THE INVISIBLE RULES THAT GOVERN USE OF FORCE

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Police departments reject the idea that use of force can be governed by hard and fast rules. Under this rule-resistant view, using rules to regulate use of force would be dangerous and in practice impossible, as officers must retain broad discretion to respond to ever-changing conditions in the field. Despite the prevalence of this view, the Article finds that, behind closed doors, departments are constructing hard and fast rules that limit officer discretion.

This disconnect between the rule-resistant narrative and the rule-bound reality has important implications for use-of-force reform. Acceptance of the rule-resistant narrative tends to deflect public attempts to exert influence over use-of-force practices, limiting community input to the proposal of aspirational standards. At the same time, departments are internally adopting hard and fast rules, some of which require officers to engage in violence. If communities had access to these rules, they could closely interrogate, disagree with, and amend them. Ultimately, departmental efforts to convince the public that it is impossible to do what the department actually does are at the center of a struggle over who wields control over use-of-force reform—the police or the communities they serve.

This Article's findings are based on extensive interviews of command-level officers across the country, in addition to the transcription and examination of a comprehensive set of training videos. These sources provide rich insights that reveal the strong departmental belief in the rule-resistant narrative that departments, however unknowingly, undermine behind closed doors.

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INTRODUCTION

Command staff with years of policing experience were asked the same question: Is it possible to regulate use-of-force practices by hard and fast rules that limited officer discretion?[1] The response: No.[2] The resistance to a rule-based approach was virtually universal, as was the rationale. From a departmental perspective, a hard and fast rule would prevent an officer from appropriately responding to a fluid, potentially dangerous encounter. "Every situation will have countless variables."[3] "[Y]ou can have two really similar incidents lead to two totally different outcomes."[4] "[It's] [i]mpossible to have a set of rules that will anticipate a

1. We conducted interviews of state representatives who regulate local policing (generally called Commissions on Peace Officer Standards and Training (POSTs)). Responding POSTs came from large, small, and geographically diverse states: Alaska, Arizona, Arkansas, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Montana, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. All interviews complied with proper institutional review board protocol.

2. *E.g.*, Telephone Interview with Steve Wagner, Dir., Wis. Training & Standards Bureau (June 29, 2020) [hereinafter Wagner]; Telephone Interview with Scott Willadsen, Use of Force Coordinator, Or. Dep't of Pub. Safety Standards & Training (June 29, 2020) [hereinafter Willadsen] ("No, they can't."); Telephone Interview with Bob Griffiths, Exec. Dir., Alaska Police Standards Council (June 26, 2020) [hereinafter Griffiths] ("No, you cannot reduce use of force to a hard and fast rule."); Telephone Interview by Farah Famouri with Matt Bloodgood, Use of Force Instructor, POST Basic Patrol Acad. of Idaho (June 29, 2020) [hereinafter Bloodgood] ("I can't give you a hard and fast rule that in this situation—'you have to do this'—because it's impossible.").

3. Telephone Interview with Erik Smith, Acting Dir., Law Enf't Div., Va. Dep't of Crim. Just. Servs. (July 1, 2020) [hereinafter Smith].

4. Telephone Interview with POST Representative Three (July 2, 2020) [hereinafter POST Representative Three].

particular situation."[5] "Because of a totality of the circumstances, you have to consider a range of options in any scenario."[6] The understanding among officers seemed to be that, unless a practice is prohibited (like a bar on chokeholds), use-of-force practices could not be subject to rigid rules that flatten out the factual variability an officer confronts in the field. According to departments, requiring officers to engage in certain protocols during an encounter would result in an officer using too little force (losing control) or using excessive force (causing unnecessary harm to meet policing objectives).

If one accepts this rule-resistant view of policing, calls for sweeping reform face an existential obstacle. The departmental narrative requires that any attempted intervention by the public must preserve officer discretion. Under this view, hard and fast rules are not just unwise but also inapplicable to the realities of policing the street. This narrative, if accepted, serves to dilute and deflect public attempts at ex ante intervention.[7] In theory, a community that was able to impose hard and fast rules would permit a more robust disruption of the status quo and an exertion of public control over policing practices.[8] But the authority of the rule-resistant narrative seems to be holding. A community furious over quickly escalating encounters might demand change; according to the departmental narrative, such demands might, at most, result in a policy addendum saying officers should "attempt to use time and distance" in approaching a scene. Such changes, however hard-fought, leave officer discretion intact; the department remains in control over the interpretation of what it means to use time and distance and when doing so is appropriate. In this way, the rule-resistant narrative helps maintain departmental control over use of force practices and deflect the consequences of public outrage.

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5. Telephone Interview with POST Representative Five (July 1, 2020) [hereinafter POST Representative Five]; Telephone Interview by Farah Famouri with Kelly Griffith, Gen. Couns., Ill. L. Enf't Training & Standards Bd. (July 2, 2020) [hereinafter Griffith] ("[I]t's very challenging [to consider a rule] because each circumstance is so different."); Wagner, *supra* note 2 ("Each circumstance is different, dependent on environmental factors, the subject, and the officer."); *see also* Interview with Bob Wertz, Section Chief, La. POST (June 26, 2020) [hereinafter Wertz].

6. Willadsen, *supra* note 2.

7. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685–86 (1976) (defining rules versus standards); Russell Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000).

8. Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 310 ("[T]he conventional picture of rules is one in which the rule-maker makes the important substantive decisions at the rule-making level, leaving little discretion to those who would implement the rules."); *id.* at 309 ("[R]ules are commonly thought to be instruments of constraining discretion, while standards are the devices by which we grant [discretion]."); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 536 (1994).

This Article does not question whether officer belief in the rule-resistant narrative is genuine. Quite the opposite; command staff and officers seem convinced of its veracity. The narrative is rooted in the Supreme Court decision in *Graham v. Connor*,[9] which only reinforces the narrative's legitimacy.[10] What this Article does question, however, is whether departments actually practice what is preached. Though departments believe officer discretion must be preserved, this Article finds that departments, however blindly, in fact impose rules that significantly limit officer discretion before an officer goes out in the field. Departments do not write these hard and fast rules down. Rather, these rules of engagement are embedded in departmental trainings. Training content is typically unscripted and unavailable for public review. Thus, rules exist, but in a double-blind setting: the police are unaware they are erecting and following rules; and, so, from the public's point of view, they do not exist. This Article, however, makes efforts to excavate these otherwise hidden rules from two sources: one, a single departmental press conference regarding a police-involved shooting that presented trainers to the public and in doing so, revealed a number of hard and fast rules that dictated the officer's actions;[11] and two, a broad survey of transcriptions of training videos typically intended for officer-only viewing.[12]

In the press conference following a tragic encounter in Madison, Wisconsin, hard and fast rules can be extracted from the trainers' presentation to the public.[13] These trainers would surely deny the existence of any rules. But there were hard and fast rules that could be extracted from their presentation—rules that, when written down, significantly limit officer discretion and apply to a whole host of potential incidents. The Article then "zooms out." We transcribed and analyzed sixty internal training videos produced over the last ten years by Lexipol, the largest provider of police training in the United States,[14] that relate to use of force. The takeaway? Though training videos reinforced the rule-resistant narrative, trainers—however unknowingly—repeated rules that limited officer discretion. In short, despite claiming they were not telling officers what to do, trainers do exactly that. From these training presentations, it becomes clear that, though departments publicly contend that officer discretion cannot be limited, departments internally create decision trees that instruct officers when and how to act when certain conditions are

9. 490 U.S. 386 (1989).

10. *See id.* at 396.

11. *See infra* Part II.C.

12. *See infra* Part II.D.

13. *See id.*

14. Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891, 893 (2018).

present. From this analysis, the Article observes that hard and fast rules already govern use-of-force training.

In Part I, the Article discusses the findings of an original study that involved interviewing the majority of representatives from State Peace Officer Standards and Training (POST) agencies about the question of whether use of force can be subject to rules. Virtually all representatives refused to consider the possibility of a rule-based regulatory approach to use of force. Part II turns to police training content, revealing that, despite what departments represent to the public, they internally limit officer discretion and create a body of unwritten rules that direct officers to act in certain ways, regardless of the factual variability of incidents. First, the Article presents a case study of the Madison Police Department that reveals how an officer was directed, by way of departmental policy, to fatally shoot a civilian. The Article then presents its findings from the analysis of over sixty use-of-force videos produced by Lexipol. The Article suggests that, from the themes and discussions within these videos, officers leave training with a set of rules that they will abide by, regardless of what situation they find themselves in. Part III reveals that the rule-resistant view adopted by departments is institutionally accepted by courts and legislatures, thereby validating and strengthening this deceptive and false narrative. Part IV discusses what is at stake: The rule-resistant narrative serves departmental interests to remain insulated from public interventions and to maintain control over use-of-force practices. Part V addresses some objections and concerns raised both by police and by critiques of current use-of-force practices if, in fact, we were to embrace the use of rules in the use-of-force space. Finally, Part VI proposes what a reform effort might achieve through a rule-based approach to regulating use-of-force practices.

I. INTERVIEWING POLICE DEPARTMENTS: RULE-RESISTANCE TO THE USE OF FORCE

Departments contend that reasonable force depends on what circumstances are presented to an officer, which are unknown and require instantaneous assessments in an evolving situation. This conception that reasonable force is determined by a totality of circumstances presented to the officer during a particular incident is rooted in *Graham v. Connor*.[15] From the departmental perspective, *Graham* is the right and only way to regulate use-of-force practices.[16] That *Graham* is limited to constitutional considerations that have little relevance to the question of how force might be democratically regulated is a doctrinal feature lost on departments. Instead, *Graham* is transformed from a constitutional backstop to an all-

15. *Graham*, 490 U.S. at 396–97.

16. *See infra* Part I.A.

encompassing directive. According to the departmental interpretation, *Graham requires* that officers must have all options available all the time. After all, each subject will react differently, be of a different stature, and have different abilities; each officer will react differently, be of a different stature, and have different ability, training, and experience; and each environment will be different—a highway, a hallway, an open space, a crowded store, dark, wet or icy, with or without back-up. Each incident is like a snowflake—each one is distinct and demands different answers to questions like, "What is the right distance to maintain from the subject in an encounter?" Answering such a question "will depend on the situation, environment, and individuals" involved.[17] To account for these realities of policing, departments contend that any use-of-force guidance must permit the officer to exercise discretion within fluid environments. Hence the rule-resistant narrative.

As to the proper approach to regulating use of force, the rule-resistant narrative favors standards.[18] Conceptually, the difference between a rule and a standard is contested; scholars recognize shared, if not interchangeable, features that can be obscured by these labels.[19] The point here, though, is not to provide a critique of the perceived differences between rules and standards. The narrative central to this Article comes from the mouths of police officers, not legal scholars. Here the traditional conception of a rule, versus a standard, prevails—that "[t]he choice of legal form has long been described as a choice between 'rules' and 'standards.'"[20] That rules and standards can co-exist in the same regulatory space is not precluded by this traditional understanding.[21] But from the departmental perspective, there is neither a choice to be made nor room for co-existence; rules are incompatible with the demands of the streets, full stop. As one officer noted, "The only thing black and white about my job is my cruiser."[22] Only standards permit the officer the discretion necessary to assess the variability of each encounter.[23]

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17. SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE 168 (2020).

18. Kennedy, *supra* note 7 (defining rules versus standards); Korobkin, *supra* note 7, at 26–27.

19. Schauer, *supra* note 8, at 309 ("[R]ules are commonly thought to be instruments of constraining discretion, while standards are the devices by which we grant [discretion].").

20. Korobkin, *supra* note 7, at 23.

21. For example, compare FED. R. CIV. P. 4, "[A] summons must . . . state the name and address of the plaintiff's attorney" (a rule), to FED. R. CIV. P. 15, "The court should freely give leave [to amend a pleading] when justice so requires" (a standard).

