PRINCIPLES OF THE LAW
Policing

Revised Tentative Draft No. 1
(July 30, 2017)

SUBJECTS COVERED

PART III Use of Force
CHAPTER 5 Use of Force

The Executive Office
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099
Telephone: (215) 243-1626 • Fax: (215) 243-1636
E-mail: ali@ali.org • Website: http://www.ali.org

©2017 by The American Law Institute
All Rights Reserved
The American Law Institute

DAVID F. LEVI, President
ROBERTA COOPER RAMO, Chair of the Council
DOUGLAS LAYCOCK, 1st Vice President
LEE H. ROSENTHAL, 2nd Vice President
WALLACE B. JEFFERSON, Treasurer
PAUL L. FRIEDMAN, Secretary
RICHARD L. REVESZ, Director
STEPHANIE A. MIDDLETON, Deputy Director

COUNCIL

Kim J. Askew, K&L Gates, Dallas, TX
José I. Astigarraga, Reed Smith, Miami, FL
Scott Bales, Arizona Supreme Court, Phoenix, AZ
John H. Beizner, Skadden, Arps, Slate, Meagher & Flom, Washington, DC
Joseph A. Claeys III, Arnold & Porter LLP, Washington, DC
Amelia H. Boss, Drexel University Thomas R. Kline School of Law, Philadelphia, PA
Elizabeth J. Cabraser, Lieff Cabraser Heimann & Bernstein, San Francisco, CA
Evan R. Chesler, Cravath, Swaine & Moore, New York, NY
Mariano-Florentino Cuéllar, California Supreme Court, San Francisco, CA
John K. Fong, 3M Company, St. Paul, MN
Kenneth C. Frazier, Merck & Co., Inc., Kenilworth, NJ
Paul L. Friedman, U.S. District Court, District of Columbia, Washington, DC
Steven S. Gensler, University of Oklahoma College of Law, Norman, OK
Yvonne Gonzalez Rogers, U.S. District Court, Northern District of California, Oakland, CA
Anton G. Hajjar, Murphy Anderson, Washington, DC
Teresa Wilton Harmon, Sidley Austin, Chicago, IL
Nathan L. Hecht, Texas Supreme Court, Austin, TX
William C. Hubbard, Nelson Mullins Riley & Scarborough, Columbia, SC
Samuel Issacharoff, New York University School of Law, New York, NY
Ketanji Brown Jackson, U.S. District Court for the District of Columbia, Washington, DC
Wallace B. Jefferson, Alexander Dubose Jefferson & Townsend, Austin, TX
Gregory P. Joseph, Joseph Hage Aaronson LLC, New York, NY
Mary Kay Kane, University of California, Hastings College of the Law, San Francisco, CA
Michelle C. Kane, The Walt Disney Company, Burbank, CA
Harold Hongju Koh, Yale Law School, New Haven, CT
Carolyn B. Kuhl, Superior Court of California, County of Los Angeles, Los Angeles, CA
Carolyn B. Lamm, White & Case, Washington, DC
Derek P. Langhauser, Maine Community College System, South Portland, ME
Douglas Laycock, University of Virginia School of Law, Charlottesville, VA
Carol F. Lee, Taconic Capital Advisors, New York, NY
David F. Levi, Duke University School of Law, Durham, NC
Lance Liebman*, Columbia Law School, New York, NY
Goodwin Liu, California Supreme Court, San Francisco, CA
Raymond J. Loewer, Jr., U.S. Court of Appeals, Second Circuit, New York, NY
J. Michael McConnell, U.S. Court of Appeals, Second Circuit, New York, NY
Margaret H. Marshall, Choate Hall & Stewart, Boston, MA
Lori A. Martin, WilmerHale, New York, NY
Troy A. McKenzie, New York University School of Law, New York, NY
M. Margaret McKeown, U.S. Court of Appeals, Ninth Circuit, San Diego, CA
John J. McKetta III, Graves, Dougherty, Hearon & Moody, Austin, TX
Judith A. Miller, Ogletree Deakins, St. Louis, MO
Patricia Ann Millett, U.S. Court of Appeals, District of Columbia Circuit, Washington, DC
Janet Napolitano, University of California, San Francisco, CA
Kathryn A. Oberly, District of Columbia Court of Appeals (retired), Washington, DC
Kathleen M. O’Sullivan, Perkins Coie, Seattle, WA
Stephanie E. Parker, Jones Day, Atlanta, GA

*Director Emeritus

© 2017 by The American Law Institute
Stuart Rabner, New Jersey Supreme Court, Trenton, NJ  
Robert Cooper Ramo*, Modrall Sperling, Albuquerque, NM  
David W. Rivkin, Debevoise & Plimpton, New York, NY  
Daniel R. Rodriguez, Northwestern University School of Law, Chicago, IL  
Lee H. Rosenthal, U.S. District Court, Southern District of Texas, Houston, TX  
Gary L. Sasso, Carlton Fields, Tampa, FL  
Anthony J. Scirica, U.S. Court of Appeals, Third Circuit, Philadelphia, PA  
Marsha E. Simms, Weil, Gotshal & Manges (retired), New York, NY  
Robert H. Sitkoff, Harvard Law School, Cambridge, MA  
Jane Stapleton, Christ’s College, University of Cambridge, Cambridge, England  
Larry S. Stewart, Stewart Tilghman Fox & Bain, Miami, FL  
Elizabeth S. Strong, U.S. Bankruptcy Court, Eastern District of New York, Brooklyn, NY  
Catherine T. Struve, University of Pennsylvania Law School, Philadelphia, PA  
Jeffrey S. Sutton, U.S. Court of Appeals, Sixth Circuit, Columbus, OH  
Sarah S. Vance, U.S. District Court, Eastern District of Louisiana, New Orleans, LA  
Seth P. Waxman, WilmerHale, Washington, DC  
Steven O. Weise, Proskauer Rose, Los Angeles, CA  
Diane P. Wood, U.S. Court of Appeals, Seventh Circuit, Chicago, IL

COUNCIL EMERITI
Kenneth S. Abraham, University of Virginia School of Law, Charlottesville, VA  
Shirley S. Abrahamson, Wisconsin Supreme Court, Madison, WI  
Phillip S. Anderson, Williams & Anderson, Little Rock, AR  
Susan Frelich Appleton, Washington University School of Law, St. Louis, MO  
Sheila L. Birnbaum, Quinn Emanuel Urquhart & Sullivan, New York, NY  
Allen D. Black, Fine, Kaplan and Black, Philadelphia, PA  
Michael Boudin, U.S. Court of Appeals, First Circuit, Boston, MA  
William M. Burke, Shearman & Sterling (retired), Costa Mesa, CA  
Gerhard Casper, Stanford University, Stanford, CA  
Edward H. Cooper, University of Michigan Law School, Ann Arbor, MI  
N. Lee Cooper, Maynard, Cooper & Gale, Birmingham, AL  
George H. T. Dudley, Dudley, Topper and Feuerzeig, St. Thomas, U.S. VI  
Christine M. Durham, Utah Supreme Court, Salt Lake City, UT  
Conrad K. Harper, Simpson Thacher & Bartlett (retired), New York, NY  
Geoffrey C. Hazard, Jr.*, University of California, Hastings College of the Law, San Francisco, CA; University of Pennsylvania Law School, Philadelphia, PA  
D. Brock Hornby, U.S. District Court, District of Maine, Portland, ME  
Carolyn Dineen King, U.S. Court of Appeals, Fifth Circuit, Houston, TX  
Pierre N. Leval, U.S. Court of Appeals, Second Circuit, New York, NY  
Betsy Levin, Washington, DC  
Hans A. Linde, Portland, OR  
Martin Lipton, Wachtell, Lipton, Rosen & Katz, New York, NY  
Myles V. Lynk, Arizona State University, Sandra Day O’Connor College of Law, Tempe, AZ  
Robert H. Mundheim, Shearman & Sterling, New York, NY  
Roswell B. Perkins**, Debevoise & Plimpton, New York, NY  
Harvey S. Perlman, University of Nebraska, Lincoln, NE  
Ellen Ash Peters, Connecticut Supreme Court (retired), Hartford, CT  
Mary M. Schroeder, U.S. Court of Appeals, Ninth Circuit, Phoenix, AZ  
Robert A. Stein, University of Minnesota Law School, Minneapolis, MN  
Michael Treanor***, Cobalt LLP, Berkeley, CA  
Bill Wagner, Wagner McLaughlin, Tampa, FL  
Patricia M. Wald, Washington, DC  
William H. Webster, Milbank, Tweed, Hadley & McCloy, Washington, DC  
George Whittenburg, Whittenburg Law Firm, Amarillo, TX  
Herbert P. Wilkins, Concord, MA

*President Emeritus  
**Director Emeritus  
***President Emeritus and Chair of the Council Emeritus

© 2017 by The American Law Institute
We welcome written comments on this draft. They may be submitted via the website project page or sent via email to PLPcomments@ali.org. Comments will be forwarded directly to the Reporters, the Director, and the Deputy Director. You may also send comments via standard mail; contact information appears below.

Unless expressed otherwise in the submission, individuals who submit comments authorize The American Law Institute to retain the submitted material in its files and archives, and to copy, distribute, publish, and otherwise make it available to others, with appropriate credit to the author. Comments will be accessible on the website’s project page as soon as they are posted by ALI staff. You must be signed in to submit or view comments.

