTS

Some of the recurring problems seen in these three police departments and their approaches to use-of-force policies include lack of officer accountability, lack of incentives to change policies, and policies that look good on paper but do not translate well into practice.¹⁵³ All three of these police departments are changing their policies in response to perceived inadequacies within their departments.¹⁵⁴ The LAPD is taking a more proactive approach by attempting to get ahead of the problem before the DOJ is asked to step in,¹⁵⁵ while the BPD and CPD are responding to the findings of the DOJ and the changes forced upon them.¹⁵⁶ Each policy approach suggests that in order to improve use-of-force policies there needs to be more public accountability, ongoing training, and clear language in use-of-force policies.

First, the policies analyzed above suggest that it is important to find ways to hold police departments and officers more accountable to the public. Each of the three departments is either providing more information to the public or considering doing so. The LAPD began releasing its policies and efforts to deal with crimes in

153. Some critics have argued that policymakers and police executives should be careful about trying to change police behavior merely with words because “[p]utting content in policy that may sound good and may appease some in the community is not effective.” See Michael Ranalli, *Police Use of Force: Reality vs. Law*, LEXIPOL (Oct. 24, 2017), <http://www.lexipol.com/news/police-use-of-force-reality-vs-law/>.

154. This is happening throughout police departments across the United States. Part of this may be due to the pressures being placed on police departments from media exposure and high-profile, controversial cases. See *supra* text accompanying notes 7–11.

155. While the LAPD appears to be the most proactive of these three police departments, this does not necessarily make the LAPD approach the better policy. The LAPD may just have more time to learn from its mistakes because it has been subject to a consent decree by the DOJ in the past. See CNN Wire, *Experts Say LAPD Has Undergone Transformations in the 25 Years Following the Riots*, KTLA 5 (Apr. 29, 2017, 6:36 AM), <http://ktla.com/2017/04/29/experts-say-the-lapd-has-undergone-transformations-in-the-25-years-following-the-riots/>.

156. See *supra* Sections III.B–C.

2015,¹⁵⁷ and the BPD was instructed by the DOJ to release its policies and data in 2016 in order to improve community relations and provide more transparency to the public.¹⁵⁸ If effective, this approach seems powerful because “people are more satisfied with police decisions when they believe that the police are exercising their authority through fair procedures.”¹⁵⁹

Second, focusing on *recurring* training may be more beneficial in the long run than merely revamping police-academy classes. The LAPD and the CPD have recognized the need for ongoing training that develops as new challenges and findings arise.¹⁶⁰ Each of the three departments is approaching training differently, but one of the similarities among them is incorporating more techniques outside of weapons training.¹⁶¹ This appears to be a step in the right direction because many police departments focus their training on weapons training rather than on other forms of conflict resolution, like deescalation techniques.¹⁶² Deescalation techniques may be crucial in reducing instances of deadly use of force because they equip officers with nonlethal ways to approach tense situations.¹⁶³

Third, these three departments have placed an important emphasis on the language used in police use-of-force strategies. Police departments need to be careful and very intentional with the language in their policies to provide guidelines that are as clear as possible. Much of the recent criticism of police use-of-force policies is that these policies are too vague, and that vagueness keeps police departments from having to explain their officers’ actions.¹⁶⁴ The problem with vague policies is that “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 . . . deadly force.”¹⁶⁵ Police departments need to take clearer stances on their policies in order for officers to understand their department’s policy and reduce the risk posed to citizens. Overall, these three takeaways provide useful information that can be used to improve police use-of-force strategies.

157. See *supra* text accompanying notes 99–103.

158. See *supra* text accompanying notes 126–32.

159. See Tracy Meares, *The Path Forward: Improving the Dynamics of Community-Police Relationships to Achieve Effective Law Enforcement Policies*, 117 COLUM. L. REV. 1355, 1355 (2017).

160. See *supra* Sections III.A, III.C.

161. “Weapons training” refers to police training centered on the use of weapons like guns, batons, and tasers. This is distinct from other forms of training that do not involve weapons, like tactical retreats and deescalation techniques. See Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, ATLANTIC (Dec. 12, 2014), <https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>.