22. Telephone Interview with POST Representative Six (Mar. 5, 2020).

23. Schauer, *supra* note 8, at 309. Not every possible conception of a rule is described here. *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 66 (1983) ("Commentators have identified a wide variety of parameters to describe legal rules: generality and clarity, comprehensibility, accuracy of prediction,

The standard-only approach to use-of-force regulation protects departmental interests. A department can claim it is committed to using reasonable force without defining what reasonable force is. Insisting that the discretion to act (or not to act) remains with the officer deflects attempts by the public to require officers to act in a certain way. Keeping the public at arm's length facilitates departmental insularity as it reinforces departmental claims of expertise. And where compliance with rules can be assessed immediately by the officer (and the public), compliance with standards requires fact-specific, after-the-fact inquiries that can shield departments from liability.[24]

A. The Rule-Resistant Narrative and Its Anchor Point: Graham

How pervasive is departmental adherence to the rule-resistant view? In interviews with State Peace Officer Standards and Training (POST) representatives, we asked, "Can use-of-force practices be reduced to hard and fast rules that limit officer discretion?" Almost all dismissed the possibility. "Absolutely not."[25] "[I]t's impossible."[26] "It's not black and white."[27] "What people want to do is put things in a nice package . . . If you try to put something in a nice package, what if the nice package doesn't apply?"[28] There cannot be rules "because everything varies a million different ways."[29] One representative saw any discussions over rule-making as hubris: "A lot of people try to come up with answers. You're a prophet in your own backyard."[30] "It's impossible to have a set of rules that will anticipate a particular situation."[31] "Every situation will

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determinacy, weight, value, and consistency with social purpose." (footnotes omitted)). This Article addresses rule attributes most relevant to debates within the use-of-force space. Schauer, *supra* note 8, at 309 ("[R]ules are commonly thought to be instruments of constraining discretion, while standards are the devices by which we grant [discretion].").

24. For example, if one goes 56 mph in a 55 mph zone, that is the only fact that matters. If one must "drive at a reasonable speed," compliance will be determined based on an after-the-fact assessment of the factual specifics of the incident.

25. Wagner, *supra* note 2; Willadsen, *supra* note 2 ("No, they can't."); Griffiths, *supra* note 2 ("No, you cannot reduce use of force to a hard and fast rule.").

26. Bloodgood, *supra* note 2 ("I can't give you a hard and fast rule that in this situation, you have to do this, because it's impossible.").

27. POST Representative Three, *supra* note 4.

28. Telephone Interview with Nick Pollaro, Lead Trainer, Ind. L. Enf't Acad. (June 26, 2020) [hereinafter Pollaro].

29. Telephone Interview with POST Representative Two (Feb. 28, 2020) [hereinafter POST Representative Two].

30. *Id.*

31. POST Representative Five, *supra* note 5; Griffith, *supra* note 2 (explaining that guidelines and procedures are "adapted and designed to be dependent on various circumstances"); Wagner, *supra* note 2 ("Each circumstance is different, dependent on environmental factors, the subject, and the officer."); *see also* Wertz, *supra* note 5.

have countless variables."[32] "What is reasonable force depends on different factors—one's confidence, the environment, the level of an officer's training, the circumstances."[33] For example, as to evaluating the environment and circumstances, "So if I am going into an abandoned building, I'm probably going to have my gun out. If I'm going to somebody's house for a noise complaint, I'm probably not going to have my gun out."[34] "What is the light? Is it a solo suspect facing four officers? Or [are] four suspects facing a solo officer? The range of options are going to depend on the circumstances, which the officer doesn't know until he gets there."[35] References to the use-of-force simulator were common to emphasize how civilian users would gain new appreciation for "how quickly [officers] have to make decisions."[36]

Graham is at the heart of this rule-resistant narrative. Many turned to *Graham* or to its language when asked to explain the rationale for rejecting a rule-based approach. "Stick to *Graham*."[37] "*Graham* is very important to law enforcement. We can all Monday-morning quarterback, but from the standpoint of an officer, it's really hard . . . you can have two really similar incidents lead to two totally different outcomes."[38] Departmental staff are quick to say an absence of rules does not mean an absence of law; officers comply with the "law." The "law" is *Graham*. And under *Graham*, reasonable force is not subject to definition but instead depends on a "totality of circumstances" unique to an encounter, understanding that "officers are often forced to make split-second judgments" about "the amount of force that is necessary in a particular situation."[39] Indicative of *Graham*'s importance, all departments adopt written policies that echo *Graham*.[40] Departments, in fact, "equate the mere presence" of its language in its written policies "with legal compliance."[41] Within this departmental view of *Graham*, officers provided a rich set of justifications for the rule-resistant view.

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32. Smith, *supra* note 3.

33. Telephone Interview with Trevor Allen, Director, N.C. Crim. Just. Educ. & Training Standards (June 29, 2020) [hereinafter Allen].

34. Telephone Interview with Mike McCarthy, Mont. Pub. Safety Officer Standards & Training (June 26, 2020).

35. Willadsen, *supra* note 2.

36. Griffith, *supra* note 5; *see also* Smith, *supra* note 3 (stating that there can always be restrictions, but "there will be exceptions").

37. Wertz, *supra* note 5 ("We just had our policies reviewed by a use-of-force expert from Shreveport, and he said, 'Stick to *Graham*.'").

38. POST Representative Three, *supra* note 4.

39. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

40. *See* Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1303–04 (2019).

41. *Id.* at 1315 (quoting LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 12 (2016)).

B. Officer Justifications for the Rule-Resistant Narrative

Rules were viewed as incapable of accommodating the shifting variables an officer will encounter in an incident. "If I approach a scene, and the subject is wearing a '2018 Karate Championship' t-shirt, I can reasonably deduce the subject has training."[42] If a person resists lawful arrest, then based on the person's size, statements made, availability of back-up, etcetera, an officer will decide whether to "elect a tool" "as opposed to a hands-on approach."[43] "How can a rule discern between a shot fired at an apartment complex versus a school? Each are active shooter situations, and each requires a different response."[44] "It boils down to if Officer A does something close to Officer B or Officer C, they're all reasonable even though different."[45] Relatedly, the impossibility of applying the same rules to a small versus large officer was oft-repeated.[46]

One view was that rules had been tried and had failed. Referring to the 1980s, "[We] used to teach . . . bats and hats . . . [a] force-based curriculum when I think we need to teach a social-sided curriculum. The world isn't such that you can teach black and white policing."[47] Another representative recalled being taught, in the past, to go in hard and fast and to "go hands on, as opposed to using [a tool], but this . . . rule led to the bulk of injuries for the officer and the offender."[48] Rules were also thought to be unfair, a guarantee of unintended, negative consequences. "[S]ubjects don't follow rules, so how can an officer be expected to do so? If a subject can start at any level of force, but an officer is required to start out at a lower level of force, that would put the officer in danger."[49] References to boxing were common, where both fighters followed rules, fell into weight classes, were refereed, and watched by a medic—to apply rules to one boxer and not the other would be unfair.[50] "When it comes to

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42. Allen, *supra* note 33.

43. *Id.*

44. POST Representative Two, *supra* note 29.

45. Bloodgood, *supra* note 2.

46. *See, e.g.*, Pollaro, *supra* note 28 ("Take a traffic stop . . . . Guy pulled over is big . . . and gets out of the car and is verbally aggressive. Take a large officer, over six feet. Take a female officer, just over five feet. Are you saying she has to follow the same guidelines? . . . They have different options."); Telephone Interview by Anya Gersoff with Robert Ferullo, Interim Exec. Dir., Mun. Police Training Comm., Mass. (June 26, 2020) [hereinafter Ferullo] ("I'm 5'6" and chubby—my fear level is greater than a guy who's 6'6" and solid as a rock. . . . The same fight may not [bring] the same fear. It's subjective."); Willadsen, *supra* note 2; Wagner *supra* note 2 ("A 5'2" female will have different options than a 6'5" male.").

47. Ferullo, *supra* note 46.

48. Allen, *supra* note 33.

49. Smith, *supra* note 3.

50. Allen, *supra* note 33 ("In the UFC, the other fighter can tap out. But an officer cannot tap out. Plus, an officer is not trained like a UFC fighter. There is no muscle

human combatants, there are no rules."[51] "It's a sticky wicket. You have to go with your heart and gut . . . you come along a motorist changing a tire. Is the tire iron being used as what it is, or is it a weapon? Bad guys have bad days, too."[52] "[W]hen it comes to a citizen choosing to harm an officer, they don't follow rules and officers [shouldn't] either."[53] Compliance with rules leads to "hesitation," and "hesitation creates danger to the officer."[54] There was also concern that rules could create danger for subjects by undermining the critical thinking necessary for de-escalation: "Making rules puts the gun in [officers'] hands one step sooner."[55] Relatedly, the Department of Justice, attempting to enjoin a municipal ordinance that would deprive federal officers of "40 mm launchers, blast balls, [tear] gas, and oleoresin capsicum spray," warned the court that "officers will lack other options to choose from in moderating their force."[56] The general sentiment seemed to be that, as one removed officer discretion, harm-mitigating options were taken off the table.

> If you don't have flexibility built into your standard, you put an officer and the public in danger. For example, if the rule is "our officers cannot shoot at a moving vehicle," fine, but what if the vehicle is going through a crowd, or is being driven with the intent to hit the officer? . . . You move to something more restrictive, you may be changing things for the worse. Are we going to restrict officers from exercising the ability to protect others?[57]

Some thought the inflexibility of rules would flatten out the diversity of approaches needed to police demographic differences.

> [Y]ou have some large counties, with 200 officers, and some counties with eight officers for the whole area. And they are serving different populations. In the small communities, your

memory. Skills learned in training are perishable. Without consistent reinforcement of the training, officers may not instinctively apply them in the heat of the moment. An officer can panic. And the officer may be in pain, and it is hard to think.").

51. Telephone Interview by Michael Longley with Doug Tangen, Program Manager, Wash. Crim. Just. Training Comm'n (June 30, 2020).

52. POST Representative Two, *supra* note 29.

53. POST Representative Three, *supra* note 4.

54. Pollaro, *supra* note 28; *see also* POST Representative Three, *supra* note 4 ("It would be unfair to make officers follow a set of rules because that will cause hesitation and it will hang them out to dry.").

55. Ferullo, *supra* note 46.

56. Motion for Temporary Restraining Order Enjoining Implementation of the Directive Issued on July 23, 2020 at 1, 6, *United States v. City of Seattle*, No. 2:12-cv-01282 (W.D. Wash. 2020).

57. POST Representative Five, *supra* note 5.

> officers may know your citizens. In a larger city, you have a different type of policing, where officers can't know everyone. . . . And as you think along a larger scale, say nationally, will the same rules of engagement work in Texas that work in California?[58]

Related to the loss of flexibility—viewed as an essential element to using reasonable force—one representative thought any rule would be overrun by exceptions, therefore obviating its utility.

> [W]e haven't taught the chokehold for over 10 years. But, can you [really] have a rule that prohibits chokeholds? What if the suspect grabs a gun, and the only option is to put the person in a chokehold? Then, that is a reasonable use of force. With use of force, with any rule, there is always going to be an exception.[59]

And because each incident is unique, one representative thought a rule-based approach would amount to whack-a-mole; any rule created in response to something would have little utility.

> Even at the extremes, hard and fast rules don't always make sense. You see something egregious, and you rightly think, that is not right. But is it behavior that will be repeated? Probably not. Take the George Floyd case. We don't teach putting a knee on the neck of a suspect.[60]

One representative thought imposing rules would be the end of policing: "You can't legislate [reasonable force] . . . If they don't trust us to use deadly force, take our guns away. If we put rules and laws in, it is going to turn into . . . it is not gonna work. You're going to get less qualified police officers . . . no one will want to do this job."[61] A few deemed any possible "rule" to be unrelated to use of force. For example, a rule prohibiting officers from engaging in a high-speed chase was not a use-of-force rule, but a "pursuit policy."[62] Relatedly, certain aspects of use-of-force training were "tactics," and "tactics are not rules."[63] "[A tactic] is a control technique. This is a procedure. Once the officer has determined to use that procedure, then it's just a matter of implementing the defensive tactic."[64]

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58. *Id.*
59. *Id.*
60. *Id.*
61. Ferullo, *supra* note 46.
62. Smith, *supra* note 3.
63. POST Representative Two, *supra* note 29.
64. Tangen, *supra* note 51.

Trainers were asked how they respond to recruits who sought more direction. "If [the recruit] asks me what to do in this specific case, I can't answer."[65] "It's because there are too many variables to give them an exact, planned response in any given situation."[66] Trainers thought it best to instead encourage a scenario-based orientation. Most would respond to that question with a series of questions.[67] "We are teaching good decision-making. We present the student with a number of scenarios. We break each scenario down. What did you perceive? What other reasonable options were available?"[68] "There is always going to be situations that require judgment, and there won't be a clear path to follow."[69]

> Recruits want answers. A recruit will say, "Okay, there is a traffic stop, and the guy is out of the car, what do I do?" We answer that with a question, after we size up the recruit who is asking: How big is the subject? Are you on a county road? Do you have back up? What is the lighting like? Is there snow, rain? What are your fighting skills?[70]

If rules provide a script, a trainer emphasized:

> [Y]ou have to be honest with them. I can teach you tactics, I can teach you cover, I can teach you marksmanship, I can teach you risk control . . . but you have to decide what to do at the moment of truth. I won't be there. You won't have a script . . . .[71]

"If the [recruits] keep asking for rules," remarked one trainer, "they should seek another profession. The reason recruits are selected is because they are expected to apply general broad guidelines and make decisions."[72] In the end, "[t]he best training is reality-based training."[73]

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65. Bloodgood, *supra* note 2.