© 2017 by The American Law Institute
Reporters’ Conflicts of Interest

The project’s Reporters may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects.
SEAN SMOOT, Illinois Police Benevolent and Protective Association, Springfield, IL
CHRISTOPHER SOGHOIAN, American Civil Liberties Union, Washington, DC
DARREL STEPHENS, Major Cities Chiefs Police Association, Charlotte, NC
GEOFFREY R. STONE, University of Chicago Law School, Chicago, IL
J. SCOTT THOMSON, Camden Police, Camden, NJ
NINA VINIK, The Joyce Foundation, Gun Violence Prevention Program, Chicago, IL
DEIRDRE VON DORNUM, Federal Defenders of New York, Brooklyn, NY
SAMUEL WALKER, University of Nebraska at Omaha, Omaha, NE
ANDREW WEISSMANN, U.S. Department of Justice, Washington, DC

LIAISONS

For the Police Foundation
JIM BUEERMANN, Washington, DC
JIM BURCH, Washington, DC
MEMBERS CONSULTATIVE GROUP

Policing

(as of July 26, 2017)

RONALD J. ALLEN, Chicago, IL
JOSÉ F. ANDERSON, Baltimore, MD
DONALD B. AYER, Washington, DC
SUSAN ANNE BANDES, Chicago, IL
RONALD G. BLUM, New York, NY
ANDREW S. BOUTROS, Chicago, IL
STEVEN M. BRADFORD, Muscatine, IA
DENNIS J. BRAITHWAITE, Camden, NJ
DAVID M. BRODSKY, New York, NY
JEAN-JACQUES CABOU, Phoenix, AZ
W. TUCKER CARRINGTON, University, MS
HARRY L. CHAMBERS, Jr., Richmond, VA
STEVEN L. CHANENSON, Villanova, PA
GABRIEL J. CHIN, Davis, CA
BEVERLY WINSLOW CUTLER, Alaska

Superior Court, Third Judicial District,
Palmer, AK

MICHAEL R. DREEBEN, Washington, DC
JOSHUA DRESSLER, Columbus, OH
KRISTI K. DU BOSE, Mobile, AL
RONALD EISENBERG, Philadelphia, PA
ILANA H. EISENSTEIN, Washington, DC
J. WILLIAM ELWIN, Jr., Chicago, IL
ANNE S. EMANUEL, Atlanta, GA
ANTHONY C. EPSTEIN, Superior Court of the
District of Columbia, Washington, DC
ROGER A. FAIRFAX, Jr., Washington, DC
MARY FAN, Seattle, WA
GERALD M. FINKEL, Charleston, SC
MATTHEW L. M. FLETCHER,
East Lansing, MI
ERIC M. FREEDMAN, Hempstead, NY
PAUL L. FRIEDMAN, U.S. District Court,
District of Columbia, Washington, DC
DOROTHY J. GLANCY, Santa Clara, CA
HERVE GOURAIGE, Newark, NJ
LINDA SHERYL GREENE, Madison, WI
MICHAEL GREENWALD, Philadelphia, PA
LISA KERN GRIFFIN, Durham, NC
JOHN J. GROGAN, Philadelphia, PA
AYA GRUBER, Boulder, CO
JOHN O. HALEY, Saint Louis, MO
RONALD J. HEDGES, New York, NY
RONALD K. HENRY, Washington, DC
HERMAN N. JOHNSON, JR., Huntsville, AL
RICHARD GIBBS JOHNSON, Cleveland, OH
JOSHUA KARSH, Chicago, IL
CECELIA M. KLINKSTEIN, Madison, WI
JOSEPH P. KLOCK, Jr., Coral Gables, FL
MICHAEL J. KRAMER, Noble Circuit Court,
Albion, IN
CHERYL A. KRAUSE, U.S. Court of Appeals,
Third Circuit, Philadelphia, PA
ERIN C. LAGESEN, Oregon Court of Appeals,
Salem, OR
PETER F. LANGROCK, Middlebury, VT
PETER E. LECKMAN, Philadelphia, PA
BILL LANN LEE, Berkeley, CA
CYNTHIA K. LEE, Washington, DC
ANDREW D. LEIPOLD, Champaign, IL
BENJAMIN LERNER, Philadelphia, PA
WAYNE A. LOGAN, Tallahassee, FL
C. SCOTT MARAVILLA, Washington, DC
PAUL MARCUS, Williamsburg, VA
DAVID CHARLES MASON, Missouri
Circuit Court, 22nd Judicial Circuit,
Saint Louis, MO
MARY MASSARON, Bloomfield Hills, MI
ALFRED D. MATHESON, Albuquerque, NM
JAMES R. MAXEGER, Baltimore, MD
JASON MAZZONE, Champaign, IL
DAVID MCCORD, Des Moines, IA
JAMES C. MCKAY, Jr., Washington, DC
THEODORE A. MCKEE, Philadelphia, PA
JOSEPH MCLAUGHLIN, New York, NY
NATASHA MINSKER, Sacramento, CA
S. DAVID MITCHELL, Columbia, MO
JENNIFER L. MNOOKIN, Los Angeles, CA
PAUL MOGIN, Washington, DC
PAUL W. MOLLICA, Champaign, IL
KIMBERLY J. MUELLER, U.S. District Court,
Eastern District of California,
Sacramento, CA
RICHARD L. NEUMEIER, Boston, MA
MICHAEL M. O’HEAR, Milwaukee, WI
FLORENCE Y. PAN, Superior Court of the
District of Columbia, Washington, DC
JAN P. PATTERSON, Waco, TX
PAUL W. PATTON, New York, NY
BRIAN J. PAUL, Indianapolis, IN
LUCIAN T. PERA, Memphis, TN

© 2017 by The American Law Institute
The bylaws of The American Law Institute provide that “Publication of any work as representing the Institute’s position requires approval by both the membership and the Council.” Each portion of an Institute project is submitted initially for review to the project’s Consultants or Advisers as a Memorandum, Preliminary Draft, or Advisory Group Draft. As revised, it is then submitted to the Council of the Institute in the form of a Council Draft. After review by the Council, it is submitted as a Tentative Draft, Discussion Draft, or Proposed Final Draft for consideration by the membership at the Institute’s Annual Meeting. At each stage of the reviewing process, a Draft may be referred back for revision and resubmission. The status of this Draft is indicated on the front cover and title page.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter’s Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project’s Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter’s and Statutory Notes remain the work of the Reporter.

This project was initiated in 2015.

Earlier versions of Chapter 5 of this Draft can be found in Preliminary Draft No. 1 (2016) (as Topic 2 of Chapter 3) and in Council Draft No. 1 (2016).
Principles (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)

Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions.

a. The nature of the Institute’s Principles projects. The Institute’s Corporate Governance Project was conceived as a hybrid, combining traditional Restatement in areas governed primarily by the common law, such as duty of care and duty of fair dealing, with statutory recommendations in areas primarily governed by statute. The project was initially called “Principles of Corporate Governance and Structure: Restatement and Recommendations,” but in the course of development the title was changed to “Principles of Corporate Governance: Analysis and Recommendations” and “Restatement” was dropped. Despite this change of title, the Corporate Governance Project combined Restatement with Recommendations and sought to unify a legal field without regard to whether the formulations conformed precisely to present law or whether they could readily be implemented by a court. In such a project, it is essential that the commentary make clear the extent to which the black-letter principles correspond to actual law and, if not, how they might most effectively be implemented as such. These matters were therefore carefully addressed at the beginning of each Comment, as they should be in any comparable “Principles” project.

The “Principles” approach was also followed in Principles of the Law of Family Dissolution: Analysis and Recommendations, the Institute’s first project in the field of family law. Rules and practice in this field vary widely from state to state and frequently confer broad discretion on the courts. The project therefore sought to promote greater predictability and fairness by setting out broad principles of sufficient generality to command widespread assent, while leaving many details to the local establishment of “rules of statewide application,” as explained in the following provision:

§ 1.01 Rules of Statewide Application

(1) A rule of statewide application is a rule that implements a Principle set forth herein and that governs in all cases presented for decision in the jurisdiction that has adopted it, with such exceptions as the rule itself may provide.

(2) A rule of statewide application may be established by legislative, judicial, or administrative action, in accord with the constitutional provisions and legal traditions that apply to the subject of the rule in the adopting jurisdiction.

Principles of the Law of Family Dissolution: Analysis and Recommendations

Thus, a black-letter principle provided that, in marriages of a certain duration, property originally held separately by the respective spouses should upon dissolution of the marriage be recharacterized as marital, but it left to each State the formula for determining the required duration and extent of the recharacterization:
§ 4.12 Recharacterization of Separate Property as Marital Property at the Dissolution of Long-Term Marriage

(1) In marriages that exceed a minimum duration specified in a rule of statewide application, a portion of the separate property that each spouse held at the time of their marriage should be recharacterized at dissolution as marital property.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application.

(b) The formula should specify a marital duration at which the full value of the separate property held by the spouses at the time of their marriage is recharacterized at dissolution as marital property.

Principles of the Law of Family
Dissolution: Analysis and Recommendations

The Comments and Illustrations examined and analyzed the consequences of selecting various possible alternatives.

“Principles” may afford fuller opportunity to promote uniformity across state lines than the Restatement or statutory approaches taken alone. For example, the Institute’s Complex Litigation: Statutory Recommendations and Analysis combines broad black-letter principles with the text of a proposed federal statute that would implement those principles.
Foreword

Principles of the Law, Policing, is coming to the Annual Meeting for the first time. The project was launched in 2015 under the leadership of Reporter Barry Friedman of New York University School of Law. Barry directs a very talented group of Associate Reporters: Brandon L. Garrett and Rachel A. Harmon of the University of Virginia School of Law, Tracey L. Meares of Yale Law School, and Christopher Slobogin of Vanderbilt University Law School. Also, the project has benefited enormously from the excellent substantive work of its Fellow, Maria Ponomarenko of New York University School of Law.

At the Annual Meeting, the membership will be asked to approve the portion of the project dealing with Use of Force. Even casual readers of major newspapers know how salient and controversial the issue of excessive police force has been in recent years, particularly in metropolitan areas. In New York City, where I live, the issue captured the front pages in July 2014 with the tragic death of Eric Garner after a police officer put him in a chokehold while arresting him for the sale of single cigarettes from packs without tax stamps.

As I wrote in one of my quarterly letters to the ALI membership, because we undertook a “Principles” project, rather than a Restatement, our goal is not to synthesize judicial precedent. Instead, the Reporters are working to develop best practices for issues concerning policing that have significant legal underpinnings. Our work is informed by a variety of sources, including existing policies and practices in various jurisdictions, social science research, and constitutional norms. Finally, the audience for the project is quite broad, including legislatures, policing agencies, bodies that regulate or conduct oversight on policing, the public, and also, in some instances, the courts.

This project is distinctive in terms of the breadth of experiences of its Advisers. The group includes police chiefs and leaders of organizations that have expressed concern about policing practices, as well as judges, prosecutors, and defense attorneys. It is comforting and significant that this very diverse group agreed about the importance of addressing the Use of Force issue as soon as possible, and coalesced around the position reflected in this Draft.

During my first year as Director—a position to which I had the great honor of being appointed in May 2014—the ALI launched seven new projects. All of these projects have now
had multiple meetings with their respective Advisers and Members Consultative Groups. Principals of the Law, Policing is the first to have a portion ready for Annual Meeting approval. It is very gratifying to see this progress!

As all close observers of the ALI’s work know, it takes a village to produce an ALI project. I am therefore very grateful to the team of Reporters, particularly Professors Friedman, Garrett, and Harmon, who took the laboring oar on this portion of the project, and to the very dedicated Advisers and Members Consultative Group. At a time when our society appears unusually divided, observing individuals from very different walks of life approach very difficult issues civilly and constructively is a real privilege!

RICHARD L. REVESZ

Director

The American Law Institute

February 26, 2017
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td>xv</td>
</tr>
<tr>
<td>Reporter’s Memorandum</td>
<td>xix</td>
</tr>
<tr>
<td>Projected Overall Table of Contents</td>
<td>xxix</td>
</tr>
</tbody>
</table>

## PART III

### USE OF FORCE

#### CHAPTER 5

#### USE OF FORCE

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 5.01. Scope and Applicability of Principles</td>
<td>1</td>
</tr>
<tr>
<td>§ 5.02. Objectives of the Use of Force</td>
<td>2</td>
</tr>
<tr>
<td>§ 5.03. Minimum Force Necessary</td>
<td>6</td>
</tr>
<tr>
<td>§ 5.04. De-escalation and Force Avoidance</td>
<td>13</td>
</tr>
<tr>
<td>§ 5.05. Proportional Use of Force</td>
<td>16</td>
</tr>
<tr>
<td>§ 5.06. Instructions and Warnings</td>
<td>23</td>
</tr>
</tbody>
</table>
MEMORANDUM

TO: ALI Membership

DATE: February 17, 2017

RE: Policing Materials (Including Use-of-Force Principles)

I am the Reporter for Principles of the Law, Policing. At the 2017 Annual Meeting we are bringing to you our first set of Principles, on the subject of Use of Force.