162. See Garrett & Stoughton, *supra* note 17, at 251.

163. See *supra* text accompanying notes 107–08.

164. See Lopez, *supra* note 26 (discussing how police body cameras have still led to many acquittals in high-profile cases due to the vague reasonableness standard provided by the Supreme Court).

165. See Garrett & Stoughton, *supra* note 17, at 261.

V. TWO-PRONGED SOLUTION

Police culture needs to adapt to changes in a society that has become more critical of use of force, and part of this involves changing the way the reasonableness standard is analyzed under the Fourth Amendment. New use-of-force policies—like the ones seen in the LAPD, BPD, and CPD—seem good on paper, but they are unlikely to create major change in their police departments if they are not able to shift the way officers view these new policies.¹⁶⁶ This Note proposes a two-pronged solution to the use-of-deadly-force problem.

First, in order to positively change policies pertaining to police use of deadly force, federal legislation needs to be enacted to set some minimum-training requirements across the country.¹⁶⁷ In order to minimize issues of states' rights, this training would have to be limited to essential types of training that are imperative to use-of-deadly-force cases.¹⁶⁸ The current lack of federal training requirements for police officers has led to very different approaches across police departments in the United States,¹⁶⁹ and different government agencies have found that many of these departments engage in unconstitutional practices.¹⁷⁰

Second, the Fourth Amendment reasonableness standard needs to be analyzed from a different perspective. Two possible alternatives include approaching the reasonableness standard from the perspective of a reasonably *well-trained* officer or allowing the jury to consider whether the officer could have deescalated the situation *before* the critical moment where a snap decision had to be made. Changing the approach to the reasonableness standard in use-of-force cases would provide more incentives for police departments to change policies and make it more difficult for officers to get away with misconduct due to a lack of training.¹⁷¹

Providing some baseline constitutional requirements will help police departments become more efficient by providing them with increased consistency and clear guidelines. Moreover, changing the way the reasonableness standard is

166. See Cohen, *supra* note 89, at 112–22 (discussing how changing police culture can help create more sustainable and lasting change in police departments that are more accepting of change).

167. See Balko, *supra* note 28 (discussing how the Supreme Court can only set limits on what the police can do, and noting that “[i]f the political will were there, any state legislature in the country could pass a law putting more stringent restrictions on the use of lethal force by law enforcement”).

168. Considering the fact that police departments have a lot of discretion, there is a strong chance that states or local governments may be resistant to the federal government telling them what to do. For this reason, change may be easier to accept if it comes in small chunks, starting with the most important changes first.

169. *Adopt Uniform Police Use-of-Force Policies*, USA TODAY (July 10, 2017, 7:15 PM), <https://www.usatoday.com/story/opinion/2017/07/10/adopt-uniform-police-use-of-force-policies/425162001/>.

170. See *supra* Sections III.B–C.

171. See Garrett & Stoughton, *supra* note 17, at 218–19. However, even if the reasonableness standard is raised, a legislative solution appears more promising than a judicial one because the reasonableness standard is still highly constrained by the qualified-immunity protection officers receive. See discussion *supra* notes 31–37.

interpreted will allow for more victims of police use-of-force cases to come forward and achieve favorable results, which in turn might disincentivize officers from shirking their training or engaging in misconduct.

A. Federal Guidelines Requiring a Consistent Set of Minimum-Training Requirements Across the Country

Some critics of the current use-of-force policies have suggested that a national model standard could be developed and that grant money could be used to encourage states and local governments to adopt minimum standards pertaining to use-of-deadly-force policies.¹⁷² Requiring police departments to incorporate certain approaches into their training and fully disclose their use-of-force policies in order to receive federal funding would pave the way for more uniform rules regarding police use of force.¹⁷³ In order to create minimum-training requirements that can apply to all police departments, it is important for Congress to have as much data as possible so it can make informed decisions based on best practices around the country. One of the ways that this data can be gathered is by mandating every police department to disclose its use-of-force policy to the public.¹⁷⁴

Minimum-training requirements are essential to creating more consistency across police departments. While it is not necessary, or even desirable, to have every police department across the country be identical,¹⁷⁵ it is important to establish basic guidelines that can provide clear guidance on what type of behavior is appropriate. The mandatory standard should go beyond the current constitutional minimum in order to lessen the ambiguity surrounding police use-of-force cases and ensure that citizens more adequately understand their rights.¹⁷⁶ However, in order to minimize

172. See *Adopt Uniform Police Use-of-Force Policies*, *supra* note 169 (discussing how the Justice Department could develop a model standard).