66. *Id.*

67. *See, e.g.*, Smith, *supra* note 3 (explaining how recruits cannot be told a clear path to follow); POST Representative Three, *supra* note 4 (explaining how he would tell recruits "there are many ways to skin a cat"); Allen, *supra* note 33 (explaining how he will ask a recruit, "What did you perceive?" in the context of use-of-force training); Bloodgood, *supra* note 2 ("What I say is look, if you ask me what to do in this specific case, I can't answer.").

68. Allen, *supra* note 33.

69. Smith, *supra* note 3.

70. Pollaro, *supra* note 28.

71. *Dennis Tueler: Shoot/Don't Shoot: Decision-Based Training*, POLICE1 (Dec. 13, 2010), policeone.com/firearms/videos/dennis-tueler-shootdont-shoot-decision-based-training-fMmQNwsOx4MESzQh/ [https://perma.cc/6QWX-95SD] [hereinafter *Tueler: Shoot/Don't Shoot: Decision-Based Training*].

72. Griffiths, *supra* note 2.

73. Tangen, *supra* note 51.

Rule-resistance also emerged with respect to litigation. "A hard and fast rule becomes a club in the hands of an attorney to go after an officer. An officer will say, I did X because the subject did Y. The [plaintiff's] attorney will go, 'Yeah, but that is not the rule.' This puts officers in an impossible situation."[74] One concern was that rules would deepen public misunderstanding. One representative explained that the fatal shooting of Rayshard Brooks in Atlanta (in which Brooks took the officer's taser)[75] was reasonable.[76] Another representative who agreed noted some underlying confusion; if a rule authorized deadly force when a subject reaches for an officer's taser, the public may not understand why the subject's use of a taser is deadly force, but an officer's use of a taser is considered non-deadly force.[77]

In our interviews, a few POST representatives were open to the idea that, despite the rule-resistance narrative, rules might apply. For example:

> You can't say in every situation, if . . . this, then do that. But you can have rules at a macro level. Where you can anticipate something happening, you can establish a rule. . . . You can have a rule that says, "We don't pursue vehicles at a high rate of speed. . . . We essentially radio ahead and monitor." You can have a rule that says "Don't go to a domestic call alone, go with a partner," as we can anticipate a whole lot more going wrong if an officer responds alone. On a traffic stop, you can have a rule that the officer approaches from a certain side of the vehicle. Where rules become difficult is if during that traffic stop, the subject aggresses. . . . You have to make quick decisions. And you can have a different kind of rule, one that says, "you don't have to wait to visually observe a subject produce a weapon." I think we can have some successful rules of engagement. . . . [I]f you can anticipate certain things happening, then you can make rules.[78]

Virtually all other representatives disagreed with this alternative view. The widespread resistance to rules indicates the depth of law enforcement's investment in *Graham*'s view that reasonable force cannot be defined. As Professor Rachel Harmon observed, everyone—scholars, policy makers,

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74. POST Representative Five, *supra* note 5.

75. *GBI Completes Investigation into Death of Rayshard Brooks*, FOX 5 ATLANTA (Sept. 28, 2020), https://www.fox5atlanta.com/news/gbi-completes-investigation-into-death-of-rayshard-brooks [https://perma.cc/P46J-JGFX].

76. Telephone Interview with POST Representative Seven (July 6, 2020) [hereinafter POST Representative Seven].

77. Griffith, *supra* note 5.

78. Telephone Interview with Isaac Suydam, Dir. of Training, Pa. Mun. Police Officer's Educ. & Training Comm'n (June 30, 2020).

and federal, state, and local officials—seems to accept *Graham*'s construction of reasonable force.[79]

II. USE OF FORCE, MEET RULES

If departments are right—that use-of-force practices cannot be governed by rules—then rule-based regulation is not feasible. As rules limit discretion and flatten out factual variability,[80] departments claim that limiting the discretion of their officers would be impossible, and if possible, dangerous. This Part drills further into that territory. Can use of force be governed by rules? And if so, to what extent? Ultimately, this Article contends that the rule-resistant narrative is self-deceptive; the Article finds that departments are *already* establishing (unwritten) rules (without knowing it). Command staff assert that trainers never tell officers what to do in a particular situation.[81] But despite what they say (and believe), trainers do exactly that. This Article asserts that training will often iron out the very officer discretion that command-staff maintain must be preserved.[82] An officer is frequently trained that a certain condition will require her to act a certain way; thus, her discretion in *any* incident that involves this condition will be limited. This is the definition of a rule.[83]

A. In Training, Graham *is Rhetorically the Touchstone*

This Article will argue that in training, departments construct hard and fast rules of engagement that limit discretion. But *Graham* and the rule-resistant narrative still provide the rhetorical scaffolding for training. After all, part of the training is to indoctrinate cadets and officers to accept *Graham* and to communicate use-of-force incidents within the language of *Graham*'s protective embrace. Trainers emphasize the unpredictability of any encounter and that training is intended to improve situational awareness important to making split-second decisions in an uncertain environment. Consistent with the rule-resistant narrative, trainers rarely utter the word "rule" and instead use terms like "guidance," "standards,"

79. *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 777 (2012); *see also* Grant Lamond, *Legal Sources, the Rule of Recognition, and Customary Law*, 59 AM. J. JURIS. 25, 26 (2014) (explaining Hart's "rule of recognition" as "an official custom, that is, as simply a collective social practice of officials").

80. Kennedy, *supra* note 7, at 1688; Schauer, *supra* note 8, at 309.

81. *See supra* Part I.A.

82. Schauer, *supra* note 8, at 309 ("[Rules] tend to be blunt instruments, grouping the virtually inexhaustible variation of human experience under easily accessible headings. 'Speed Limit 65' dampens relevant variations in driving ability, traffic, weather, and road conditions, but people are still on notice as to what is required.").

83. *Id.* at 309–10.

"policies," "practices," and "principles."[84] This adherence to rule-resistant rhetoric can trump logic: A Chicago Police Department video instructs officers to always confront a suspect in a V or L formation to avoid each other's line of fire; yet the narrator concludes this training is principle-based and dependent on circumstances.[85]

Graham's centrality is made even more obvious in this training on report writing:

> [*Graham v. Connor* is] the standard by which [we are] judged, so it makes sense . . . that we will have our officers specifically articulate those things that the Court is looking for. Specifically, those are the severity of the crime, the immediate threat to the officer or others, whether the subject was actively resisting arrest, and whether the subject was evading arrest by flight. Now we didn't make those up, the Supreme Court laid those out for us. So, every one of our reports has to start with those things . . . . [If] we see a word like "non-compliant" we'll simply ask a student, "is that a fact or conclusion?" and the reaction usually is a little smile and, "oh, what I meant to say was 'he clenched his fist' or 'he gritted his teeth' or 'he furrowed his brow[.]'" . . . We want to include those in that part we call the totality of circumstances.[86]

Indicative of *Graham*'s influence, Chuck Joyner explained, "a lot of departments are still using [the] continuum [model] . . . created prior to [*Graham*], so it has no legal basis. [My approach] was created based on court decisions providing guidance to law enforcement officers on how to use force."[87] Trainer Gary Klugiewicz explained how *Graham* requires that officers be able to "deviate" from any established protocol:

> [W]e have all these tools including verbal tools, we have physical tools . . . . Now sometimes we use a small wrench, sometimes we use a large wrench but . . . we can use whatever we want anytime we want. We don't have to go point-by-point step-by-step . . . . We can jump [to the tool] we need. . . . [T]he

84. *See infra* Part II.A.

85. Video: Tactical Awareness: Crossfire (Educ. & Training Div., Chi. Police Dep't) (on file with author).

86. *Report Writing: Have a Checklist*, POLICE1 (July 17, 2012), policeone.com/police-trainers/videos/report-writing-have-a-checklist-laRNfXWThx6U7c3c/ [https://perma.cc/ZX9E-4CRK] (emphasis added).

87. *Applying the DRM in Use-of-Force Incidents*, POLICE1 (Nov. 16, 2016), policeone.com/police-products/less-lethal/videos/applying-the-drm-in-use-of-force-incidents-BoBRM2HVv4fkwmMB/ [https://perma.cc/JL7X-XHVK] [hereinafter *Applying the DRM in Use-of-Force Incidents*].

> tools we use . . . are determined by . . . what threat assessment we've made.[88]

Within this rule-resistant training paradigm, trainers reinforce that there is no one way to use force the right way. At the end of a hypothetical scenario, a trainer might state, "How would you have handled it? . . . Here's what I want you to do today . . . . Talk with your teammates about how you guys would handle it."[89]

Taken at face value, rhetoric that reinforces the unpredictability of each encounter and demands that officers react to a new set of circumstances in accordance with one's own discretion is terrifying. What institution would actually give such discretion to its employees? What employees would want to go out in the field without rules of engagement that direct action in quickly evolving situations? Despite the pervasiveness of the rule-resistant narrative and fealty to *Graham*, departments do in fact give direction to their officers on how to react when certain conditions are present. This gets us closer to the obvious: departments are communicating hard and fast rules to officers, even as they deny doing so.

B. Extracting Rules from Narrative Noise

Despite rule-resistant rhetoric, departmental training imposes rules on officers. Though departments maintain that reasonable force will depend on an infinite number of circumstances, it is departments that diminish the importance of variability during training. A department may, for example, require officers stopping a car reported stolen to train firearms on the subject, call back-up, call the subject out of the vehicle, and order the subject to walk backward toward officers. This is a rule: it requires the officer to immediately move up the force continuum if a condition is present (e.g., a vehicle is reported stolen). Take, for example, a law student of color driving home from yoga.[90] An officer checks the license plate. The car comes up as stolen two years ago. As required, the officer calls backup. The law student pulls over. She is ordered to exit the vehicle slowly, hands up, facing away from the officers. Cars pass by. She is terrified as she walks backward toward multiple officers, their guns trained on her. Her life is in danger, and she is publicly humiliated. She is

88. *A Box Full of Intervention Options*, POLICE1 (Mar. 8, 2011), policeone.com/legal/videos/a-box-full-of-intervention-options-2n4limIhbDvkfWPS/ [https://perma.cc/JAK6-L54L] [hereinafter *A Box Full of Intervention Options*].

89. *Reality Training: Officer-Involved Shooting During a Traffic Stop*, POLICE1 (Sept. 27, 2019), policeone.com/officer-shootings/videos/reality-training-officer-involved-shooting-during-a-traffic-stop-vmkt31CphqtmSbzC/ [https://perma.cc/9F4T-KVFY].

90. The following hypothetical is based on an incident reported to the author by a law student in Madison, Wisconsin.

cuffed. After further inquiry, police confirm the car is hers. She had reported it stolen years ago, found that it had been towed, paid her fee, and went on with her life.

The rule that is trained rejects the relevance of any variability. Was the car reported stolen that day or three years ago? Was the car sold after it was reported stolen? Training deems these facts irrelevant, despite their mitigation of the potential seriousness of the encounter. If the officer fails to call back-up and fails to subject the driver to an unholstered firearm, he knows that, regardless of the circumstances, he violated the rule.[91]

The power of the rule-resistant narrative leads departments to believe they do not do what they actually do. This narrative consequently relieves departments from any obligation to notify the public of the hard and fast rules they, in fact, follow—rules that frequently protect officers at the expense of civilians, causing humiliation, danger, and risk of injury and death to the subject. Not written down, these rules are communicated through departmental messaging that has "enormous influence over what law enforcement looks like on the street,"[92] as "most of the training and standards are coming out word of mouth."[93]

This is not to say that departments do not write down anything as to use of force. They do.[94] Documents—written policies and general orders—fall into three categories.[95] First, documents that announce

91. Rules facilitate transparency (the public knows what an officer can and cannot do in certain situations) and accountability (the officer knows immediately whether she is in compliance). *See* Lamond, *supra* note 79, at 29–30. Rules also facilitate adjudication and enforcement efforts. H.L.A. HART, THE CONCEPT OF LAW 81, 98–99 (3d ed., Oxford Univ. Press 2012); Maria Ponomarenko & Barry Friedman, *Democratic Accountability and Policing*, *in* 2 REFORMING CRIMINAL JUSTICE: POLICING 5, 9–13 (Erik Luna ed., 2017) (providing a close analysis of how "front-end" democratic participation is critical to achieving "meaningful accountability"). The Policing Project at the NYU School of Law provides resources for considering benefits of democratic participation in police regulation. *Front-End Voice in Policing*, NYU SCHOOL OF LAW POLICING PROJECT, https://www.policingproject.org/front-end-landing [https://perma.cc/C472-K3XY].