Because this is our first set of materials for you to consider, I am also including the materials we sent to our Advisers and MCG prior to our first meeting, so that you can get a sense of the scope of the project. The only document I have revised is the Projected Overall Table of Contents, which has been altered to reflect input from the Advisers and MCG.

I know this is a somewhat novel project for ALI. I wanted to say that it is going quite well, in the sense that our Advisers and MCG are very engaged, and we are making good progress. Our group of Advisers includes a wide swath of individuals and organizations that work with policing, from prosecutors and judges, to law-enforcement officials, to community groups, advocacy groups, and activists. All are working well together, and we are finding many areas on which we can agree.

We are bringing you the Use of Force materials because the subject is timely, the need is evident, and the Advisers and MCG were able to come to agreement fairly quickly on the content. These were the subject of a meeting of the Advisers and MCG, as well as two extended conference calls. We had an excellent discussion of the material at the Council Meeting in October 2016, and made a few revisions afterward. We are very pleased to bring
them to you for your consideration. The Associate Reporters who have taken the lead on this part of the project—Brandon Garrett and Rachel Harmon (both at the University of Virginia School of Law)—and I look forward to discussing these with you in May. I also appreciate the opportunity to discuss other aspects of the project with you at that time, should you have questions.
PLAN OF WORK: TEXTUAL OUTLINE

Note: This Plan of Work originally appeared in Preliminary Draft No. 1 (2016). Some Chapter numbers and contents have since changed.

PART I

The first Chapter of Policing will provide overarching principles that apply to the Chapters that follow. The first three Sections define the scope of the volume (i.e., to which governmental functions the Principles apply), specify the goals of policing, and identify core values that ought to guide agencies in carrying out their responsibilities. Then, the first Chapter will turn to some central themes that resonate throughout the Principles: the importance of developing written policies on all aspects of police investigations, and of making these policies available to the public; the need for better data on various aspects of policing, as well as some of the challenges that data collection poses both for policing agencies and for the public; and the role that training ought to play in ensuring that policing officials act in accordance with agency policies.

PART II

The first and largest subject in Principles of the Law, Policing deals with matter commonly described as “search and seizure.” There will be five Chapters of search and seizure principles: General Principles of Search and Seizure; Investigative Searches and Seizures; Programmatic Searches and Seizures; Technology and Surveillance; and Databases.

The first Chapter of search and seizure—Chapter 2—provides some cross-cutting principles. These include when and whether warrants are necessary; the means by which warrants can be obtained; and the protections essential for various sorts of searches, seizures, or surveillance. In its discussion of protections, the Principles will draw a distinction, important to all that follows, between traditional, investigative policing—which by definition is suspicion-based—and newer programmatic, regulatory, or deterrent approaches, which tend to be suspicionless. Suspicion-based searches and seizures are the stops, searches, and arrests that typically have been governed by warrants or exceptions to the warrant requirement. Suspicionless searches include (among other things) administrative searches, roadblocks, and
much of the surveillance driven by modern technology, such as CCTV, license-plate readers, and bulk data collection.

Chapter 3 will deal with policing in the investigative context. By this we mean policing directed primarily at criminal investigation, and usually, but not always, justified by—in the Supreme Court’s parlance—“individualized suspicion.” Thus, this Chapter does not address police actions such as checkpoints, drug testing programs, municipal inspection programs, and general camera surveillance, which are addressed in the Chapter on programmatic searches.

This Chapter is divided into three parts: policing encounters, generically referred to as seizures (stops and arrests); acquiring information (frisks, full searches, tracking, wiretapping); and the use of force.

Importantly, the principles of justification described here do not pertain solely to constitutional justification. The Constitution provides a floor of minimal standards, but more is needed to ensure democratic accountability and the use of police practices in a manner consistent with the rule of law, as discussed in Chapter 1. With respect to investigation, the Principles outlined below encourage departments to develop justification rationales that include attention to statutory constraints as well as constitutional ones. Because investigative policing is one of the most common sites of police–citizen interaction, this work must be carried out with attention to promoting the legitimacy of policing. That is, policing must be carried out in a way that promotes fairness and trust between police and citizens.

Chapter 4 will address programmatic searches and seizures, which are searches and seizures that, in contrast to investigative searches and seizures, are explicitly suspicionless. In other words, programmatic actions permit search or seizure of individuals despite the absence of what the courts call “individualized suspicion.” Examples of programmatic actions include checkpoints (aimed at illegal immigrants, drunk drivers, unlicensed drivers, etc.); drug testing programs; DNA sampling; residential and business inspection programs; collection of communications metadata; and general surveillance involving cameras, tracking systems, and the like.

Some of these programmatic actions may not involve “searches” or “seizures” as defined by the Supreme Court’s Fourth Amendment jurisprudence. Those that are so designated are usually governed by the Supreme Court’s “special needs” doctrine. The fact that programmatic actions are either not governed by the Fourth Amendment or are governed by a doctrine that
many believe suffers in coherence makes this topic a particularly important one to address in these Principles.

The Principles will address: (1) the role of legislatures and executive bodies in authorizing programmatic actions, including the degree of specificity required by authorizing statutes, regulations, or policies; (2) the types of oversight necessary for programmatic actions; (3) the application of administrative law principles to police agencies contemplating programmatic actions, including the need for notice and comment procedures, written rules, and explanations for those rules; (4) the requirement of even-handed implementation of programmatic actions both in a particular case (as with operation of a particular roadblock) and across cases (as with the decision as to where to operate roadblocks); (5) the interaction of the principles on programmatic actions with the principles on investigative policing (which might be triggered during a programmatic search or seizure), and with the principles on databases (since databases might provide the basis for programmatic actions or record their results).

Chapter 5 will address some of the key issues surrounding technology and policing—both policing agency use of various surveillance technologies, and government access to private data stored on technological devices, social networking sites, and cloud servers. New technologies have greatly enhanced the capabilities of policing agencies, but also the ability of those who wish to do harm to society to avoid detection. Use of new surveillance technologies—such as CCTV cameras, license-plate trackers, and GPS devices—also poses a threat to individual privacy and anonymity by enabling policing agencies to collect and store information about civilians’ movements, habits, and associations. In addition, surveillance technologies present difficult choices about who will be subject to enhanced monitoring and observation.

Given the rapid pace of technological change and the limited reach of the Fourth Amendment in this area, many of the questions surrounding use of technology ultimately will need to be resolved by legislatures, executive bodies, policing agencies, and their communities. The Principles in this Chapter will provide much-needed guidance to these various bodies as they consider how best to make the most of the promise of new technologies, while addressing the various threats to individual liberty and privacy that their use can potentially pose.

This Chapter will proceed in two parts. Part 1 will provide a framework for analyzing various surveillance technologies, explain why it is necessary to create rules governing their use, and then address specific categories of technologies based on the unique concerns that they raise.
These will include: (1) technologies (such as GPS tracking) that allow ubiquitous monitoring of a person’s public movements over time; (2) technologies that do not track over time, but enhance detection or surveillance capacity, such as bio-recognition software, license-plate trackers, sting rays (which detect the instantaneous location of a cell phone), and drones; and (3) technologies designed to monitor police, such as body cameras. Part 2 will focus on government access to individuals’ data stored on technological devices (i.e., cell phones or laptops), e-mail providers, or digital storage sites; and shared on social networking sites.

The final Chapter of Part II will focus on police use of databases. Law enforcement agencies maintain databases that contain information about identified or identifiable individuals in a number of domains, including: stop, arrest, criminal, and correctional histories; DNA profiles; terrorist affiliations; gang membership; weapons use; released sex offenders; and compilations of communications, financial, travel, and other transactions (as might occur, for instance, with “fusion centers”). Law enforcement also often seeks to access the databases of other public and private entities, including banks, phone companies, and Internet service providers.

Regulation of the creation, maintenance, and use of law enforcement databases is often nonexistent or haphazard. Constitutional jurisprudence regarding police access to information held by third parties is in a state of flux, and federal and state legislatures have created a welter of statutes regulating this type of law enforcement activity. Thus, principles that provide guidance on law enforcement use of databases would be of significant assistance to law enforcement agencies.

The Principles on databases will cover: (1) the types of data law enforcement may retain; (2) the duration of such retention; (3) measures designed to keep data secure; (4) measures designed to assure the accuracy of data, including procedures for permitting subjects to correct misinformation; (5) when, and with what restrictions, law enforcement may access its own databases; (6) when law enforcement may access the databases of other government agencies and private entities, including the role of subpoenas and other mechanisms for obtaining recorded information; (7) when data may be used for adjudicatory purposes; (8) disclosure of law enforcement data to other agencies and entities; and (9) accountability mechanisms, including notice to the subjects of databases and periodic reporting.
PART III

Part III will begin by setting out general goals of criminal investigations, including accuracy in evidence gathering, fairness during the process of evidence gathering, and principles for documentation and report writing during investigations. The first Chapter also will discuss at the outset professional and ethical obligations during evidence gathering including by taking a risk-based approach to investigation integrity. Then, in four separate Chapters, this Part will address forensic evidence, eyewitness identification evidence, confessions, and the use of informants.

Chapter 8 on forensic evidence will establish the importance of policy and training on the accurate and well-documented collection and preservation and retention of crime scene evidence. Principles will set out obligations of law enforcement and crime lab personnel to document their analysis of that crime scene evidence. Principles will set out their legal and ethical obligations to clearly and accurately convey their findings to law enforcement, prosecutors, and the defense, including by conveying the documentation of their analysis, the findings, their methods, and the statistical significance of their findings, together with applicable error rates. Principles will set out a framework for pretrial judicial review of forensic evidence, use of expert testimony, jury instructions at trial, and postconviction review.

The Principles regarding eyewitness identifications in Chapter 9 will describe the need to adopt in policy clear written procedures that reflect scientific evidence concerning human vision and memory. Principles will describe: the need for standardized eyewitness identification procedures that provide easily understood instructions to eyewitnesses; procedures for selecting and presenting photographs to eyewitnesses; procedures for presenting images “blind” or “blinded” so that the administrator cannot even unintentionally influence the outcome; procedures for recording the level of confidence of the eyewitness; and when available, procedures for electronically recording the procedures. The Principles will set out a framework for pretrial judicial review of eyewitness evidence, the use of experts, jury instructions at trial, and postconviction review.