173. Conditioning federal funding has been effective in achieving state compliance and more uniform statutes for laws related to the drinking age: Congress passed a law in 1984 stating that the federal government could withdraw ten percent of federal funding from states that do not comply with a minimum drinking age of 21. See *Alcohol Policy*, NAT'L INST. HEALTH, <https://www.niaaa.nih.gov/alcohol-health/alcohol-policy> (last visited Oct. 10, 2018). All states now abide by a minimum drinking age of 21. *Id.*

174. Currently, police departments are under no obligation to disclose this information, but some police departments have voluntarily chosen to do so. See German Lopez, *Police Shootings and Brutality in the US: 9 Things You Should Know*, VOX (May 6, 2017, 1:23 AM), <https://www.vox.com/cards/police-brutality-shootings-us>. While this seems like a practical approach to the problem, police departments may not like the idea because they would have to find a way to convey the data to the public, and this data may leave their departments open to more criticism.

175. It is unnecessary for departments to be identical because “[w]hat’s wrong with your police department is not necessarily the same as what’s wrong in that of another city.” See Ira Glasser, *Fighting Police Abuse: A Community Action Manual*, ACLU (Aug. 1997), <https://www.aclu.org/other/fighting-police-abuse-community-action-manual>. However, there are some vital changes that can benefit all police departments. See *id.*

176. A similar analysis has been taken in different settings. See, e.g., Drew Thomas, *Salinas v. Texas: Why Silence Is No Longer Golden, and What That Means for Texas Citizens and Police Agencies*, 16 TEX. TECH ADMIN. L.J. 247, 267 (2014).

the pushback from states'-rights advocates,¹⁷⁷ the federal legislation would need to be narrowed to training that is deemed "essential." This Note proposes three conditions the federal government should require of all police departments.

First, the federal government should require all police departments to release information pertaining to police use-of-force policies. This information should include police manuals, training materials, and statistics showing how often force is used and justified in the department. While this information may shock people if the policies are seen as too lax or unfair, this transparency is necessary to better understand the pros and cons of the current policies. Releasing this information could ultimately improve relationships between the police and community by creating more legitimacy and trust within the general public.¹⁷⁸

Second, every police department should be required to explicitly include a use-of-force policy in its police manual. Based on the three police departments discussed above, and some of the concerns that arose within them, it is imperative for police departments to provide their officers with clearer directions on what conduct will be allowed by their respective departments. Although some departments are already doing this, it is not required at the moment, and many police departments are just releasing information because it seems like the politically correct thing to do rather than actually believing in its importance.¹⁷⁹ While this may still have some positive effects, the greatest change will come if police departments create real institutional change and alter the police culture surrounding use-of-force policies.

Third, the use-of-force policy in every police department should clarify and provide detailed explanations of how the department will incorporate at least three different safeguards prior to an officer's use of deadly force in order to decrease deadly use-of-force situations.¹⁸⁰ These three safeguards include the incorporation of deescalation techniques, more nonlethal weapons, and more verbal communications. While it is important to provide more specificity in use-of-force policies, there is merit to the claim that officers are often involved in dangerous

177. The legislative branch would have to be careful with the suggested approach to ensure that the federal government does not violate anticommandeering principles. See generally Mike Maharrey, *States Don't Have to Comply: The Anti-Commandeering Doctrine*, TENTH AMEND. CTR. (Dec. 28, 2013), <https://tenthamendmentcenter.com/2013/12/28/states-dont-have-to-comply-the-anti-comandeering-doctrine/>.