92. Rachel Harmon, *Reconsidering Criminal Procedure: Teaching the Law of the Police*, 60 ST. LOUIS U. L.J. 391, 396, 398 (2016) ("[D]epartments are the principal determinant of police conduct.").

93. POST Representative Two, *supra* note 29.

94. Obasogie and Newman analyzed seventy-five policies from an open-source FOIA database. Obasogie & Newman, *supra* note 40, at 1281. Brandon Garrett and Seth Stoughton examined policies of the fifty largest departments. Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211 app. at 304–07 (2017). A DOJ-funded survey was also conducted to assess such policies. William Terrill, Eugene A. Paoline III & Jason Ingram, NAT'L INST. OF JUST., *Final Technical Report Draft: Assessing Police Use of Force Policy and Outcomes*, i, 16 (2011). Documentation provides a second line of defense in litigation; if the officer's actions cannot be defended, a department will point to its policy to avoid liability. *See* Garrett & Stoughton, *supra*, at 272–73.

95. Obasogie & Newman, *supra* note 40, at 1306. These categories are not mutually exclusive.

fidelity to *Graham*.[96] Second, documents that often embed a "force continuum" that categorizes levels of force available to an officer but does "not impose any requirements of sequential progression."[97] Third, and rarely, documents that spell out limitations on discretion.[98] Thus, in these documents, one typically finds a recapitulation of *Graham* and some generic standards, but rarely any "hard-edged rules."[99] For this reason, documentation "must be extensively supplemented by training and supervision on law and practice"—training that is in-house, verbally communicated, and insulated from public view.[100]

The Article examines training content and from it, excavates rules. First, the Article presents a case study. The Madison Police Department (MPD) held a public event in which it explained departmental training related to a tragic incident that occurred in the community. From the MPD's presentation, one can conclude that the department would have found it unreasonable had the officer *not* used deadly force; for the officer to have acted differently would have violated departmental rules. From this single training presentation, however steeped in rule-resistant rhetoric, hard and fast rules can be unearthed. These rules limited the discretion of the officer involved in the incident as well as the discretion of officers in future incidents.

Second, the Article zooms out. We transcribed and analyzed sixty training videos produced over the last ten years by Lexipol, the largest provider of police training in the United States.[101] Some training material was collected from other sources.[102] Despite the rule-resistant narrative, the training is susceptible to being reduced to rules. After one excludes the

96. *Id.* at 1303–04 (reporting that one-hundred percent of the policies asserted duty to use reasonable force); Garrett & Stoughton, *supra* note 94, at 278.

97. Garrett & Stoughton, *supra* note 94, at 273–74.

98. Obasogie & Newman, *supra* note 40, at 1303. One explanation for this rare occurrence is that it results from litigation. *See, e.g.*, Motion Recommending Approval of Revised Use of Force Policies of the Cleveland Division of Police, *United States v. Cleveland*, (1:15-cv-01046-SO) (explaining potential changes to the Cleveland Division of Police's use of force policy after litigation on the issue).

99. Garrett & Stoughton, *supra* note 94, at 213.

100. *Id.* at 278.

101. To understand Lexipol's influence, ninety-five percent of California's law enforcement agencies, for example, subscribe to its services. Eagly & Schwartz, *supra* note 14, at 893–94. "Lexipol appears to be the single most influential actor in police policymaking, its successes—and failures—have an outsized impact on American police policy. As Lexipol goes, so go thousands of law enforcement agencies across the country." *Id.* at 897–98.

102. In conducting requests for training videos, departments frequently denied the request, citing to Freedom of Information Act (FOIA) exceptions or indicating trainings were live. Private sector product is generally reserved to use by sworn officers and often protected by copyright and contractual provisions. *See, e.g.*, *id.* at 938 ("Lexipol, LLC's vigorous use of copyright law to protect its business interests is another troubling outgrowth of its for-profit status.").

narrative noise about discretion that dominates training, a set of rules emerges. Once exposed, these rules speak for themselves: departments tend to favor rules that preemptively turn to violence to ensure officer safety at the expense of the safety of civilians. And because the department denies the existence of rules, the public never knows that these rules exist, shielding them from scrutiny.

C. Extracting Rules that Governed A Single Incident

Paul Heenan, 31, lived in Madison, Wisconsin. A musician, he toured with Billy Idol, Big Head Todd and the Monsters, and members of the Talking Heads.[103] After Heenan was shot in front of his home, a former housemate asked, "How do you sum up the life of the most beautiful person you have ever known?"[104] The shooter was Officer Steven Heimsness. People questioned whether Heimsness committed murder or was justified in using deadly force.[105] But another question remained dormant. Did MPD require Heimsness to do what he did? The MPD would indirectly provide the answer in a press conference in which trainers explained how Heimsness acted reasonably. Unaware of doing so, the trainers in fact described how it would have been *unreasonable* for Heimsness to have not shot Heenan.

Intending to placate community unrest, MPD trainers ultimately described how killing an inebriated young man was required by training. This attempt at community reassurance was delivered by a self-described progressive department. At the time, the MPD had an annual budget of $48 million with 450 sworn officers.[106] The MPD's lead trainer, Mike Koval (who would later succeed the Chief at the time, Noble Wray), told a paper, "I believe that I'm probably viewed by some recruits as this sort of ACLU, tree-hugging guy who has to be endured for six months. And I've come to accept that."[107] The MPD's training was more rigorous than

103. Isthmus, *Paul Heenan*, YOUTUBE (Aug. 11, 2015), https://www.youtube.com/watch?v=Wx93vNj04lM [https://perma.cc/T5ZN-YGUJ].

104. *Id.*

105. *See* Bill Lueders, *Neighbor Disputes Madison Police Account in Paul Heenan Shooting*, ISTHMUS (Jan. 6, 2013), https://isthmus.com/news/news/neighbor-disputes-madison-police-account-in-paul-heenan-shooting/ [https://perma.cc/C3JD-K9T7].

106. Video Deposition of Noble L. Wray at 7–8, *Estate of Heenan ex rel. Heenan v. City of Madison*, 111 F. Supp. 3d 929 (W.D. Wis. 2015) (No. 13-CV-606).

107. Josh Wimmer, *The Cop Who Trains the Cops*, ISTHMUS (Dec. 11, 2009), https://isthmus.com/news/cover-story/the-cop-who-trains-the-cops/ [https://perma.cc/WZ4H-9A5S].

state requirements.[108] If the state "requires 30 hours on search-and-seizure and constitutional rights, we're going to at least double that."[109]

What happened the night of November 9, 2012, at 2:50 a.m. in the quiet, hipster, east-side Madison neighborhood? Initially, not much. Heenan had moved into the Willy Street Neighborhood a week earlier. He ate dinner at the Weary Traveler with his new household, a married couple and their young daughter.[110] He went out to listen to bands, returning to the Weary Traveler, where he drank and chatted it up.[111] Owner Bregan Fuller, Heenan's friend of ten years, noticed Heenan was intoxicated when he staggered into the women's bathroom. Heenan could not respond when Bregan asked if he needed a cab.[112] Bregan tasked an employee to watch over Heenan. At closing time, Bregan had to ask a lot of questions to get Heenan to indicate where he lived—Baldwin Street, just a few blocks away. Bregan dropped Heenan off around 2:00 a.m.[113]

Hours earlier, long-time Baldwin Street resident and mother of four, Megan O'Malley, had walked the dog. She left the key in the deadbolt, as she often did. At 2:44 a.m., Megan was nursing when she heard someone at the front door.[114] Her husband Kevin investigated. He found Heenan, his new neighbor, standing on the porch.[115] Heenan was shivering and confused, and as he attempted to walk in, Kevin told him it was not his house.[116] Kevin asked for the front door key. Heenan pulled out his own keys and handed them to Kevin. Ascertaining from all this that Heenan was inebriated, Kevin assisted Heenan to his home, two doors down.[117] Heenan remained unaware of where he was.[118] Kevin told Heenan he could have called the police. Heenan asked, "You want to get weird?" and leaned toward Kevin, who caught Heenan.[119] Heenan reached out and held

108. Video Deposition of Noble L. Wray, *supra* note 106, at 13–14.

109. Wimmer, *supra* note 107.

110. Complaint at 27, *Estate of Heenan ex rel. Heenan v. City of Madison*, 111 F. Supp. 3d 929 (W.D. Wis. 2015) (No. 13-CV-606) [hereinafter Heenan Complaint].

111. *Id.* at 27.

112. The coroner's report indicated a BAC of .218. *Id.* at 29. "Someone with a BAC level of 0.18 to 0.30 is in the confusion stage, characterized by emotional upheaval and disorientation." Amanda Lautieri & Scot Thomas, M.D., *The 7 Stages of Alcohol Intoxication*, SUNRISE HOUSE TREATMENT CTR. (Mar. 5, 2021), https://sunrisehouse.com/stop-drinking-alcohol/stages-intoxication/ [https://perma.cc/KXX4-LC9M].

113. Heenan Complaint, *supra* note 110, at 29.

114. Deposition of Kevin O'Malley at 52, *Estate of Heenan ex rel. Heenan v. City of Madison*, 111 F. Supp. 3d 929 (W.D. Wis. 2015) (No. 13-CV-606).

115. *Id.* at 60, 63, 67.

116. *Id.* at 61.

117. *Id.* at 77–79.

118. *See id.* at 82.

119. *Id.* at 82–84.

Kevin's arms for support.[120] In this position, Kevin backed toward his house, thinking he would get someone to help with the situation.[121]

Unbeknownst to Kevin, Megan had called 911 to report a possible burglary.[122] Officer Heimsness received the dispatch. He was close to Baldwin Street when the call came in. He parked his squad and blipped his flashlight to Officer Stacey Troumbly—she had arrived down the block. He approached two figures locked together.[123] Dispatch radioed: "Husband's wearing a grey t-shirt and plaid pajama bottoms."[124] Heimsness emerged with his firearm drawn.[125] Kevin thought Heimsness was a neighbor, walking a dog.[126] It was only after Heimsness screamed, "Get down!" that Kevin realized it was an officer; he stepped back, easily disengaging with Heenan.[127] Heenan stumbled toward the officer, flailing, "Oh, now you?"[128] Heenan grabbed Heimsness's left hand. Kevin repeatedly yelled, "He's a neighbor!"[129] Heimsness pushed Heenan back three feet. Kevin noticed the two seemed to stand up straight, attributing this to the arrival of a second officer.[130] Heimsness assumed a wide stance and shot Heenan as Heenan hugged his body.[131] Officer Troumbly was three feet away, stunned and swearing, as Heimsness had almost shot her. Heenan, who likely had no idea he had encountered an officer, died as his lungs filled with blood.[132]

Heimsness's statement of the event was informed by *Graham*. He stated he had been aware of "armed robberies and burglaries" in the area.[133]

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120. *Id.* at 84.

121. *Id.* at 85, 89–90.

122. Letter from Dan Olivas, Lieutenant of Police, City of Madison, to Noble Wray, Chief of Police, City of Madison (Jan. 1, 2013) (on file with author) (regarding Administrative Review) [hereinafter Olivas to Wray Letter].

123. Affidavit of Stephen Heimsness at 5, *Estate of Heenan ex rel. Heenan v. City of Madison*, 111 F. Supp. 3d 929 (W.D. Wis. 2015) (No. 13-CV-606); Olivas to Wray Letter, *supra* note 122, at 6.

124. Affidavit of Stephen Heimsness, *supra* note 123, at 6.

125. *Id.*

126. Deposition of Kevin O'Malley, *supra* note 114, at 91–92.

127. *Id.* at 92, 94–95. Heenan weighed 150 pounds. Deposition of Vincent Tranchida, M.D. at 15, *Estate of Heenan ex rel. Heenan v. City of Madison*, 111 F. Supp. 3d 929 (W.D. Wis. 2015) (No. 13-CV-606).

128. Deposition of Kevin O'Malley, *supra* note 114, at 95.

129. *Id.* at 96.