The Principles on confession evidence in Chapter 10 will include police interviews and interrogations. Principles will set out the need to electronically record interviews and custodial interrogations, as well as the need for written policies to guide the use of recording equipment and the retention and disclosure of such recordings. Principles will guide the use of interrogation
and interview techniques and constitutional and professional obligations to avoid coercion and contamination of resulting statements. Principles will separately treat interviews and interrogations of juveniles and mentally ill and disabled persons. Principles will set out a framework for pretrial judicial review of confession evidence, use of expert testimony, jury instructions at trial, and postconviction review.

The final Chapter, on informant evidence, will cover the need for written policies regulating: the recruitment of such informants; the screening, qualifications, and eligibility of informants; the documentation of cooperation, payment, and leniency arrangements with informants; the documentation and electronic recording of interviews with informants; as well as the systematic tracking of the use of informants across cases. Principles will set out a framework for pretrial judicial review of informant evidence, use of expert testimony, jury instructions at trial, and postconviction review.

PART IV

This Part will consist of three Chapters on remedies and accountability. Chapter 12 will focus on Principles to ensure that police officers are accountable within the policing agencies that employ them. The Principles will describe the role that legislatures and agencies can play in articulating expectations for police conduct. They will elaborate upon the training necessary to enable officers to pursue their mission and to adhere to the rules and law that govern their conduct. They will describe the importance of reinforcing those rules with agency supervisory practices, performance measures, and disciplinary processes. And they will emphasize the role that collecting data on police conduct and practices, complaints, civil suits and settlements, and other sources of information can play in internal accountability.

Chapter 13 will provide Principles designed to facilitate political governance of policing. These Principles will highlight the significance of departmental and municipal structure in this regard, and will describe external mechanisms for evaluating policing policy and practices such as civilian review and auditing mechanisms. They will discourage practices that undermine political governance of the police, such as providing resources to policing agencies outside traditional paths of political control. They will also state Principles for collecting, aggregating, and making accessible information and data about policing policy and conduct.

The final Chapter will state principles concerning the legal mechanisms for ensuring individual officer and agency accountability. Although legal accountability for police
misconduct covers several major areas of law, including some addressed in other ALI projects, the Principles here are intended to ensure that legal responses to police misconduct provide adequate remedies for harms caused by police conduct to individuals, that they encourage officers and agencies to comply with the law and work to avoid future violations, and that they are fair to officers and agencies. This Chapter will include discussion of the following remedies: the exclusionary rule, civil liability for damages, civil liability for equitable relief, criminal prosecution, and decertification.
PROJECTED OVERALL TABLE OF CONTENTS

Part I. Overarching Principles of Policing

Chapter 1. Definitions and General Principles

Part II. Principles of Search and Seizure

Chapter 2. General Principles of Search and Seizure
Chapter 3. Investigative Policing
Chapter 4. Suspicionless Searches and Seizures

Part III. Use of Force

Chapter 5. Use of Force

Part IV. Technology

Chapter 6. Body-Worn Cameras
[Additional chapters TBA]

Part V. Databases

Chapter 7. Databases

Part VI. Principles of Evidence Gathering

Chapter 8. General Principles of Evidence Gathering
Chapter 9. Forensic Evidence Gathering and Preservation of Brady Material
Chapter 10. Eye Witness Identification
Chapter 11. Interrogation
Chapter 12. Informants

Part VII. Remedies and Accountability

Chapter 13. Internal Agency Accountability
Chapter 14. External Accountability and Political Oversight
Chapter 15. Enforcement Mechanisms and Remedies

© 2017 by The American Law Institute
PART III
USE OF FORCE

CHAPTER 5
USE OF FORCE

§ 5.01. Scope and Applicability of Principles

The following Principles:

(a) are intended to guide the conduct of all agencies that possess the lawful authority to use force, which are referred to throughout this Chapter as “agencies”;

(b) are intended for consideration by an informed citizenry, and for adoption as deemed appropriate by legislative bodies, courts, and agencies;

(c) are not intended to create or impose any legal obligations or bases for legal liability absent an expression of such intent by a legislative body, court, or agency.

Comment:

a. Scope and applicability of Principles. These Principles relating to the use of force by public-safety agencies are directed at agencies and agency employees that possess this power lawfully.

The intended audience for these Principles relating to the use of force—as is true of all Principles in this project—is broad. The Principles are intended to inform and guide the decisions of all government actors, be they legislative, executive, or judicial, as well as members of the public with an interest in public safety and law enforcement.

The Principles, standing alone, are not intended to create liability in agencies or their employees. First, they are stated at a high level of generality and thus are less specific than should be the rules that govern policing. Second, these Principles contain none of the appropriate limits on liability, such as fault or causation standards. Rather, they are intended to inform the principled development of policies and rules by governmental actors, including legislative bodies, administrative bodies (including public-safety agencies themselves), and courts.
§ 5.02. Objectives of the Use of Force

Officers should use physical force only for the purpose of effecting a lawful seizure (including an arrest or detention), carrying out a lawful search, preventing imminent physical harm to themselves or others, or preventing property damage or loss. Agencies should promote this objective through written policies, training, supervision, and reporting and review of use-of-force incidents.

Comment:

a. Definition of force. Although there are many different definitions of “force” used in law-enforcement law and policy, in these Principles, “force” refers to physically touching a person or object either directly or indirectly, such as by use of a weapon, in order to control or restrain a person, or to seize, examine, or damage property. It does not include nonphysical efforts by officers to influence conduct through commands, warnings, or persuasion, although those efforts can be used to control a person and can be used to avoid the need for physical force.

b. Definition of deadly force. “Deadly force” refers to physical force that creates a substantial risk of death or serious physical injury, whether or not death results. Except where these Principles make an express distinction, “force” includes both deadly and non-deadly force.

c. Objectives of force. Law-enforcement agencies face the unfortunate reality that some individuals will fail to comply with officer commands and will impede officer efforts, sometimes threatening public order and safety. Officers are therefore given the authority to use force in some circumstances. This authority is a serious responsibility that must be exercised judiciously and with conscious respect for human life, dignity, and liberty. Although the failure to use force also imposes risks, balancing the competing concerns requires that force only be employed for the purpose of achieving an important state end, namely, to conduct a lawful seizure, to conduct a lawful search or frisk, to secure evidence, to prevent imminent physical harm to officers or others, or to prevent property damage, property loss, or evidence destruction. In contrast, force should not be used to punish an individual or retaliate for an individual’s conduct or attitude. Moreover, force should not be used to enforce a lawful command unless compliance itself is important to serve public order, officer or public safety, or criminal adjudication. Even if enforcing a command serves an important and legitimate goal, and an individual refuses to comply, the force used should be only as much as is needed to overcome noncompliance, as is developed further in § 5.03. Given the central importance of safeguarding human life, deadly
force should be used only to stop a credible threat of death or serious physical injury to the
officer or others. Even non-deadly force, however, can cause serious nonphysical harm, serious
physical injury, or unexpected death, and should therefore be used with restraint, and in
adherence to these Principles. Similarly, force should not be threatened, such as by brandishing a
weapon, if using force would not be permitted under these Principles. Drawing or brandishing a
weapon can escalate a dangerous situation and increase the risk of injury.

   d. Promoting appropriate use of force. Although many Sections in this Part should be
promoted by agency policy, training, and supervision, agency participation in ensuring the
appropriate use of force is especially critical. To emphasize the role of agencies, the Sections in
this Chapter state that role expressly. This reference is not intended to suggest that other Sections
in this Part or others should not be furthered by similar means.

e. Relationship to other Sections. This Section states the permissible purposes of use of
force by law-enforcement officers. Even if force is intended to serve one of the purposes stated
in this Section, the decision to use force, and the kind and degree of force employed, should
comply with the requirements of §§ 5.03-5.06. Thus, officers should use the minimum force
necessary to serve the law-enforcement purpose safely (§ 5.03); they should seek to avoid force
if circumstances permit (§ 5.04); even if force is necessary to serve a permissible purpose, it
should not be used if the harm the use of force is likely to cause is disproportionate to the threat
to or the significance of the public interest (§ 5.05); and officers should provide clear instructions
and warnings before using force whenever feasible (§ 5.06).

REPORTERS’ NOTE

The definitions of “force” and “deadly force” in this Section are consistent with both
judicial rulings and state and federal statutes. See Mark A. Henriquez, IACP National Database
Project on Police Use of Force, in NATIONAL INSTITUTE OF JUSTICE, USE OF FORCE BY POLICE:
OVERVIEW OF NATIONAL AND LOCAL DATA 19 (1999); see also INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, POLICE USE OF FORCE IN AMERICA 2001, at 1 (2001),
project defines force as ‘that amount of effort required by police to compel compliance from an
unwilling subject.’”); cf. TOM MCEWEN, NATIONAL DATA COLLECTION ON POLICE USE OF FORCE
5-6 (1996) (describing varying definitions of “force” among law enforcement and researchers,
and questioning whether the presence of officers or initial verbal commands should be included
in such definitions).
Deadly force is defined—by the Model Penal Code and by federal and state courts and statutes—as physical force that creates a substantial risk of death or serious physical injury. See Model Penal Code § 3.11(2) (AM. LAW INST. 1985) (defining “deadly force” as force that creates “substantial risk of causing death or serious bodily injury”); Smith v. City of Hemet, 394 F.3d 689, 693 (9th Cir. 2005) (“We also hold that in this circuit ‘deadly force’ has the same meaning as it does in the other circuits that have defined the term, a definition that finds its origin in the Model Penal Code” and noting that “[a] definition including ‘a substantial risk of serious bodily injury’ is used by police in all fifty states, the District of Columbia, and Puerto Rico”); see, e.g., N.Y. PENAL LAW § 10.00(11) (“‘Deadly physical force’ means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.”); 10 C.F.R. § 1047.7(a) (“Deadly force means that force which a reasonable person would consider likely to cause death or serious bodily harm. Its use may be justified only under conditions of extreme necessity, when all lesser means have failed or cannot reasonably be employed.”); Kenneth Adams, What We Know About Police Use of Force, in USE OF FORCE BY POLICE, supra, at 1, 4 (1999) (describing definition of “deadly force”); Deadly Force, BLACK’S LAW DICTIONARY 760 (10th ed. 2014) (“violent action known to create a substantial risk of causing death or serious bodily harm.”); Restatement Second, Torts § 131, “Use of Force Intended or Likely to Cause Death,” Comment a (AM. LAW INST. 1965) (“In determining whether the particular means used to effect an arrest are privileged under the rule stated in this Section, the fact that they are or are not intended to cause death or are or are not such that the actor, as a reasonable man, should realize that they are likely to cause such a result, is decisive; the harm which results from their use is immaterial.”); see also International Association of Chiefs of Police, National Consensus Policy on Use of Force (January 2017), at http://www.iacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf (defining “deadly force” as “Any use of force that creates a substantial risk of causing death or serious bodily injury.”).