178. See Ryan Sibley et al., *The Benefits of Data in Criminal Justice: Improving Police-Community Relations*, SUNLIGHT FOUND. (Apr. 30, 2015, 3:33 PM), <https://sunlightfoundation.com/2015/04/30/the-benefits-of-data-in-criminal-justice-improving-police-community-relations/>; see also Community Relations Services, *Importance of Police-Community Relationships and Resources for Further Reading*, U.S. DEP'T JUST., <https://www.justice.gov/crs/file/836486/download> (last visited Sept. 26, 2018).

179. See Brian Landers, *Are De-Escalation Policies Dangerous?*, POLICE MAG. (Oct. 14, 2017), <http://www.policemag.com/channel/careers-training/articles/2017/10/are-de-escalation-policies-dangerous.aspx> (noting that police departments throughout the country are adopting deescalation techniques due to political pressures).

180. These three safeguards are particularly necessary because they allow officers to focus on nonlethal uses of force that carry less danger than the current methods.

situations where they do not know all of the information when they respond to a potential crime.¹⁸¹ This proposed model would still allow for police use-of-force cases to be analyzed on a case-by-case basis, which can alleviate concerns about rapidly evolving and tense situations, while still helping to achieve more justice for those harmed by officers who explicitly violate publicly stated policies. One of the goals of requiring police departments to explicitly include language that emphasizes other nondeadly approaches is to increase public trust in and perception of law enforcement.¹⁸² Putting clear policies in writing makes it easier to hold officers accountable because courts and plaintiffs will have specific language to support their claims.

B. Changing the Way the Reasonableness Standard is Viewed Under the Fourth Amendment

The Supreme Court has set a very low standard for what type of behavior is permissible under the Fourth Amendment reasonableness standard.¹⁸³ The major Supreme Court cases discussed above make it clear that the Court has been more deferential toward police officers, which suggests that the Court has been reluctant to become overly involved in police affairs.¹⁸⁴ This reluctance has led some scholars, as well as Justice Sotomayor, to conclude that the Court is essentially sanctioning a “shoot first, think later” mentality among police departments across the United States.¹⁸⁵ Some police departments are beginning to respond to public concerns, either by choice or by force, through consent decrees required by the DOJ.¹⁸⁶ However, in order to leave a stronger lasting impact on Fourth Amendment jurisprudence, the Fourth Amendment reasonableness standard needs to be analyzed in a different way.

The current standard for a police use-of-force case takes an objective approach that allows officers too much wiggle room.¹⁸⁷ Because the Court focuses on the split-second moment of a police encounter and disregards the subjective motivations of police officers, officers that are ill-trained or intentionally abusive of

181. See *supra* text accompanying notes 55–57.

182. See *supra* text accompanying notes 104, 124, 127, 140.

183. This has left many agencies to turn “not to their own best practices or tactics, but to the more flexible and forgiving standard adopted by the Supreme Court.” See Garrett & Stoughton, *supra* note 17, at 290–91.

184. There are many different explanations for this deference, including political reasons and judicial concerns that this is not a matter for the court to get involved in. See Gross, *supra* note 18, at 161 (noting that the Supreme Court may not want to require officers to take unnecessary risks while on the job); see also Balko, *supra* note 28 (discussing how “[t]he Supreme Court has long been deferential to police officers, refusing to second guess their motives, and in many contexts giving them passes for ‘honest mistakes’”).

185. See *supra* text accompanying note 88.

186. See German Lopez, *America’s Police Use of Force Problem, In One Sentence*, Vox (Apr. 3, 2017, 12:40 PM), <https://www.vox.com/policy-and-politics/2017/4/3/15160342/betty-shelby-terence-crutcher-police-shooting>.

187. See *supra* text accompanying notes 76–80.

their authority can often still get away with killing someone while on the job.¹⁸⁸ Two suggestions for the Court are provided below.