130. *Id.* at 109–10; Deposition of William Gaut at 88, *Estate of Heenan ex rel. Heenan v. City of Madison*, 111 F. Supp. 3d 929 (W.D. Wis. 2015) (No. 13-CV-606).

131. Deposition of Vincent Tranchida, M.D., *supra* note 127, at 17, 33, 43, 64.

132. *See id.* at 54. Three bullets pierced Heenan's aorta, liver, spine, and lungs. *Id.* at 41, 44.

133. Affidavit of Stephen Heimsness, *supra* note 123, ¶ 16.

> I understood that I was dispatched to a felony-in-progress, that it is a high-risk incident, that I may be confronting a suspect who does not want to get caught, that the suspect may have to go to prison, that confronting a suspect can be dangerous, and that the suspect could have a weapon or be armed.[134]

Heimsness reported that, despite commands to get down, the suspect "grabbed my left hand, squeezed it, and I felt immediate pain in my hand. . . . My pinkie finger on my left hand and my left hand hurt badly during the encounter, and the pain continued for several hours . . . ."[135] The suspect "was grabbing with his left hand at my handgun . . . I was worried the suspect was trying to disarm me, and that if he disarmed me, he may shoot me."[136]

The MPD initiated an investigation to assess the reasonableness of force and to assist the District Attorney in any criminal inquiry.[137] MPD bias was stark; in its investigation of Heimsness, the department only attempted to find dirt on Heenan.[138] The MPD reviewed Heenan's social media accounts; not those of Heimsness. The MPD reviewed Heenan's phone use; not so as to Heimsness. The MPD reviewed Heenan's credit history; not so as to Heimsness. The MPD reviewed security footage of Heenan making recent purchases; not so as to Heimsness. The MPD tested Heenan for drugs and alcohol; not so as to Heimsness. The MPD interviewed Heenan's family members, friends, employers, and co-workers regarding Heenan's recent conduct and any propensity for violence; not so as to Heimsness. The MPD searched Heenan's bedroom to assess his mental state; not so as to Heimsness. The MPD searched Heenan's car; not so as to Heimsness. The MPD looked for citations issued against Heenan; the MPD did not look for any complaints as to Heimsness.[139]

Based on the MPD's investigation, District Attorney Ismael Ozanne announced no criminal charges would be filed.[140] Consistent with Chief Wray's assessment that Heimsness's actions were legal and morally defensible, the MPD, on January 7, 2013, concluded that Heimsness used

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134. *Id.* ¶ 24.

135. *Id.* ¶¶ 59, 61.

136. *Id.* ¶ 64.

137. Video Deposition of Noble L. Wray, *supra* note 106, at 125.

138. *Id.* at 126–29.

139. Though swabs of the gun were taken, they were not tested for Heenan's DNA to assess the credibility of Heimsness's assertion that Heenan grabbed the gun. *Id.* at 131–32.

140. Press Release, Ismael R. Ozanne, Dane Cnty. Dist. Att'y, No Criminal Liability for Law Enforcement Officers Involved in Shooting of Paul Heenan on 11-9-2012 (Dec. 12, 2012) (on file with court for related litigation). The DA did not provide the legal basis for his decision. *See id.*

reasonable force.[141] Facing continued public skepticism,[142] the MPD called a press conference to explain why Heimsness had been exonerated.[143] The presentation was extraordinary for two reasons. First, timing. Before any civil lawsuit was filed,[144] MPD trainers provided a frame-by-frame justification for the officer's conduct without interference from lawyers.[145] This exhibited striking confidence in the MPD's conclusion that the officer acted reasonably. Second, it seems MPD trainers concluded that it would have been unreasonable for Heimsness to have *not* shot Heenan.[146] If one accepts this interpretation, then the MPD required Heimsness to do what he did. This Article contends that this limitation on officer discretion constitutes a rule, one that requires violence if certain conditions are present.

At the press conference, Sergeant Jason Freedman and Officer Kimba Tieu explained Heimsness's actions.[147] Sgt. Freedman offered a big picture view: An officer does not operate in a "strategic," but a "tactical" environment.[148] An officer is thrust into a situation with "limited options" and "very little information."[149] He explained three principles govern every encounter: (1) always retain advantage; (2) action is faster than reaction (hesitation kills); and (3) the suspect escalates, not the officer (for

141. Video Deposition of Noble L. Wray, *supra* note 106, at 165, 232, 236.

142. *See, e.g.*, Sandy Cullen, *Shooting Leaves Neighbors with 'Incredible Sadness,' 'Increased Distrust' of Police*, WIS. STATE J. (Nov. 18, 2012), https://madison.com/wsj/news/local/crime_and_courts/shooting-leaves-neighbors-with-incredible-sadness-increased-distrust-ofpolice/article_9ee77d78-3047-11e2-8baa-0019bb2963f4.html [https://perma.cc/9T6K-C7Q4]; Steven Elbow, *Public Skeptical of Police Decision in Fatal Shooting; Here's a Wrap-up of Stories So Far*, CAP TIMES (Jan. 9, 2013), https://madison.com/ct/news/local/writers/steven_elbow/public-skeptical-of-police-decision-in-fatal-shooting-heres-a-wrap-upof-stories-so/article_a7353480-5a8f-11e2-9cd0-0019bb2963f4.html [https://perma.cc/H2UJ-M5WA].

143. *See* Letter to Citizens from Chief Wray, Madison Police Dep't (Jan. 10, 2013); City of Madison Police Department, News Conference – January 9, 2013, YOUTUBE (Jan. 10, 2013), https://www.youtube.com/watch?v=oWxOC5Iw7WU [https://perma.cc/LY7R-EJSY] [hereinafter MPD News Conference].

144. *See* Heenan Complaint, *supra* note 110, at 60 (indicating complaint filed after the MPD News Conference).

145. MPD News Conference, *supra* note 143, at 40:45–54:55.

146. *See* Video Deposition of Noble L. Wray, *supra* note 106, at 236. Chief Wray would be explicit about this belief in a later statement: "I believe that a lesser degree of force would not have been sufficient to stop Paul Heenan and to prevent death or great bodily harm to Officer Heimsness." *Id.*

147. MPD News Conference, *supra* note 143, at 45:40. The "reactionary gap" is the "amount of time an officer needs to become aware of and react to any given threat." Garrett & Stoughton, *supra* note 94, at 255 n.211; *see also* CHARLES REMSBERG, THE TACTICAL EDGE: SURVIVING HIGH-RISK PATROL, 436–37 (1986) (describing the "*reactionary gap*" as enough space to allow one to "scan the suspect's entire body . . . for nonverbal clues to his intent").

148. MPD News Conference, *supra* note 143, at 35:10–35:50.

149. *Id.* at 35:45–36:15.

example, an officer drawing a weapon is "defensive," a suspect's non-compliance is "escalation").[150]

The trainers turned to the incident. Why approach Heenan with a deadly weapon? Why not approach with a taser? Officer Tieu explained that "in high risk situations such as burglaries[] [and] home invasions . . . where the threats are unknown . . . the officer [has] . . . limited information" such that "to start at a lower level of force" would disadvantage the officer, potentially allowing the suspect to harm the officer or members of the public.[151] Sgt. Freedman explained that in such a high-risk scenario, "We don't know . . . the subject's intentions, their motivation, their training, the equipment that they carry . . . [or] if they're fleeing from something heinous that they just did."[152] "Felonious situations," said Sgt. Freedman, will be a "firearm day."[153] The officer is not to move down the force continuum until the officer is "proof positive" such a downgrade is warranted.[154]

Sgt. Freedman ordered Officer Tieu, playing a subject, to get down. The subject is "going to choose to do what he's going to choose to do. He's going to act," and the officer will have to "react."[155] Officer Tieu pulled out a gun. Sgt. Freedman reported that an untrained person can produce a firearm and unleash an accurate shot in less than a half-second.[156] Officer Tieu explained that, even if unarmed, a subject presents a deadly threat. Returning to their places, Sgt. Freedman pulled out his weapon and verbally commanded compliance from Officer Tieu. Officer Tieu quickly closed the distance and grabbed the gun. Sgt. Freedman explains that now the "gun won't function."[157] Officer Tieu added that Heenan has the opportunity to gain control of the gun.[158]

What if the officer attempted to use additional verbal commands to gain compliance? "I'm going to give one more verbal command to see if he complies," said Sgt. Freedman.[159] Officer Tieu aggressed. "It takes me two, three, four-tenths of a second," said Freedman, "to process that he's not surrendering, he's lunging forward" and "by the time my brain physically is able to process that, he's got my weapon . . . now he has my weapon, I am unarmed, and [there is a] threat to the community and to myself."[160] What if the officer had attempted to holster his weapon (to

150. *See id.* at 38:45–43:00.
151. *Id.* at 38:30–39:00.
152. *Id.* at 41:07–41:17.
153. *Id.* at 41:21–41:44.
154. *Id.* at 39:00–39:20.
155. *Id.* at 42:45–42:55.
156. *Id.* at 43:03–43:20.
157. *Id.* at 44:46–44:50.
158. *Id.* at 44:53–45:30.
159. *Id.* at 46:21–46:24.
160. *Id.* at 46:30–46:50.

reduce the possibility of it being taken by the suspect)? Sgt. Freedman attempted to holster his weapon. Officer Tieu aggressed and knocked Freedman off-balance with a right hook. What if the officer attempted to step backward? Sgt. Freedman explained it is not possible to move backward faster than the suspect can move forward. What if the officer had turned his back to run? Sgt. Freedman turned, and Officer Tieu put him in a headlock. What if the officer had not pushed Heenan backward before employing deadly force? Officer Tieu grabbed Sgt. Freedman's right hand and Sgt. Freedman continued to point the firearm at Officer Tieu, without pushing him back. Officer Tieu disarmed Sgt. Freedman and shot Sgt. Freedman. "We think about what it takes to disarm [the officer]," said Officer Tieu, "nothing at all, I'm gonna rip the gun, and I'll apply deadly force to the officer."[161]

Are there rules that can be extracted from this MPD training session? What did the trainers communicate as to how officer discretion is limited once certain conditions are present? What rules of engagement might an MPD officer take away from this training session? The following rules would be reasonably understood by an officer:

> *One*, an officer has no duty to question the accuracy of information from dispatch, and the officer is prohibited from conducting any inquiry if doing so compromises the officer's tactical advantage. *Two*, an officer has no duty to maintain cover and distance to facilitate strategic decision-making. *Three*, an officer has no duty to wait for back-up to approach the suspect. *Four*, once an approach is initiated in a felonious situation, the officer must advance with an unholstered firearm. *Five*, the officer cannot retreat. *Six*, active non-compliance in a felonious situation is to be met with deadly force.

These rules—embedded in MPD training—required Heimsness to use deadly force against Heenan.[162] As Heimsness approached a reported burglary-in-progress, he had no duty to assess the accuracy of the report, despite the deadly show of force such an incident required of him. When Heimsness unholstered his firearm, it created risk—it increased the chance a suspect would be able to use deadly force by accessing the weapon. Heimsness had no duty to assess the particularities of the incident. As

161. *Id.* at 45:20–45:30.

162. Officer Troumbly, Heimsness's backup, approached with a taser rather than a firearm, which MPD found to also be reasonable. Video Deposition of Noble L. Wray, *supra* note 106, at 242. How did MPD thread this needle and find both officers' actions reasonable? Troumbly heard from Heimsness that a battery was occurring, which, according to MPD Policy 6-200, requires a taser approach. *Id.* at 241–42. As to Heimsness, training dictated it inappropriate for him to transition from gun to taser at that juncture. *Id.* at 242.

Heimsness closed the distance, he was required to produce his firearm. Such action, as Professor Seth Stoughton points out, creates "path dependence, limiting an officer's ability to use other force options."[163] When Heenan failed to comply with the officer's order to "get down" by approaching the officer, Heimsness violated two MPD rules in failing to immediately shoot Heenan: the rule to retain a tactical advantage over the suspect and the rule that, in a felonious situation where there is active resistance, deadly force must be used against the subject. Even if Heimsness had heard Kevin scream Heenan was a neighbor, Heimsness had no obligation to consider this information; according to the MPD rule, solely relying on information from dispatch is permissible. Once Heenan did not comply with the order to "get down" and approached Heimsness, it was, according to MPD rules, unreasonable for Heimsness to do anything but use deadly force.[164]

From a single presentation applied to a specific incident, one can identify features of department training that limit officer discretion in a wide range of circumstances. Had Heimsness controlled the situation without any injury to Heenan, the MPD would not discipline Heimsness for his failure to follow the rules communicated to him in training. But the failure to enforce a rule does not obviate its existence; a rule prohibiting murder is no less a rule for the failure of the State to bring charges.