In addition to force that injures or creates a risk of injury to a person, force that results in property damage may also constitute a seizure that could violate the Fourth Amendment. Although a search or an entry may be lawful, “excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment.” United States v. Ramirez, 523 U.S. 65, 71 (1998); see also United States v. Jacobsen, 466 U.S. 109, 113 (1984) (“A ’seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.”); Foreman v. Beckwith, 260 F. Supp. 2d 500, 505 (D. Conn. 2003) (“when officers act unreasonably in damaging property during the execution of a search warrant, they may be subject to liability for that damage.”). However, courts recognize that some property damage may be necessary for the officers to perform a lawful search. See, e.g., Dalia v. United States, 441 U.S. 238, 258 (1979) (“officers executing search warrants on occasion must damage property in order to perform their duty.”).

Both federal constitutional rulings and state statutes and rulings also reflect the view expressed in this Section that all uses of force must be justified by a lawful objective. At a
minimum, all police uses of force prior to conviction must satisfy the standards set by the U.S. Constitution in the Fourth, Fifth, and Fourteenth Amendments, as interpreted by the decisions of the U.S. Supreme Court and lower federal courts. Those rulings indicate that force is permissible only when it is used to accomplish lawful police objectives. See, e.g., Scott v. Harris, 550 U.S. 372, 383 (2007) (focusing on the “threat to the public” that the officer was seeking to eliminate); Graham v. Connor, 490 U.S. 386, 396 (1989) (including as one of the factors in the Fourth Amendment analysis whether there was an “immediate threat to the safety of the officers”).

Most states also have statutes governing the use of force. They typically mirror this Section by setting out permissible uses of force in relation to lawful justifications. See, e.g., CAL. PENAL CODE § 196; FLA. STAT. § 776.05; MISS. CODE ANN. § 97-3-15. Others define the scope of permissible force through common-law defenses to suits and criminal proceedings against police officers for excessive force. See, e.g., Gnadt v. Commonwealth, 497 S.E.2d 887 (Va. Ct. App. 1998) (finding that police officer use of force is not a battery so long as it is justified). Though states may set standards that exceed constitutional minimums, and state statutes differ somewhat in their details, state laws more explicitly than constitutional law emphasize that force must be necessary to achieve an arrest or other law-enforcement end, an emphasis reiterated in this Section. See, e.g., CONN. GEN. STAT. § 53a-22(b) (“[A] peace officer . . . is justified in using physical force upon another person when and to the extent that he or she reasonably believes such to be necessary to: (1) Effect an arrest or prevent the escape from custody of a person whom he or she reasonably believes to have committed an offense, unless he or she knows that the arrest or custody is unauthorized; or (2) defend himself or herself or a third person from the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape.”); HAW. REV. STAT. § 703-307(1) (“[T]he use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.”); 720 ILL. COMP. STAT. 5/7-5(a) (“A peace officer . . . is justified in the use of any force which he reasonably believes to be necessary to . . . defend himself or another from bodily harm while making the arrest.”). See also Reynolds v. Griffith, 30 S.E.2d 81, 83 (W. Va. 1944) (“It is also well settled that officers, in making arrests, may not legally do more than is necessary to bring the person sought to be arrested within the officer’s control.”); Ortega v. State, 966 P.2d 961, 966 (Wyo. 1998) (approving jury instruction that states “[I]f the officer uses force in excess of what is reasonable and necessary to effect compliance, then he cannot be deemed to be engaged in the lawful performance of his duties.”); Restatement Second, Torts § 131, Comment f (AM. LAW INST. 1965) (“The use of force intended or likely to cause death for the purpose of arresting another for treason or for a felony is not privileged unless the actor reasonably believes that it is impossible to effect the arrest by any other and less dangerous means.”).
§ 5.03 Minimum Force Necessary

In instances in which force is used, officers should use the minimum force necessary to perform their duties safely. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.

Comment:

a. Minimum force. As noted in § 5.01, these Sections assert principles to which agencies and their policies should adhere, rather than standards for legal liability. They adopt the view that use-of-force policies should be more specific and informative than the general “reasonableness” standard applied pursuant to the U.S. Supreme Court’s constitutional precedents, though these Principles may also contribute to courts’ understanding of appropriate constitutional limits on the use of force. Thus, agency policies should require officers to use only the minimum force that is necessary under the circumstances. Force cannot be considered necessary if a practical, less harmful alternative means exists for achieving the same law-enforcement ends. Force should not be used simply to resolve a situation more quickly, unless the extended delay would risk the safety of the subject, officers, or others, or if it would risk damage to property or would significantly interfere with other legitimate law-enforcement objectives. Nor should force be used before a suspect manifests an imminent threat, when alternatives to force are feasible, or after a suspect no longer threatens a law-enforcement objective.

Officers often make decisions about using force with less than perfect information, in situations that are changing rapidly and are dangerous to the officers’ own lives and to the lives of members of the community, and in situations risking psychological harm and the destruction of property. By “necessary force,” this Section refers to the minimum amount of force that a well-trained and properly equipped officer would need to use in a situation to achieve one of the legitimate objectives of force stated in section § 5.02, taking into account the conditions in which the decision is made and the opportunities for reevaluation. Necessary force is that which is justified in the present or immediate moment. Force is unnecessary if it is carried out either before a legitimate objective is threatened or after a threat to a legitimate objective is resolved. Therefore, force is not to be used to retaliate for prior wrongdoing (such as resistance or flight) by a suspect, or to deter the suspect from resisting or fleeing in the future. Nor may force be used for longer than is necessary. Officers should reevaluate whether continuing to use force is necessary throughout an incident, if it is feasible and safe to do so.
§ 5.03

b. Training and supervision. Officers will have difficulty determining the minimum force necessary unless they are trained adequately, equipped properly, and guided by policy and supervision. Law-enforcement agencies and governments play a critical role in ensuring that the use of force by officers is appropriate, because they are best positioned to ensure that these conditions are met.

Training should be designed to prepare officers and agencies to work to minimize the use of physical force prior to the moment when force is applied. As § 5.04 suggests, this includes, but is not limited to, using less harmful means of applying force when feasible (e.g., less-lethal weapons); using strategies to de-escalate interactions that could lead to the use of force; and making tactical decisions in furthering law-enforcement goals that are likely to obviate the need to use physical force (e.g., collecting additional information; using multiple officers to respond to a call; using specially trained officers and collaborations between officers and community partners to respond in situations involving emotionally disturbed persons; or situating officers to make them less vulnerable to physical threat). Training, in order to be effective, should be repeated and ongoing, and it should be linked to supervision, through internal guidance and discipline of officers.

Effective reporting and investigation of uses of force are crucial to supervision. All uses of weapons and of deadly force, whether injury results or not, should be reported immediately by officers to their supervisors or other agency officials and investigated. Written policy should set out the use-of-force investigative process step by step, including the roles of supervisors.

c. Written policy. Rather than providing detailed provisions that legislatures or agencies should adopt, these Sections state principles to which legislation and agency policies should adhere. Consistent with § 1.03, use-of-force policies should be written, adopted in advance of agency action, and made available to the public, and they should be as detailed as necessary to ensure compliance with these principles. Given how critical the use of force is in policing, it is especially important that there be written policies on the use of force, and that those policies be concise and accessible to officers and to the public. Training on the use of force should be tailored to the specific policies of the agency. Though many agencies make their policies on the use of force public, a minority do not, sometimes out of concern that doing so could provide tactical advantage to criminals who engage with officers. Agencies can accommodate this concern by making the written policies for using force and deadly force available, but keeping
supplementary tactical guidance nonpublic. For example, specific tactics used by Special Weapons and Tactics (SWAT) teams may be set out in nonpublic material, while general guidance on when such teams may be used and for what purposes may be set out in policy that is public. See generally § 1.04 (discussing the line between disclosure for transparency and secrecy to protect tactical advantages). Such nonpublic guidance is often provided in the form of internal, agency Standard Operating Procedures.

REPORTERS’ NOTE

At a minimum, all police uses of force must satisfy the standards set by the U.S. Constitution in the Fourth, Fifth, and Fourteenth Amendments, as interpreted by the decisions of the U.S. Supreme Court and lower federal courts. Police uses of force directed at suspects during investigation and arrest are seizures, governed by the Fourth Amendment command that government seizures cannot be “unreasonable.” See Graham v. Connor, 490 U.S. 386, 394 (1989). As interpreted by the U.S. Supreme Court, this is an objective, but open-ended standard, one that “allow[s] for the fact that police officers are often forced to make split-second judgments— in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” 490 U.S. at 396-397. “[T]he question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.” Id. at 397. The Court has held that a use of deadly force, in particular, is reasonable if “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” Tennessee v. Garner, 471 U.S. 1, 3 (1985). More generally, the Court’s Graham decision states that the constitutional reasonableness of a use of force must be evaluated from an objective perspective in light of the totality of the circumstances of the particular case, “including 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 is actively resisting arrest or attempting to evade arrest by flight.” Graham, supra at 396. Thus, Graham recognizes that officers must have discretion to exercise force appropriately. More recently, in 2007, the Court further emphasized the fact-specific nature of the constitutional inquiry, emphasizing that the Fourth Amendment does not provide any “magical on/off switch that triggers rigid preconditions” for the use of reasonable force. Scott v. Harris, 550 U.S. 372, 382 (2007).

Refining the constitutional standard for the use of force is challenging, and lower courts have often struggled to apply the standard to new weaponry and diverse situations. Thus, they have sometimes disagreed on questions such as whether and how to incorporate conduct of the officer just prior to the use of force (or “pre-seizure conduct”) into the constitutional analysis. Compare Marion v. City of Corydon, 559 F.3d 700, 705 (7th Cir. 2009) (“Pre-seizure police
conduct cannot serve as a basis for liability under the Fourth Amendment; we limit our analysis to force used when a seizure occurs.”), and Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992) (“[P]reseizure conduct is not subject to Fourth Amendment scrutiny.”), with St. Hilaire v. City of Laconia, 71 F.3d 20, 26 (1st Cir. 1995) (“court[s] should examine the actions of the government officials leading up to the seizure”), Bella v. Chamberlain, 24 F.3d 1251, 1256 & n.7 (10th Cir. 1994) (“Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable.”), and Estate of Starks v. Enyart, 5 F.3d 230, 234 (7th Cir. 1993) (holding that an officer violates the Fourth Amendment if he “unreasonably create[s an] encounter” in which an individual would be “unable to react in order to avoid presenting a deadly threat to [the officer]”). See generally Aaron Kimber, Note, Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer’s Pre-Seizure Conduct in an Excessive Force Claim, 13 WM. & MARY BILL RTS. J. 651 (2004). Most important to this Section, courts differ in characterizing the constitutional significance of using the minimum force reasonably available. Compare Griffith v. Coburn, 473 F.3d 650, 658 (6th Cir. 2007) (requiring officers to effectuate seizures using “the least intrusive means reasonably available”) (quoting United States v. Sanders, 719 F.2d 882, 887 (6th Cir. 1983)), with Wilkinson v. Torres, 610 F.3d 546, 551 (9th Cir. 2010) (holding the “availability of a less-intrusive alternative will not render conduct unreasonable”), and Reynolds v. County of San Diego, 84 F.3d 1162 (9th Cir. 1996) (finding that opinions of a police-tactics expert did not support finding that police conduct was unreasonable). Note, however, that those constitutional rulings are concerned in the first instance with whether officers and agencies may be held liable in constitutional-tort suits brought under 42 U.S.C. § 1983 and not with whether particular uses of force, or use-of-force policies or practices, are desirable as a matter of policy. This latter distinction, between a constitutional baseline developed in the context of determining liability and what is desirable as a matter of policy for regulating the use of force ex ante, cannot be stressed strongly enough.