First, a better approach would be to change the standard from the perspective of an objective officer to that of a *well-trained* objective officer. To adopt this policy, the Supreme Court would need to define a “well-trained officer” so that there is a standard for courts to follow.¹⁸⁹ The rationale behind this approach would be that officers will be held to a slightly higher standard, in the sense that they will need to show that their actions were objectively reasonable compared to that of an officer who was adequately trained for that situation.¹⁹⁰

Many of the police departments across the United States focus primarily on tactical combat training that emphasizes the use of weapons rather than other less dangerous police tactics and techniques.¹⁹¹ Research has suggested that there may be other tactics that are less dangerous and can still be as effective.¹⁹² Like the LAPD, some police departments across the United States are starting to incorporate more training centered on less dangerous tactics, like deescalation techniques.¹⁹³ The rationale behind this approach is that if officers are better equipped and trained to respond to high-stress situations, they will be more likely to use these approaches rather than resort to more deadly tactics that involve the use of weapons. A tactical approach to the reasonableness standard would raise the constitutional floor under current § 1983 litigation and make the standard more useful.¹⁹⁴ Encouraging police departments to take a tactics-focused approach and analyzing the training officers had when a police-shooting death occurs would help ensure that more officers are held accountable when their conduct was clearly not in line with their training.

Second, the jury could be allowed to consider whether an officer could have deescalated the situation *before* the critical moment when a snap decision had to be made. Currently, the Court has been very focused on the split-second atmosphere of police encounters, but evidence seems to suggest that not every situation requires a split-second decision.¹⁹⁵ While officers are often involved in stressful and dangerous situations, the jury should be allowed to determine whether the officer in a particular case had time to handle a situation differently before a split-second decision needed to be made. In some of the cases discussed above, the Court ignored minutes of deliberation prior to a decision.¹⁹⁶ Allowing the jury to make this determination may encourage officers to think more carefully about their decisions or try to make nonlethal choices before a split-second atmosphere arises. More importantly, giving

188. See *supra* text accompanying notes 85–88.

189. See Garrett & Stoughton, *supra* note 17, at 293–96.

190. *Id.* This approach would help officers in most situations, but a good-samaritan provision could be included to account for unique situations where an ordinary officer finds himself in a tricky situation that might require special training only available to special task forces like SWAT.

191. *Id.*

192. See *supra* Part IV.

193. See *supra* text accompanying notes 107–08.

194. See Garrett & Stoughton, *supra* note 17, at 220.

195. See BARKAN & BRYJAK, *supra* note 68 at 288–93.

196. See *supra* notes 69, 81.

this power to the jury would still ensure that officers in high-stress situations may not be held liable if the encounter really necessitated a quick, split-second decision.

CONCLUSION

While people may disagree on the effectiveness of current police use-of-force policies, it is clear that there is room for improvement that can benefit both police and the public. Police officers can benefit from better training and clearer guidelines that will help them understand how to perform their jobs more effectively. The general public can benefit from clearer use-of-force guidelines by understanding what officers are legally authorized to do. Disclosure of police training and use-of-force policies can improve community relations by increasing transparency and making this information available to scholars, who can then analyze these policies and contribute to this area of the law.

The two-pronged approach proposed here is meant to contribute to the current debate regarding police use of force. However, it must be acknowledged that this approach is not comprehensive, and it is only intended as a jumping-off point. The current Trump Administration seems unlikely to adopt a policy approach like this, considering some of the comments President Donald Trump has made regarding police use of force.¹⁹⁷ Nevertheless, police use-of-force cases will keep appearing in the Supreme Court and in the national media until the Court or Congress steps in to provide more clarity regarding permissible police conduct in use-of-force cases.

197. See generally Mark Berman, *Trump Tells Police Not To Worry About Injuring Suspects During Arrests*, WASH. POST (July 28, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/28/trump-tells-police-not-to-worry-about-injuring-suspects-during-arrests/?utm_term=.957675838dd5; see also Jelani Cobb, *Donald Trump is Serious When He “Jokes” About Police Brutality*, NEW YORKER (Aug. 1, 2017), <https://www.newyorker.com/news/news-desk/donald-trump-is-serious-when-he-jokes-about-police-brutality>.