Another question remains: Do the residents of Madison think the MPD rules are reasonable? One way to consider this question is to consider how those residents interacted with Heenan that night. Heenan, drunk, cold, and confused, was, over the course of the evening, assisted by civilians who never feared for their lives. Bregan, of course, knew Heenan and had someone watch over him and then drove Heenan home. Kevin, however, did not know Heenan. But despite his initial alarm over a possible home intruder threatening the safety of his own family, Kevin never feared for his life and continued to try to help Heenan, even as he lurched toward him. Before the officer arrived, Kevin was planning on calling to someone to assist. Over the course of the evening, these civilians assessed the circumstances by observing the scene in close proximity to Heenan. Within fifteen seconds of arriving on the scene, an MPD officer killed Heenan, a shooting the MPD found legally and morally justified. Perhaps Bregan and Kevin did not act in a way that facilitated safety concerns for themselves or the surrounding community. But the assessment did not require some special expertise. Rather, and for Kevin

163. STOUGHTON, NOBLE & ALPERT, *supra* note 17, at 171.

164. To "stop the threat," officers are trained to target the largest area, the torso, which also contains the central nervous system that, when compromised, will stop the threat. MPD News Conference, *supra* note 143, at 50:35–51:30. Why three shots? Freedman attributed this to "reactionary gap"; an officer will let off a number of rounds before realizing the threat has stopped. *Id.* at 49:00–50:00.

especially, individuals had faced uncertain circumstances with limited information and acted very differently than a trained MPD officer. But unlike Heimsness—that trained MPD officer—Kevin was not subject to a set of rules that required a different set of reactions to similar input.

Despite departmental insistence that each incident is different, it was the MPD's own rules that ironed out the incident's otherwise unique circumstances. To the officer, it was not after bar time in a safe neighborhood, with two individuals leaning into each other, with back-up present. Rather, all the MPD officer was required to know, and required to act on, was a reported "high-risk" felony. The MPD officer did not have to assess the mental state or physical condition of the suspect. It did not matter whether Heenan knew Heimsness was an officer (as Kevin did not know at first). It did not matter whether Heenan heard the officer order, "Get down!" as the physical presence of the officer was adequate to require compliance.[165] None of these particularities were of relevance to the MPD.

Under a traditional view (reflected by the rule-resistance narrative), this is because rules flatten out difference.[166] A rule will disregard details or equitable concerns that distinguish two events.[167] A rule reflects a set of values that justify similar treatment. MPD rules are highly protective of officer safety at the expense of suspect safety. Where civilians who interacted with Heenan throughout the evening did attempt to gather facts, the only actor failing to assess particularities of the incident was the officer. This is because the officer's discretion was highly limited by training. Under MPD rules, it was a "firearm day." Once it is a firearm day, a decision tree governs when the officer must pull the trigger and allows for very little discretion. This lack of choice is, according to departments,[168] incompatible with *Graham*'s framing: reasonable force is dependent on how an officer exercised discretion in a fluid environment.[169] As to MPD training, the fluid environment was ignored, and the presence of certain features constrained the officer to take certain actions.

The case study reveals how hard and fast rules can be extracted from a training presentation. The case study shows how, within a single

165. If one thinks it likely Heenan heard the order, one must think it likely Heimsness heard Kevin scream, "It's a neighbor!" Heimsness claimed he did not hear this. A supportive police union attributed this to the "auditory exclusion" phenomenon. *See* Bill Lueders, *Police Account of Shooting Disputed*, WIS. WATCH (Jan. 6, 2013), https://wisconsinwatch.org/2013/01/police-account-of-shooting-disputed/ [https://perma.cc/D5AR-HSK6].

166. Schauer, *supra* note 8, at 309.

167. *Id.* at 309 ("[R]ules are typically thought to bring the virtues of predictability and simple application at some cost to producing the optimal result or optimal justice in the individual case.").

168. *See A Box Full of Intervention Options*, *supra* note 88.

169. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

incident, an officer may have little discretion, regardless of how things evolve. It is less a "tactical environment," as MPD trainers assert, than a rule-bound environment. The case study helps appreciate how officers abide by categorical directives that simplify an incident and reveals how these rules potentially require violence.

D. Extracting Rules from Multiple Training Sessions

What type of hard and fast rules might officers internally follow after being exposed to departmental training over time? To address this question, we transcribed and analyzed sixty training videos produced by Lexipol, the largest provider of police training in the United States. Lexipol publishes videos and articles through its online police academy Police1.[170] We started with Lexipol's most recent productions and worked back ten years. We selected videos based on titles and descriptions that suggested commentary on how an officer should approach a scene, how an officer should interact with a subject, when an officer should use force, and the level of force that should be employed.[171] We did not include every video involving use of force; for example, we did not select videos focused on how to correctly use a force technique, such as "Tactical Tip: The Brace Contact Position."[172] The selection process was iterative. At first, for example, we did not include videos about report-writing, but upon spot-checking excluded content, we found this topic important to shaping an officer's use-of-force practices.

Below we summarize the content, providing representative quotes. Directives to the officer are sometimes thematic, providing context to how any officer is to understand policing generally. On a few occasions, we supplement this section with other sources that complement Lexipol's approach so to fill in some gaps. From this compendium of videos, we then attempt to extract a set of rules governing use-of-force practices that have been communicated to officers.

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170. *See Online Learning*, LEXIPOL, https://www.lexipol.com/solutions/online-learning/ [https://perma.cc/Y4ER-6LKE] (last visited Mar. 3, 2021).

171. For example, we selected a video titled "Standoffs and Compliance" from 2018 because a subject's compliance is a frequent factor in an officer's decision tree for using force. *See Reality Training: Standoffs and Compliance*, POLICE1 (Aug. 17, 2018), https://www.police1.com/de-escalation/videos/reality-training-standoffs-and-compliance-LexL0wbbq15fYJSg/ [https://perma.cc/L6JX-66A5]. Similarly, we selected a video titled "Distance and Cover" from 2017 because whether an officer closes the distance between herself and a subject is commonly understood to be related to use of force. *See Reality Training: Distance and Cover*, POLICE1 (Oct. 13, 2017), https://www.police1.com/officer-safety/videos/reality-training-distance-and-cover-oPkj8ArDA8WKKrnd/ [https://perma.cc/637B-NULY].

172. *See Tactical Tip: The Brace Contact Position*, POLICE1 (Jan. 26, 2018), https://www.police1.com/close-quarters-combat/videos/tactical-tip-the-brace-contact-position-Ez3JjaADLCBqdsrB/ [https://perma.cc/4XZW-4FKT].

1. WHAT OFFICERS HEAR DURING LEXIPOL TRAININGS

What follows are direct quotes or paraphrased communications, mostly from Lexipol, that are intended to inform officers in use-of-force encounters.

Being an officer is at times like being "your own Jack Bauer."[173] "[O]fficers are in harm's way each and every hour of their shift" and are more likely than any other public servant to be murdered.[174] "There's always a gun in our fights. I hear people say, 'the subject was unarmed.' But the officer was armed and is not allowed to lose."[175]

> [O]fficers who are facing an unarmed suspect get killed either by being disarmed themselves or the subject just beats them to death. The public has to understand, there's no subject who's unarmed and no fight is ever [a] nonlethal fight for an officer because we always bring deadly force to that fight.[176]

An officer must have a:

> [H]unter mindset. No matter what happens I'm going to go in and I'm going to find the bad guy, the bad actor . . . . Nothing is going to stop me . . . until I do my duty. I'm going to go in there and win for myself, win for my community . . . . Facing those things that we may actually face someday first in our mind so that we are cocked and locked and ready to go.[177]

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173. *Don Alwes: Active Shooter Response Strategies*, POLICE1 (Sept. 1, 2010), policeone.com/active-shooter/videos/don-alwes-active-shooter-response-strategies-oKs542kNpEhR1Xgj/ [https://perma.cc/TV3T-PBR4]. Police1 is a subsidiary of Lexipol. *See Online Learning*, *supra* note 170.

174. *National Blue Alert Registration Introduced in House!*, FRATERNAL ORD. OF THE POLICE (Oct. 4, 2010), fop.net/SearchResult.aspx?Category=NEWS&index=53 [https://perma.cc/44MJ-DUQJ].

175. *Fight Like a Fighter Pilot*, POLICE1 (Aug. 5, 2014) https://www.policeone.com/police-training/videos/fight-like-a-fighter-pilot-ABrsbHws6NZFIYDP/ [https://perma.cc/X4JZ-L6MX] [hereinafter *Fight Like a Fighter Pilot*].

176. *Reality Training: Staying in the Fight*, POLICE1 (Apr. 13, 2018), policeone.com/dave-smith/videos/reality-training-staying-in-the-fight-KRq8uc0VwUeRO4sF/ [https://perma.cc/GMT9-6FLQ] [hereinafter *Reality Training: Staying in the Fight*] (commenting on a video of a subject who fights through a tasing to attack an officer).

177. *Dave Smith: Single Officer Squad, No Backup Available*, POLICE1 (Apr. 5, 2010), policeone.com/backup/videos/dave-smith-single-officer-squad-no-backup-available-FgqPLakofDNHHn3R/ [https://perma.cc/HLW8-86HP].

The fight is unfair; there are no weight classes, referees, or medics.[178] A subject's non-compliance, in whatever form, can present life-threatening danger.

> [O]fficers cannot wait to react until they are absolutely certain of an individual's malicious intent. If an officer waits to be certain that the individual . . . is retrieving a weapon, . . . the weapon could easily be used against the officer before he or she has an opportunity to respond.[179]

> [Y]ou see officers hesitate . . . [trainers] sitting back with perfect perspective [who know the officer will be harmed are thinking], shoot, shoot, shoot, shoot now, [but the officer is paralyzed by the] overwhelming information they get regarding what they can't do.[180]

An officer loses tactical advantage the moment she does not control the situation.[181] Passive resistance is as dangerous as active resistance, as every moment the subject is not under control provides time for the subject to plan.[182] Thus, "resistance is resistance."

Attempting to investigate before controlling a situation presents unacceptable risks. "The quicker I resolve a physical confrontation, the less liability there is to the officer."[183]

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178. *Acie Mitchell: Focus on Hand to Hand Survival*, POLICE1 (May 24, 2011), policeone.com/acie-mitchell/videos/acie-mitchell-focus-on-hand-to-hand-survival-Lr011Y2yAzNpyTcO/ [https://perma.cc/UA7M-29Q9].

179. KIMBERLY A. CRAWFORD, FED. BUREAU OF INVESTIGATION, LEGAL INSTRUCTION UNIT, REVIEW OF DEADLY FORCE INCIDENT: TAMIR RICE, http://i2.cdn.turner.com/cnn/2015/images/10/10/crawford-review.of.deadly.force-tamir.rice.pdf [https://perma.cc/8QQS-RH2X] (last visited Mar. 18, 2021).

180. *Tueler: Shoot/Don't Shoot: Decision-Based Training*, *supra* note 71.

181. *Fight Like a Fighter Pilot*, *supra* note 175 (explaining that with the OODA loop—Observation, Orientation, Decision, Action—the officer must continue acting to reset the suspect's OODA loop, keeping him on a back foot); *see also* Tracy A. Hightower, *Boyd's O.O.D.A Loop and How We Use It*, TACTICAL RESPONSE, https://www.tacticalresponse.com/blogs/library/18649427-boyd-s-o-o-d-a-loop-and-how-we-use-it [https://perma.cc/C632-K67M] (last visited Mar. 21, 2021).

182. *Mike Gardner: Reflections on Police Use of Force*, POLICE1 (Feb. 28, 2011), policeone.com/police-trainers/videos/mike-gardner-reflections-on-police-use-of-force-pjJng4LNguAXoVAC [https://perma.cc/57SG-GCVJ] [hereinafter *Mike Gardner: Reflections on Police Use of Force*].

183. *See Reality Training: Deadly Hesitation*, POLICE1 (Jan. 5, 2018), https://www.police1.com/deadly-hesitation/videos/reality-training-deadly-hesitation-83URuHYYSkieMYp9/ [https://perma.cc/F4DD-V8RG]; *see also Applying the DRM in Use-of-Force Incidents*, *supra* note 87; *Reality Training: Staying in the Fight*, *supra* note 176 (describing the necessity of using force when the situation requires).