Constitutional rulings and agency policies reflect the view of necessity expressed in this Section. See, e.g., Harris, 550 U.S. at 383 (emphasizing the “actual and imminent threat” to pedestrians and to the officer); Tennessee v. Garner, 471 U.S. 1, 11 (1985) (asking whether force was “necessary to prevent escape”); Lolli v. County of Orange, 351 F.3d 410, 417 (9th Cir. 2003) (stating that “a jury could conclude that little to no force was necessary or justified here.”); U.S. CUSTOMS AND BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK 3 (2014), https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf (stating that agents may use deadly force “only when necessary”); Dept. of Justice, Commentary Regarding the Use of Deadly Force in Non-Custodial Situations (Oct. 17, 1995), https://www.justice.gov/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-1 (“[T]he touchstone of the Department’s policy regarding the use of deadly force is necessity. Use of deadly force must be objectively reasonable under all the circumstances known to the officer at the time. The necessity to use deadly force arises when all other available means of preventing imminent and grave danger to officers or other persons have failed or would...
be likely to fail.”). The Restatement Second of Torts expresses this view of necessity in the context of the use of deadly force. See Restatement Second, Torts § 131, Comment f (AM. LAW INST. 1965) (“The use of force intended or likely to cause death for the purpose of arresting another for treason or for a felony is not privileged unless the actor reasonably believes that it is impossible to effect the arrest by any other and less dangerous means.”).

Constitutional rulings and state law also reflect the view of imminence expressed in this Section. See, e.g., Graham v. Connor, 490 U.S. 386, 396 (1989) (including as one of the factors in the Fourth Amendment analysis whether there was an “immediate threat to the safety of the officers” and whether the person was “actively resisting”); Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 905 (4th Cir. 2016) (“[A] police officer may only use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force.”); Galvan v. City of San Antonio, 435 F. App’x 309, 311 (5th Cir. 2010) (noting how officers “reacted with measured and ascending responses—verbal warnings, pepper spray, hand- and arm-manipulation techniques, and then the use of a Taser”; and “did not use force until [the plaintiff’s husband] attacked [an officer].”).

Although agencies often incorporate Graham’s reasonableness standard into their written use-of-force policies, they frequently also provide agency rules and procedures for using force that are far more detailed than the constitutional standard, and often more restrictive with respect to when force may be used. See, e.g., Denver Police Dept. Use of Force Policy 105.00 (Mar. 2010) (requiring that use of force not only be reasonable but also be necessary and that officers do not precipitate the use of force by engaging in unreasonable actions); Chicago Police Department General Order, G03-02-02, Force Options (Jan. 1, 2016) (stating that, as a matter of policy, officers “will de-escalate and use Force Mitigation principles whenever possible and appropriate, before resorting to force and to reduce the need for force.”), at http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-9001-1d970b87782d543f.pdf?hl=true. See also Samuel Walker, The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context, 22 St. LOUIS U. PUB. L. REV. 3, 33-34 (2003) (describing varying provisions of Department of Justice settlements with municipalities, frequently regarding when officers may use force).

Disagreements exist among policing executives about how and to what degree departmental policy should supplement the constitutional “reasonableness” standard. In advocating for changes to agency policies concerning the use of force, the Police Executive Research Forum (PERF) expressly encouraged law-enforcement agencies to adopt “a higher standard than the legal requirements of Graham v. Connor.” Use of Force: Taking Policing to a Higher Standard, supra. On the other hand, some organizations have expressed real concern about departing from federal constitutional standards. Most prominently, in response to a PERF report, the Fraternal Order of Police and the International Association of Chiefs of Police (IACP) released a statement rejecting any “calls to require law enforcement agencies to unilaterally, and haphazardly, establish use-of-force guidelines that exceed the ‘objectively reasonable’ standard set forth by the U.S. Supreme Court” and arguing that any reforms be “carefully researched and evidence-based.” IACP Statement on Use of Force (Feb. 7, 2016), http://lawofficer.com/2016/02/iacp-statement-on-use-of-force/. The subsequent National Consensus Policy on Use of Force released by the IACP in January 2017 does not merely restate the constitutional reasonableness baseline, however, it also includes important guidance and
§ 5.03  Policing

statements concerning de-escalation, verbal warnings, warning shots, ongoing training, and other
subjects discussed in these Principles. See International Association of Chiefs of Police, National
Consensus Policy on Use of Force, supra.

These Principles adopt the view of those organizations and individuals who believe that
agency use-of-force policies should be more specific and informative than the general
constitutional “reasonableness” standard. Constitutional litigation typically focuses on a case-by-
case analysis of an individual officer’s actions, rather than the presence or the quality of
municipal policy or practice regarding use of force. Moreover, constitutional cases often avoid
reaching determinations regarding the use of force through application of various immunity or
justiciability doctrines. See Pearson v. Callahan, 555 U.S. 223 (2009) (holding that courts may
address qualified-immunity defenses without addressing the merits of whether officers violated
constitutional rights); City of Los Angeles v. Heller, 475 U.S. 796 (1986) (holding that an
individual violation must be found first before policy or practice can be relevant); City of Los
Angeles v. Lyons, 461 U.S. 95, 105-106 (1983) (limiting standard to enjoin police policy in the
context of use of force).

The constitutional standard does not speak to how uses of force should be investigated,
tracked, or subjected to internal discipline. Nor does the constitutional standard speak to specific
types of weapons or tactical situations that officers may face, ranging from mass demonstrations,
to emotionally disturbed persons, to juveniles. Agencies cannot expect a coherent body of policy
or even guidance on those subjects from the courts; they must themselves define clear and
effective standards. See Lorie Fridell, Steve James & Michael Berkow, Taking the Straw Man to
the Ground: Arguments in Support of the Linear Use-of-Force Continuum, POLICE CHIEF, Dec.
2011, at 78 (arguing that use-of-force continuum policies better inform officers than “the vague
(2012) (arguing that constitutional standards articulated by courts are inadequate by themselves
to guide appropriate police conduct); see also Seth W. Stoughton, Policing Facts, 88 T UL. L.
REV. 847, 864-869 (2014). Modern agencies adopt policies in order to provide detailed guidance
to officers. Simply instructing officers to use their discretion to act reasonably is insufficient for
this purpose. See, e.g., SAMUEL WALKER, THE POLICE IN AMERICA 225 (1999) (describing use-
of-force policy and training). Indeed, courts may themselves give some weight to those policies.
Ludwig v. Anderson, 54 F.3d 465, 472 (8th Cir. 1995) (“Although these ‘police department
guidelines do not create a constitutional right,’ they are relevant to the analysis of
constitutionally excessive force.”)

In addition, these Principles reflect the view that police officials require more detailed
policy and training on the use of force in order to supervise officers effectively. The U.S.
Supreme Court has itself recognized that law-enforcement policies, training, and supervision are
critical to ensuring that the Fourth Amendment is observed: “Police departments and prosecutors
have an obligation to instill this understanding in officers, and to discipline those found to have
violated the Constitution.” Malley v. Briggs, 475 U.S. 335, 345 n.9 (1986); see also International
Association of Chiefs of Police, National Consensus Policy on Use of Force, at 5 (describing the
need for annual training on an agency’s use of force policy and “regular and periodic training” on techniques such as de-escalation and use of less-lethal force).

§ 5.04. De-escalation and Force Avoidance

Agencies should require, through written policy, that officers actively seek to avoid using force whenever possible and appropriate by employing techniques such as de-escalation. Agencies should reinforce this Principle through written policies, training, supervision, and reporting and review of use-of-force incidents.

Comment:

a. De-escalation and force-avoidance tactics. This Section adopts the view that agencies should require officers to avoid using force and to de-escalate if they can do so without endangering themselves or others both before and during encounters. Although other Sections concerning the use of force are directed primarily to officers, the framing of this Section is intended to emphasize that achieving the objective of avoiding unnecessary force demands (in particular) institutional as well as individual efforts. In approaching situations in which force might become necessary, agencies can provide officers on the scene with additional information, they can send resources, and they can facilitate communications among officers. Such techniques can provide additional time for officers to assess a situation, reduce the threat an individual poses, and ensure that law enforcement can achieve its goals without the use of force. Examples of techniques that can be used to de-escalate or avoid the use of force include: tactical repositioning to increase distance or cover; containing the scene in order to reduce the threat to members of the public; and avoiding acts and instructions that are likely to lead individuals to present a risk of serious harm to a police officer.

Although officers should seek to minimize the use of force against all individuals, some subpopulations may require special efforts to limit the use of force. For example, officers may require special training to avoid using force against mentally ill individuals who do not immediately follow law-enforcement instructions. In light of recent research regarding implicit biases, indicating that African American men may be perceived as more threatening than their white peers, agencies may also need to consider special efforts to reduce the risk of disproportionate force against African American men. If force is used against some individuals
under circumstances in which steps would be taken to avoid force against others, then adequate
steps to minimize force have not been taken.

Policies, training, and supervision, including performance measures, positive incentives,
and discipline, should reinforce use of force-avoidance and de-escalation techniques, and
training should be provided to all law-enforcement officers on an ongoing and repeated basis.

Many agencies include such techniques in existing policies. Although law-enforcement
groups are themselves divided on whether agencies should depart from the constitutional
standard, which does not specifically mandate de-escalation and force-avoidance techniques,
these Principles endorse the use of tactics to avoid the need to use force, in order to protect the
lives of officers and citizens. In general, officers should be routinely equipped with less-lethal
tools, and they should be trained to use a range of techniques to defuse situations and avoid the
need to use force when it is possible to do so. Complying with this Section does not necessitate
detailed written policies laying out every technique that can be used to minimize or avoid force.
Rather, much of this Section can and will be implemented through training, supervision, and an
agency’s broader commitment to reducing harm in policing.