> Too often people go with hindsight bias and [say] . . . "look, the suspect only was holding dope and . . . the officer did this control technique . . . which appears quite severe." But had it not been drugs, had it in fact been a weapon, that officer saved his life or her life by using that higher level of control force.[184]

Attempts to de-escalate give the subject the advantage.[185] In fact, "de-escalation has nothing to do with the use of force."[186] Any failure to comply is, instead, the subject's choice. "The person who decides there's going to be shooting is [the] subject, not the officer."[187] "[Officers] don't control the events around [them], we can only control our response to them."[188] The New Orleans Police Department offers an accurate use of the term: "Force shall be de-escalated immediately as resistance decreases."[189] "Act civilly if you want your civil rights and that means you don't resist a peace officer trying to do his or her job."[190] For example, in the Jerame Reid incident, officers pulled over the driver for running a stop sign. When the driver opened the glove-box to retrieve his license, the officer spotted a firearm. The officer screamed, "[D]on't move, hands up!" The passenger, Jerame, exited the car with his hands up.

> [W]ell he was unarmed . . . . [But] why is [Jerame] coming out? Well, again, we can't interview a subject who's dead, but the thing we have to wonder is, is this guy trying to create an incident? . . . So what the public has to understand is: when

184. *Reality Training: Controlling a Suspect*, POLICE1 (July 21, 2017), policeone.com/police-products/less-lethal/taser/videos/reality-training-controlling-a-suspect-yDs7mG0HhvKEaJd5/ [https://perma.cc/P7GS-CSGZ].

185. Curtis Gilbert, *Not Trained to Not Kill: Most States Neglect Ordering Police to Learn De-Escalation Tactics to Avoid Shootings*, APM REPS. (May 5, 2017), https://www.apmreports.org/story/2017/05/05/police-de-escalation-training [https://perma.cc/5FL4-G4DF].

186. In the Line of Duty, *De-Escalation: Common Sense Tips for All Cops*, YOUTUBE (July 20, 2018), youtube.com/watch?time_continue=12&v=7hLwfH5SpBI&feature=emb_logo [https://perma.cc/M4H9-4YLF].

187. *Reality Training: How to Handle a Suspicious Activity Call*, POLICE1 (Oct. 9, 2015), policeone.com/police-products/body-cameras/videos/reality-training-how-to-handle-a-suspicious-activity-call-GkOr6EvgaEDbTOv0/ [https://perma.cc/JE4B-KBR6].

188. *Chief Jeff Chudwin: Speed Kills*, POLICE1 (Jan. 25, 2011), policeone.com/jeff-chudwin/videos/chief-jeff-chudwin-speed-kills-9miqzLrMZKQbchUS/ [https://perma.cc/26U6-K7RC].

189. NEW ORLEANS POLICE DEP'T, POLICY MANUAL 29 (2013), perma.cc/ZWY3-TJ73.

190. *Mike Gardner: Reflections on Police Use of Force*, *supra* note 182.

> you're given a command, especially in the intensity of emotion . . . you've got to obey it.[191]

Some de-escalation techniques, like buying time behind cover, embolden violent suspects:

> [Use] cover simply as a tool to maneuver and then strategically get the position to find . . . weakness . . . and stop the threat right away. We in law enforcement have got to start thinking [with a] military mentality. . . . Dynamic movement is so critical in combat and yet we practice being in fixed positions all the time.[192]

Likewise, withdrawing from a scene only increases danger to the officer:

> When you step back a lot of bad things start happening . . . . You are opening up all this room between you and the subject, which enables the subject to punch you, kick you, shoot you, stab you . . . . All bad things begin to happen when you start to back up.[193]

Don't hesitate. The problem is "the failure to use adequate force soon enough . . . officers are getting hurt or they're getting killed . . . because of that hesitation."[194] It is safer to use a higher level of force and achieve immediate control:

> It's not in any of our literature at all[,] [but a guiding principle is] the maximum amount of violence in the shortest amount of time. I don't know if that's good for a camera, but I tell you, it sets something up in the mindset that sometimes to win you got to get medieval. Now that may not be politically correct, but that gets the job done . . . and so we're really concerned about winning first and we can figure the rest out later.[195]

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191. Police1, *Reality Training-How Do You Handle a Non-Compliant Subject*, YOUTUBE (Feb. 12, 2016), youtube.com/watch?v=uFNkteUXqFo [https://perma.cc/9RFC-KZ8U]. The video presentation does not explain how Mr. Reid could follow what were contrary commands.

192. *Fight Like a Fighter Pilot*, *supra* note 175.

193. *How to Respond to Threats by Closing the Distance*, POLICE1 (Nov. 8, 2016), https://www.policeone.com/officer-safety/videos/how-to-respond-to-threats-by-closing-the-distance-f9ny3QIgpF3m0iKc/ [https://perma.cc/Q564-AT7N].

194. *Liability Issues in Use of Force*, POLICE1 (Jan. 7, 2014), policeone.com/dave-smith/videos/liability-issues-in-use-of-force-ntGp9v2gAU31ebSv/ [https://perma.cc/SYG9-V472] [hereinafter *Liability Issues in Use of Force*].

195. *Hank Hayes: Warrior Mindset*, POLICE1 (Mar. 14, 2011), policeone.com/hank-hayes/videos/hank-hayes-warrior-mindset-OnxwcWSUM1oppuAd/ [https://perma.cc/THD6-F79T] ("[I]n the last 11 years we've trained 11,500 guys.").

> Is excessive force a problem? Absolutely. But, not using enough force soon enough is probably a bigger problem here. And it comes down to the same thing: are you better off striking somebody with love taps 50 times or one good strong baton strike that does the job?[196]

In approaching a scene, a taser should rarely be a starting tool; it "can fail or the probes can miss or other things can happen and . . . we don't want our officers to think that it's an appropriate response to use a taser against somebody with . . . any type of weapon."[197] Selecting a taser, even when responding to minor criminal activity, can lead to disastrous results. Take an officer who responded to a shoplifting call. The officer approaches the suspect with a taser. The suspect turns and shoots him. "If your hands are full of the less lethal option and the bad guy comes out with a lethal option and you don't have cover, you're in deep stuff . . . . [O]ur officer gets shot multiple times."[198]

What is the purpose of policing? Lexipol trainers answer the question with an emphasis on an officer's need to ensure public safety amidst uncertainty.

> I hear too much talk when I listen to the media, the elites, our intellectuals talk as if there is no evil in the world. There's plenty of evil in the world. I don't know what's in the heart of men and women who do bad but I do believe that we could best describe it as evil. And that's why [officers are] out there. That's why you wear a badge and a gun, 'cause you're allowed to intercede between evil and our people you keep safe and free.[199]

> [Civil rights attorneys will claim] officers . . . should not have intervened, or should have gone away, or should have avoided closing with the individual and thereby forcing the incident . . . . None are valid. [O]fficers are sworn to protect the community

196. *Applying the DRM in Use-of-Force Incidents*, *supra* note 87.

197. *Ryan Spurling: Reaction and Response to TASER Hit*, POLICE1 (Jan. 10, 2011), https://www.policeone.com/police-products/less-lethal/taser/videos/ryan-spurling-reaction-and-response-to-taser-hit-73shQ7n38DlPRQmS/ [https://perma.cc/L6X7-7RJB]; *see also Mike Gardner: Reflections on Police Use of Force*, *supra* note 182 ("[U]se-of-force continuums . . . can be frustrating and even sometimes dangerous for the officer.").

198. *Reality Training: Options Without Backup*, POLICE1 (July 5, 2019), policeone.com/officer-safety/videos/reality-training-options-without-backup-2c0r9rQEpDpDUq40/ [https://perma.cc/4AKW-NRBQ].

199. *Reality Training: An Immediate Response to a Spontaneous Threat*, POLICE1 (June 21, 2019), https://www.policeone.com/close-quarters-combat/videos/reality-training-an-immediate-response-to-a-spontaneous-threat-X3Y00nXFfRGZOf4s/ [https://perma.cc/3X8W-JE9X].

> and its citizens, and to do so they must resolve such incidents in favor of the safety of the community and its citizens.[200]

In all presentations, Lexipol trainers emphasize a dynamic environment. Police need to exercise discretion in an environment that changes "microsecond to microsecond."[201] "It's a dynamic encounter. So, what was a good use of force two seconds ago, may not be so [now]."[202] "What is the level of force appropriate right now, at this time? . . . [N]ow has already gone by . . . . And what's now important?"[203] In addition, at the end of debriefing a body-cam encounter, Lexipol trainers often ask officers to discuss how they would approach a similar scene with their colleagues. Yet, within this rule-resistant narrative, recruits and officers are receiving thematically consistent messaging that ultimately determines "the reasonable" way to approach a scene. What is trained can easily be reduced to rules.

2. RULES OF ENGAGEMENT EXTRACTED FROM LEXIPOL TRAINING

What rules of engagement might an officer take away from Lexipol's training? The following set of rules would be consistent with Lexipol's messaging:

> Information received from dispatch that indicates potential danger to the officer is deemed correct. The time to clear up any misunderstanding is after an officer has gained control and eliminated any threat to public safety, after which the officer can investigate to confirm or dismiss the accuracy of the initially reported information.
>
> Once an approach is initiated, an officer shall quickly close distance. The officer shall not retreat. A subject who fails to respond to questions is resisting. Officer presence is sufficient to require submission. In effectuating a detention, an officer shall establish immediate physical control over the suspect.
>
> A show of force (i.e., approaching a scene with a firearm) does not constitute use of force. An officer shall approach a reported or suspected felony, or any potentially dangerous situation, with

200. UREY PATRICK & JOHN HALL, IN DEFENSE OF SELF AND OTHERS loc. 4997 (3d. ed. 2017) (ebook).

201. *Applying the DRM in Use-of-Force Incidents*, *supra* note 87.

202. *Id.*

203. *Id.*

> a firearm. An officer shall only reduce a show of force upon proof positive it is not needed to ensure officer safety.
>
> If a suspect fails to submit to officer authority, an officer shall immediately deploy force. A deadly weapon is always present, and resistance indicates potential for deadly force. Any attempt by a subject to disarm the officer of any tool places the officer and others in imminent danger of deadly harm. In felonious circumstances or where imminent danger to the officer or others is possible, resistance shall be met with deadly force. An officer shall cease the use of deadly force only when it is proof positive that the suspect no longer has the capacity to use deadly force. Deadly force may be used to stop a suspect who engages in a high-speed pursuit.
>
> An officer's life, as well as any bystander's life, is given a higher value than a suspect's life.

These rules are rooted in the messaging of Lexipol trainers. The training is, of course, subject to different takeaways, a dynamic exacerbated by the failure of departments to take responsibility for the rules they have communicated. The failure to write down rules embedded in training fosters departmental unaccountability to its officers and to the public. Compounding the problem of unwritten rules in hiding, there are 18,000 separate law enforcement agencies.[204] One expects variation, and those variations are impactful; officers subject to different rules will use force in different ways. However similar the circumstances, depending on the jurisdiction, outcomes for civilians will be different. Because these rules are unwritten, the department, convinced by its own narrative that rules do not regulate use of force, denies the existence of rules. As a result, each community remains in the dark as to departmental decisions that require officers to engage in significant, sometimes life or death, decisions.

III. THE INSTITUTIONAL ENTRENCHMENT OF THE RULE-RESISTANT VIEW

How entrenched is this rule-resistant view? What kind of validity does the rule-resistant view have among non-executive institutions? Do courts and legislatures adhere to this view? The answer is yes, and this alignment serves to further validate a narrative that insulates departments

204. Seth W. Stoughton, Jeffrey J. Noble & Geoffrey P. Alpert, *How to Actually Fix America's Police*, ATLANTIC (June 3, 2020), https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/ [https://perma.cc/36KC-8LQF].

from public interrogation and helps maintain internal control over use-of-force practices. When a trainer states rules are "impossible" in the use-of-force space, her assertion finds support in court decisions and legislative pronouncements. This institutional alignment lends legitimacy to the rule-resistant view, however false.

A. The Court: Adopting the Rule-Resistant View

In *New York v. Belton*,[205] the Supreme Court, in 1981, observed the need for standards, as opposed to rules, within the context of the Fourth Amendment:

> A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts, and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."[206]

This conception was consistent with the Court's post-*Terry* acknowledgment that a street encounter is complex, an officer's authority broad, and that exercising on-the-spot discretion was necessary to policing.[207] This rule-resistant view would not always shape Fourth Amendment doctrine,[208] but it informed *Graham v. Connor*, the Court's defining use-of-force case.[209] *Graham* determined that reasonable force was "not capable of precise definition" but instead depended on a "totality of circumstances" unique to an encounter.[210] The incident was to be "judged from the perspective of a reasonable officer on the scene,"[211] understanding that "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly

205. 453 U.S. 454 (1981).