REPORTERS’ NOTE

The primary goal of this Section is to encourage agencies to adopt policies and practices
that minimize the force used by officers. Agencies vary in their adoption of force-minimization
techniques and in the specificity with which they detail these techniques in policy. In general,
many agencies include de-escalation, minimization, and force-avoidance tactics in policy. See,
e.g., POLICE EXECUTIVE RESEARCH FORUM, AN INTEGRATED APPROACH TO DE-ESCALATION AND
MINIMIZING USE OF FORCE (2012),
http://www.policeforum.org/assets/docs/Critical_Issues_Series/an%20integrated%20approach%
20to%20de-escalation%20and%20minimizing%20use%20of%20force%202012.pdf; David
Griffith, De-Escalation Training: Learning to Back Off, POLICE, March 2, 2016,
http://www.policemag.com/channel/careers-training/articles/2016/03/de-escalation-training-
learning-to-back-off.aspx; Brandon L. Garrett & Seth W. Stoughton, A Tactical Fourth
Amendment, 102 Va. L. Rev. ___ (forthcoming 2017),
agencies and finding that most include de-escalation and force-avoidance tactics in policy).
Some agencies have quite detailed policies on this subject, while other agencies quite concisely
note that minimization should be used. See Seattle Police Manual, Use of Force Policy § 8.100.3
(2013); compare Newark Police Dept. General Order 63-2 (Mar. 4, 2013) (officers “are charged
with the responsibility of using minimum force necessary to affect [sic] a lawful arrest.”). This
Section recognizes that the specificity of the policy may be dictated by agency-specific conditions. Nevertheless, only by explicitly requiring that officers minimize the use of force can departments sufficiently prioritize the use of strategies obviating the need for force. This approach adopts language from the International Association of Chiefs of Police, National Consensus Policy on Use of Force, which states that “[a]n officer shall use de-escalation techniques and other alternatives to higher levels of force consistent with his or her training whenever possible and appropriate before resorting to force and to reduce the need for force,” International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 3, at http://www.iacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf, and conforms with the President’s Task Force on Twenty-First Century Policing, which states that “[b]asic recruit training must also include tactical and operations training on lethal and nonlethal use of force with an emphasis on de-escalation and tactical retreat skills.” See Final Report of the President’s Task Force on 21st Century Policing 57 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf; see also Police Executive Research Forum, Use of Force: Taking Policing to a Higher Standard 5 (Jan. 29, 2016), https://www.themarshallproject.org/documents/2701999-30guidingprinciples (“The Critical Decision-Making Model provides a new way to approach critical incidents,” describing a decisionmaking framework for “critical incidents and other tactical situations”); International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 3 (stating that “Whenever possible and when such delay will not compromise the safety of the officer or another and will not result in the destruction of evidence, escape of a suspect, or commission of a crime, an officer shall allow an individual time and opportunity to submit to verbal commands before force is used.”).


Agencies should also collaborate as necessary before and during crisis situations in order to enable officers to avoid or minimize force. In many jurisdictions, collaboration now occurs between police and mental-health-service providers in order to improve response to persons with

Resource constraints make it difficult for all law-enforcement agencies to offer high-quality training on many specialized techniques for minimizing force. Indeed, many believe that effective training must involve reality-based training, interactive role-play scenarios, and field training, which require far more resources than simply instructing officers on a written policy or procedure, or providing just “shoot/don’t shoot” training that does not address techniques that can minimize or avoid the need to use force. Mark R. McCoy, *Teaching Style and the Application of Adult Learning Principles by Police Instructors*, 29 POLICING 77 (2006); see also Zuchel v. Denver, 997 F.2d 730, 739 (10th Cir. 1993) (noting expert testimony concluding that training films are viewed “quite often as video games,” and that field exercises and “role-play situations” are “much more effective”); International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 4 (describing need for “regular and periodic” training designed to “provide techniques for the use of and reinforce the importance of deescalation” and “simulate actual shooting situations and conditions” and to “enhance officers’ discretion and judgment in using less-lethal and deadly force.”). It will be crucial for jurisdictions to provide additional resources for agencies to participate in training efforts. Moreover, agencies should think broadly about the kinds of training that may lead to force minimization.

Finally, as noted in Comment a, supervision can play a critical role in promoting force avoidance and minimization. Such supervision should include not only additional training and disciplinary consequences for officers who use unnecessary force or violate procedure, but also professional rewards and commendations for officers who resolve conflicts in ways that avoid the need to use force.

§ 5.05. Proportional Use of Force

Officers should not use more force than is proportional to the legitimate law-enforcement objective at stake. In furtherance of this objective:

(a) deadly force should not be used except in response to an immediate threat of serious physical harm or death to officers, or a significant threat of serious physical harm or death to others;
(b) non-deadly force should not be used if its impact is likely to be out of proportion to the threat of harm to officers or others or to the extent of property damage threatened. When non-deadly force is used to carry out a search or seizure (including an arrest or detention), such force only may be used as is proportionate to the threat posed in performing the search or seizure, and to the societal interest at stake in seeing that the search or seizure is performed.

Comment:

a. Policy. Proportionality requires that any use of force correspond to the risk of harm the officer encounters, as well as to the seriousness of the legitimate law-enforcement objective that is being served by its use. This requirement of proportionality operates in addition to the requirement of necessity. It means that even when force is necessary to achieve a legitimate law-enforcement end, its use may be impermissible if the harm it would cause is disproportionate to the end that officers seek to achieve. Thus, the proportionality principle demands that law-enforcement interests go unserved if achieving them would impose undue harm. As the U.S. Supreme Court has noted, “It is not better that all felony suspects die than that they escape.” Tennessee v. Garner, 471 U.S. 1, 11 (1985). Thus, when an officer faces a minor threat to the officer’s safety, force should not be disproportionate to the physical harm that is threatened. When an officer faces resistance or a threat to the success of an arrest, search, or other law-enforcement activity justifying the use of force, force should not be disproportionate either to the threat or to the significance to the public interest in the specific activity that the officer is using force to achieve. Where engaging in a law-enforcement activity, such as an arrest, may result in a use of force out of proportion to the societal interest in the activity, officers should look for alternatives to the activity in order to minimize the likelihood of disproportionate force.

As noted in § 5.01, this Section is not intended to create a liability rule for policing. Accordingly, it states the objective that force should be proportional to the interests at stake. In practice, officers will not always be able to calibrate the use of force precisely to the degree of threat they face or to the significance of the public interest, and liability rules should reflect that fact.

Subsection (a) limits deadly force to those situations in which an officer is confronted with an immediate threat of serious harm or death to himself or a significant threat to the public. Thus, this Section permits stopping a resisting or escaping suspect only if he or she poses such a
threat. The Section does not take for granted that a person suspected of a crime involving force or the threat of force inevitably poses such a threat. This is consistent with the reasoning of *Garner*, which states that “[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so,” *Garner*, 471 U.S. at 11, but it would limit dicta in both *Garner* and *Scott v. Harris* that suggests that deadly force may be used against *any* suspect fleeing a crime in which violence was used or threatened, on the ground that such a suspect always poses a sufficient threat to society to justify such force. *Scott v. Harris*, 550 U.S. 372, 382 n. 9; *Garner*, 471 U.S. at 10-11. In addition, pursuant to this Section, force should not be used against individuals who pose a threat only to themselves or to property.

The proportionality principle is implicit in many agency policies, use-of-force matrices, and narrative descriptions of force options that are used in training or policy. Nevertheless, departments should make explicit that officers may use greater force only when the significance of the public interest justifies it. Moreover, department policies often do not expressly acknowledge that where the harms of force are disproportionate to the public goal the use of force serves, police officers should permit the goal to go unserved. For example, where the public interest is in enforcing a minor criminal law, it may be better to permit a suspect to escape than to use force in a way that risks great harm to the suspect or third parties.

The U.S. Supreme Court’s ruling in *Garner* and other constitutional cases makes clear the need to limit deadly force to situations in which officers or civilians face a serious or deadly threat from a suspect. The Supreme Court has not expressly extended the principle of proportionality to the use of force by officers more generally, but doing so is consistent with the Court’s approach to the use of force generally, which requires that courts “‘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.’” *Scott v. Harris*, 550 U.S. 372, 383 (2007) (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

b. Policies barring or limiting certain uses of force. Some uses of force are almost invariably disproportionate and for that reason should be barred. Many agencies already prohibit firing warning shots or firing at or from moving vehicles except in situations in which the officers or others face an imminent and unavoidable threat of death or serious injury. Similarly,
agencies commonly bar or limit the use of hog-tying, chokeholds, neck restraints, and other restraints that pose a heightened danger of asphyxiation.

Agencies also provide and train officers in using intermediate weapons that assist in forcing compliance and restraining individuals, but are less likely to cause death, in order to permit officers to use proportional force. Officers should be equipped with some less-lethal tools for using force.

c. Public interests. Proportionality demands different responses in different law-enforcement situations, depending on the public interests at stake and the risks of harm and indignity. Physical harms to individuals are not the only harms that must be taken into account. The use of force can damage or destroy property. It can also cause psychological damage to individuals. All this should also be considered in evaluating the proportionality of force. This evaluation must also recognize that different populations are differently susceptible to harm from the use of force: vulnerable individuals such as juveniles, the disabled, the mentally ill, and the elderly may be at special risk. Thus, the harms of a use of force may be proportional to the law-enforcement goal it serves when used against one member of the public, but disproportionate to the same goal when used against someone more vulnerable to harm.

d. Duty to render aid. Proportionality requires caring for those against whom force is used, once a situation is sufficiently under control. Agencies should instruct and require officers to render necessary medical aid to those against whom force is utilized as soon as is practicable following imposition of such force.

REPORTERS’ NOTE

Proportionality is an important component of a harm-minimization use-of-force strategy. The proportionality principle is plainly visible in the U.S. Supreme Court’s admonition, “It is not better that all felony suspects die than that they escape.” Tennessee v. Garner, 471 U.S. 1, 11 (1989); see, e.g., Scott v. Harris, 550 U.S. 372, 378 (2007) (emphasizing the “great risk of serious injury” posed by car chase); Giles v. Kearney, 516 F. Supp. 2d 362, 368-369 (D. Del. 2007) (finding that “amount of force” an officer used was reasonable because it was “proportionate”). Nonetheless, state laws on use of force do not adopt a proportionality principle beyond limiting the use of deadly force. Most states directly incorporate the language of Garner into their statutes on the use of deadly force. See, e.g., N.H. REV. STAT. § 627:5. But some states have not even updated their deadly force laws to reflect the Supreme Court’s decision in Garner. See, e.g., CAL. PENAL CODE § 196; Fla. Stat. § 776.05; Miss. Code Ann. § 97-3-15; N.Y. PENAL LAW § 35.30; 13 Vt. Stat. Ann. § 2305. And none of the states
incorporate a proportionality principle with respect to the use of non-deadly force, despite widespread acceptance of such a principle by law-enforcement agencies.

The U.S. Supreme Court’s decision in Tennessee v. Garner, 471 U.S. 1 (1985), supports limiting the use of deadly force to those circumstances in which the suspect poses a threat of harm to the officer or to others. However, the Court also suggested by implication that any person suspected of having committed a crime involving violence or the threat of violence poses such a threat. See Garner, 471 U.S. at 11-12 (“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”). The Court itself interpreted Garner this way in Scott v. Harris, 550 U.S. 372, 382 n. 9 (reading Garner to permit deadly force against a suspect who has committed a crime simply because “his mere being at large poses an inherent danger to society”). However, the Court did not explain or support the assumption that probable cause that one has committed one crime involving violence or the threat of violence is sufficiently predictive of an ongoing threat to the public to justify permitting deadly force against such suspects, and the assertion seems problematic in light of contemporary concerns about the use of deadly force. See Rachel A. Harmon, Why Arrest?, 115 Mich. L. Rev. 307 (2016). One can imagine circumstances in which the commission of a violent crime—for example a crime of passion directed at a particular individual—implies nothing about an ongoing threat. Nor does it appear from Garner that the Court considered carefully the implications of its assertion.

In addition, many other departments utilize use-of-force matrices or tables in training officers, which are structured to dictate that officers use only proportional kinds and amounts of force. See, e.g., WILLIAM TERRILL, EUGENE A. PAOLINE III & JASON INGRAM, FINAL TECHNICAL REPORT DRAFT: ASSESSING POLICE USE OF FORCE POLICY AND OUTCOMES 16-17 (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/237794.pdf (finding that a “substantial majority of police agencies” use a “force continuum structure” typically using a linear design); National Institute of Justice, Office of Justice Programs, The Use-of-Force Continuum, http://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/continuum.aspx (Aug. 4, 2009). These tools often specify categories of less-lethal force that must be used prior to the use of lethal force and link these to categories of suspect actions, such as resistance. For a catalogue of use-of-force spectrums used by departments, and an analysis of the relative effectiveness of these spectrums in guiding uses of force, see Joel H. Garner & Christopher D. Maxwell, Measuring the Amount of Force Used By and Against the Police in Six Jurisdictions, in NATIONAL INSTITUTE OF JUSTICE, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 37 (1999). For visual models of use-of-force continuums, see INT’L ASS’N OF CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT 116 (2006); National Institute of Justice, The Use-of-Force Continuum, supra.

Though these matrices and visual representations highlight the concept of proportional uses of force, they focus on the correspondence between officer conduct and suspect resistance. This focus misses other components of a full proportionality analysis. Thus, these tools typically do not consider whether some law-enforcement interests simply are not worth the harm necessary to achieve them in light of larger law-enforcement and public goals. They focus on bodily harm, rather than the full range of harms that individuals suffer as a result of the use of force, such as emotional harm and damage to property. They often do not address the specific issues that arise when officers respond to vulnerable individuals, such as the mentally ill, disabled individuals, and juveniles. See, e.g., Jeffrey S. Golden, De-escalating Juvenile Aggression, POLICE CHIEF, May 2004, at 30, https://www.researchgate.net/profile/Jeff_Golden/publication/256374548_Deescalating_Juvenile_Aggression/links/00b7d522629f647565000000/Deescalating-Juvenile-Aggression.pdf. They may or may not acknowledge that different rules are required in specific contexts, such as mass protests, vehicle pursuits, or domestic-violence situations. Thus, policies should move beyond the limited concept of proportionality reflected in existing tools to take account of these varied factors.

§ 5.05  Policing


Training is important to ensure that proportionality principles are applied in the use-of-force context. Already, departments train on proportionality through use-of-force continua. Many officers also receive training in use of firearms, batons, pressure-point control, ground fighting, and other types of use-of-force strategies. See Brian A. Reaves, State and Local Law Enforcement Training Academies, 2006, at 4, 9, 14 (2009), http://www.bjs.gov/content/pub/pdf/slet06.pdf; Officers likewise should be trained to decide which techniques are proportional to the threat they are facing, in accordance with their use-of-force continuum. See PROTECTING CIVIL RIGHTS, supra, at 119; see also POLICE EXECUTIVE RESEARCH FORUM, RE-ENGINEERING TRAINING ON POLICE USE OF FORCE 46-47 (2015), http://www.policeforum.org/assets/reengineeringtraining1.pdf. All agencies should consider providing additional training on proportionality in use of lethal and nonlethal force. The IACP recommends training on use of force, and specifically less-lethal types of force, and, without endorsing a proportionality principle explicitly, the IACP counsels use where available of “alternatives to higher levels of force,” and also notes that deadly force “should not be used against persons whose actions are a threat only to themselves or property.” International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 3-4.

The Police Executive Research Forum (PERF) has also advocated for a proportionality approach to use of force, stating that departments should adopt policies holding themselves to a proportional approach higher than the legal standard laid out by the U.S. Supreme Court. See POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE (2016), http://www.policeforum.org/assets/30%20guiding%20principles.pdf. Several organizations have criticized the PERF report’s approach to proportionality. Most controversially, the PERF report states that: “Proportionality [] requires officers to consider how their actions will be viewed by their own agencies and by the general public, given the circumstances.” Id. at 21. This Section departs from this aspect of PERF’s definition of “proportionality,” which incorporates the
perspective of the public. This Section reflects a more traditional understanding of proportionality, one that is consistent with common-law public-authority defenses and constitutional reasonableness, while also taking into account public interests. See Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1178-1183 (2008) (discussing role of proportionality in police uses of force). It is therefore not subject to the same set of critiques or controversies as the PERF report. This Section nevertheless shares the conclusion that U.S. Supreme Court principles do not adequately address proportionality. Moreover, agencies may be well advised to carefully consider perspectives of the public and the community when considering policy and training on the use of force. See GUIDING PRINCIPLES ON USE OF FORCE, supra, at 8, 21; Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 872 (2015) (describing the harms from the use of and threat of force and advocating that they be considered in making police policy).

§ 5.06. Instructions and Warnings

Officers should provide clear instructions and warnings whenever feasible before using force. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.

Comment:

a. Instructions and warnings. Whenever possible, officers should provide clear instructions to individuals, should make clear if a call for conduct is a request or a command, and should indicate the consequences of refusing to comply with a mandatory order. A verbal warning about force should incorporate these elements in a statement that indicates that force will be used unless a subject complies with a specific command.

Verbal warnings may be inadequate for communicating with individuals who do not speak English or are unable to hear or to understand the warnings. If an officer suspects that a verbal warning would not be understood, the officer should seek to communicate in nonverbal ways, to the degree circumstances allow. However, gun shots should not be used to communicate a nonverbal warning.

Although federal constitutional law does not always require the use of a warning, it does recognize that warnings are relevant to whether force is reasonable under the law. Specifically, the U.S. Supreme Court held in Tennessee v. Garner, 471 U.S. 1 (1985), that warnings should be given “where feasible” before using deadly force against a fleeing suspect, and lower federal courts have examined whether warnings were provided, both as to deadly and non-deadly force. While it is common for agencies to recommend that officers provide warnings when feasible
before using deadly force, echoing Garner, some agencies neglect to provide clear requirements in policy or training on the subject, and still more neglect to provide requirements that such warnings be used for non-deadly types of force. Warnings are often feasible and advisable when intermediate or lesser types of force are used, and sound policy should require (and training should emphasize) that warnings be used when possible to avert the need to use force.

In addition to warnings, when feasible, officers should give individuals who may be subjected to force clear instructions about what conduct the officer considers essential to avoid force, and should do so in a way that conveys the mandatory nature of the order and the consequences of refusing to comply.

**REPORTERS’ NOTE**

The U.S. Supreme Court held in Tennessee v. Garner that warnings should be given “where feasible” before using deadly force against a fleeing suspect. See Tennessee v. Garner, 471 U.S. 1, 12 (1985); Bryan v. MacPherson, 630 F.3d 805, 831, 833 (9th Cir. 2010) (finding failure to warn the plaintiff before tasing her “militate[s] against finding [the defendant’s] use of force reasonable”); Casey v. City of Federal Heights, 509 F.3d 1278, 1285 (10th Cir. 2007) (finding “[t]he absence of any warning” before the officer deployed her taser “makes the circumstances of this case especially troubling”); see also Jones v. Wild, 244 F. App’x 532, 533 (4th Cir. 2007) (noting that officer “gave a verbal warning prior to releasing” police dog); Estate of Martinez v. City of Fed. Way, 105 F. App’x 897, 899 (9th Cir. 2004) (finding no liability, explaining that “[v]erbal warnings are not feasible when lives are in immediate danger and every second matters”); see also International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 4 (“Where feasible, the officer shall identify himself or herself as a law enforcement officer and warn of his or her intent to use deadly force.”).

Clear officer instructions and warnings help to reduce the need for use of force by preventing miscommunication that can lead to escalation. See, e.g., Dept. of Justice, Commentary Regarding the Use of Deadly Force in Non-Custodial Situations (Oct. 17, 1995), https://www.justice.gov/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-1; Minn. Dept. of Public Safety, Use of Force and Deadly Force Model Policy (Oct. 2011), https://dps.mn.gov/entity/post/model-policies-learning-objectives/Documents/Use-of-Force-Deadly-Force-Model-Policy.doc; Emily N. Schwarzkopf et al., *Command Types Used in Police Encounters*, 8 L. ENFORCEMENT EXECUTIVE F. 99 (2008). Instructions and warnings play an important role in preventing escalation and ensuring compliance. A person who is clearly told that force will be used if they do not comply, and given a clear path to avoid force, is more likely to comply. See, e.g., Dept. of Justice, Commentary, supra (“Implicit in this requirement is the
concept that officers will give the subject an opportunity to submit to such command unless danger is increased thereby.")

Most state statutes and case law do not expressly require warning prior to the use of force. Some state statutes demand that the officer make his intent to arrest and the reason for the arrest known to the arrestee when he or she makes an arrest. See, e.g., 11 DEL. C. § 467(b)(1). Despite this lack of support at the state-law level, law-enforcement agencies typically require that a warning be given where feasible, tracking the language used in Garner and in the lower federal courts. Agency policies reflect this need to provide warnings and this Section reflects consensus among agencies. See, e.g., Chicago Police Dept. General Order G03-02-01, The Use of Force Model (2012), http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-11cec11383d806e05f.html; Fort Worth Police Dept., General Order Revision (June 30, 2008); New Orleans Police Dept. Operations Manual, Chapter 1.3 (Dec. 6, 2015), http://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-1-3-Use-of-Force.pdf/ (“Officers shall use verbal advisements, warnings, and persuasion, when possible, before resorting to force”); New York City Police Dept., Deadly Physical Force, Procedure No: 203-12, (8/01/2013), http://www.nyc.gov/html/ccrb/downloads/pdf/pg203-12-deadly-physical-force.pdf; U.S. CUSTOMS AND BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK 3 (2014), https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf (requiring warnings “if feasible” before use of force); see also Brandon L. Garrett & Seth W. Stoughton, A Tactical Fourth Amendment, 102 VA. L. REV. __ (forthcoming 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754759 (describing how most large agencies encourage or require the use of verbal warnings before using deadly force, but somewhat fewer do so regarding non-deadly types of force). Similarly, many agencies prohibit the use of warning shots. See, e.g., COMMISSION ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, CALEA STANDARDS FOR LAW ENFORCEMENT AGENCIES 1.3.3 (“Generally, warning shots should be prohibited due to the potential for harm. If permitted, the circumstances under which they are utilized should be narrowly defined.”); see also International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 4 (stating that "[w]arning shots are inherently dangerous" and recommending limitations on their use).