206. *Id.* at 458 (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. CT. REV. 127, 141).

207. Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 443–44 (1990).

208. *Id.* at 444; *see, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 28 (1985) (providing three requirements that must be present to justify an officer's use of deadly force as to a person fleeing arrest).

209. *Graham v. Connor*, 490 U.S. 386 (1989); *Scott v. Harris*, 550 U.S. 372, 382 (2007) (holding that *Graham* controls any constitutional question as to use of force).

210. *Graham*, 490 U.S. at 396.

211. *Id.*; *see also Bryan v. MacPherson*, 630 F.3d 805, 825 (2010) ("Rather than relying on broad characterizations, we must evaluate the nature of the *specific* force employed in a *specific* factual situation." (emphasis added)).

evolving—about the amount of force that is necessary in a particular situation."[212]

Professor Rachel Harmon writes *Graham* is so vague that it provides little functional limit on use of force.[213] Professor John Gross contends *Graham* is so deferential that it leaves the determination of force "almost entirely up to the individual officer" and for this reason, constituted a failed judicial intervention.[214] But from the Court's perspective, this "failed" approach is institutionally defensible.[215] Justice O'Connor opined that the constitutionality of force is not tied to political preferences.[216] In this framing, the judiciary avoids questions of what officers must or should do, only weighing in when an officer's conduct in an incident is so egregious as to be nationally condemned and deemed unreasonable.[217] The judiciary largely ceded national, state, and local regulatory space to legislative and executive treatment.[218] Though reasonable force under *Graham* is not subject to a precise definition, nothing in *Graham* prevents states and localities from defining what force is reasonable.

Rather than forge new regulatory paths, however, these branches have largely embraced *Graham*'s rule-resistant view.[219] Much recommends *Graham* to law enforcement. The case assumes a well-

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

213. Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1129–33 (2008) (observing that *Graham*'s guidance is so contradictory that all expressions of force can be justified).

214. John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. C.L. & C.R. 155, 161 (2016).

215. *See, e.g.*, *Illinois v. Lafayette*, 462 U.S. 640, 647–48 (1983). The Court cautioned, "it is not our function to write a manual on administering routine, neutral procedures of the station house." *Id.* at 647.

216. *Tennessee v. Garner*, 471 U.S. 1, 28 (1985) (O'Connor, J., dissenting) ("[T]he effectiveness or popularity of a particular police practice does not determine its constitutionality."). Similarly, reviewing stop-and-frisk practices, Judge Scheindlin commented: "[T]his Court does not stand in the shoes of the Police Department and is in no way qualified or empowered to engage in policy determinations." *Ligon v. City of New York*, 925 F. Supp. 2d 478, 484 (2013).

217. Harmon, *supra* note 79, at 777 ("[Constitutional] rights establish only minimum standards for law enforcement."); *id.* at 764 ("[C]ourts lack the institutional capacity to undertake complex empirical analysis . . . ."). *But see* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1786 (2005) (noting local standards "still play[] no formal role in criminal procedure doctrine, but . . . [have] begun to be part of the rhetorical atmosphere of some of the Court's decisions.").

218. Sklansky, *supra* note 217.

219. Keven M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 212–14 (2005); STOUGHTON, NOBLE & ALPERT, *supra* note 17, at 77–78 (describing a state regulatory scheme, whether judicial or legislatively adopted, that shares affinities with the *Graham* standard).

intentioned officer.[220] *Graham*'s standard, based on the reasonable officer, defers to, and supports claims of, departmental expertise.[221] *Graham* permits departments to propose justifications for an officer's use of force in the course of litigation, threatening a slippery environment for a plaintiff.[222] If accepted by a court, the justification contributes to a re-shaping of the law that allows officers more discretion.[223] Relatedly, *Graham* credits an officer's perception as to what dangers could have happened but did not.[224] Those contending that this construction has limits observe that the standard is based on the perception of an objectively reasonable officer. This limitation is illusory; as worst-case scenarios are repeated in trainings, improbable occurrences become objectively reasonable.[225] "Never expect a safe environment."[226] As an officer, "I've always got to be ready for the worst."[227] "In fact, anytime, anywhere, we are vulnerable."[228] As one trainer explains, *Graham* is "based on the officer's perception of the threat. So as an officer, you decide if there's a threat or not a threat."[229]

Graham is also forgiving of officer misperception. In *Graham*, where officers confused a medical emergency (insulin shock) with non-compliance, that misperception did not disqualify departmental claims of

220. Bennett Capers observes the persistence of this portrayal in criminal procedure jurisprudence. Bennett Capers, *Criminal Procedure, the Police, and The Wire as Dissent*, 2018 U. CHIC. LEG. FORUM 65, 69–76 (2019); *see also* Seth Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 861 (2014) ("The Court has only rarely credited fears that police officers will attempt to circumvent the constitutional limits to their authority.").

221. *See* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 400 (2016) (observing how the permissiveness of the Fourth Amendment, writ large, provides "officers a monopoly over the narratives that shape courts' interpretations").

222. Wisconsin proposed these additions to *Graham*: a "perception of threat;" the "subject's *ability* to escalate force rapidly" (even in the absence of assault); the officer's "physical positioning" (for example, the officer is at a "tactical disadvantage"); the "availability of backup;" "the presence of other people;" and "special knowledge of the subject." *See* WIS. DEP'T OF JUST. L. ENF'T STANDARDS BD., DEFENSIVE AND ARREST TACTICS: A TRAINING GUIDE FOR LAW ENFORCEMENT OFFICERS 27 (Aug. 2007).

223. *See, e.g.*, *Estate of Redd v. Love*, 848 F.3d 899, 909 (10th Cir. 2017) (accepting a department's justification of force that was based on the officer's knowledge of the suspect's propensity for violence).

224. *Graham v. Connor*, 490 U.S. 386 (1989).

225. *See* Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 227 (2015).

226. *Reality Training: Never Expect a Safe Environment*, POLICE1 (Apr. 8, 2016), https://www.police1.com/officer-safety/videos/reality-training-never-expect-a-safe-environment-JGN00ocJHnTIToRM/ [https://perma.cc/2LGA-CH4M].

227. *Id.*

228. *Reality Training: How Cops Can Avoid an Ambush*, POLICE1 (Aug. 28, 2015), https://www.police1.com/officer-survival/videos/reality-training-how-cops-can-avoid-an-ambush-fQDY3zbfEPAkfUTQ/ [https://perma.cc/YF3H-6X7G].

229. *Liability Issues in Use of Force*, *supra* note 194.

reasonable force.[230] Departments accordingly communicate to officers that it is acceptable to ratchet up force based on misperception. A training manual: "Your perception—that a subject was armed with a gun, for example—may turn out to be incorrect," but "your action in response to that perceived threat may well be justified nonetheless."[231] This feature of *Graham* weakens an officer's duty of inquiry, distributing risks of harm from officer misperception to the subject.[232] *Graham* imposes no obligation to thoroughly assess an incident, rendering misperceptions common. In sum, *Graham* not only validates officer discretion, but the standard is forgiving; it makes sense departments would not only invest in *Graham* but also resist any efforts to regulate use of force by alternative means—for example, through a rule-based approach.

Though *Graham*'s standard is forgiving, departments still look to make it more so. Professor Osagie Obasogie and Attorney Zachary Newman recognized this dynamic from a socio-legal perspective.[233] A regulated subject will "respond to ambiguous law by creating a variety of policies and programs designed to symbolize attention to law."[234] Compliance with the law is symbolic, followed to the extent that it "does not disrupt the status quo."[235] Professor Laura Edelman further observed how a regulated community would adopt an aspirational view of the law and announce new interpretations of law as if they are the law until told otherwise.[236] Within law enforcement, doctrinal aspirations emerge from an attempt to achieve a forgiving conception of an "objectively reasonable officer."

Departments, for example, assert that experience and training should matter in assessing reasonableness. "Your level of experience and your

230. *Graham v. Connor*, 490 U.S. 386, 389–90 (1989).

231. WIS. DEP'T OF JUST. L. ENF'T STANDARDS BD., *supra* note 222, at 27.

232. *See* MERRICK J. BOBB, YAEL MAZAR, BRANDY MIDDLETON, CAMELIA NAGUIB, TIM SHUGRUE & CHARLES TOLLIVER, POLICE ASSESSMENT RES. CTR., LOS ANGELES COUNTY SHERIFF'S DEPARTMENT: 30TH SEMIANNUAL REPORT 63 (2011), https://oig.lacounty.gov/Portals/OIG/Reports/30th%20Semiannual%20Report.pdf?ver=2018-11-11-142101-470 [https://perma.cc/7M4G-GVNH] ("[I]n nearly two-thirds of cases where the deputy acted on a waistband movement without seeing a weapon, the suspect had no weapon and thus must have been doing something other than arming himself.").

233. Obasogie & Newman, *supra* note 40, at 1317–18.

234. *Id.* at 1315.

235. *Id.* at 1314; Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 573–74 (2021) (describing the sometimes "swift and vehement" opposition by police organizations to any policy proposal that attempts to diminish the centrality of *Graham* to use-of-force regulation); Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. (forthcoming 2021) (manuscript at 32–42) (showing empirically that police department training regimes focus on core principles of *Graham*, often to the exclusion of subsequent circuit court precedent that would limit officer discretion in the use of force).

236. LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 12 (2016).

training is different than mine after 30 years. I might go in and do X-Y-Z, you might do 1-2-3, is that bad? No, it's just your experience and training."[237] "Take a baton/OC/taser as intermediate force. If one officer is more competent or capable in one or another, then they both elect to use those, is that wrong? No."[238]

> Different officers will approach the same situation in different ways. The biggest factor is experience. I always ask how many years of service did the officer have. That factor can dictate the patience and response levels . . . starting out, I was always trying to prove myself. Ten years later, this was not the case . . . .[239]

Some propose that an officer's emotional state should figure into the calculation of reasonableness. "An officer can appear to have a short fuse, but the public is not taking into consideration that the last four calls have been frustrating or emotionally taxing . . . ."[240] Fitness has also been proposed as relevant: as "[o]fficers get older, they might get overweight" or see declined levels of fitness.[241] "They will not be able to use the same options as a new officer."[242] Under these interpretations, it may not seem reasonable for an officer to have shot a person until one considers that the officer might be a reasonable rookie officer, a reasonable officer suffering PTSD, a reasonable officer beaten in a prior call, a reasonable officer serving overtime and exhausted, or a reasonable officer not trained in baton use.[243] "No two situations are the same," states a publication of the National Institute of Justice, "nor are any two officers."[244] Courts have not validated such reasoning,[245] and yet, departments may be presaging what

237. Bloodgood, *supra* note 2.

238. *Id.*

239. Telephone Interview with POST Representative One (June 30, 2020).

240. *Id.*

241. Allen, *supra* note 33.

242. *Id.*

243. Where a POST representative asks that we consider an officer's prior experiences, for example, to assess the reasonableness of his actions, never did the representative also extend that excuse to a subject, for example, who has previously been harassed by police.

244. *Overview of Police Use of Force*, NAT'L INST. OF JUST. (Mar. 5, 2020), https://nij.ojp.gov/topics/articles/overview-police-use-force [https://perma.cc/XE2J-J36M].

245. With the exception of recognizing differences in stature. *See, e.g.*, *T.W. ex rel. E.W. v. Dolgos*, 884 F.3d 172, 180–81 (4th Cir. 2018) ("The second factor identified in *Graham*, whether the suspect poses an immediate threat to the safety of the officer or others, weighs strongly in E.W.'s favor. In assessing the threat an individual poses, it is often useful to consider the suspect's conduct at the time of the arrest and 'the size and stature of the parties involved.'" (citation omitted)); *Solomon v. Auburn Hills Police Dep't*, 389 F.3d 167, 174 (6th Cir. 2004) ("We must also consider the size and stature of the parties involved. Here, each of the officers stood at least five-feet-eight-inches tall and

will come, underscoring law enforcement's investment in *Graham* as a co-author of the reasonableness standard. The judicial approach, one of restraint, has been co-opted by the regulated entity. This is obvious, and accordingly, the judiciary has become an ally in departmental efforts to deepen allegiance to the rule-resistant view.

B. The Legislature: Accepting the Rule-Resistant View

Legislatures have done little to disrupt the symbiotic relationship between courts and law enforcement. Rather, they reinforce *Graham* to further validate the rule-resistant view. Congress constrains its role to authorizing the Department of Justice to encourage local compliance with *Graham*.[246] State laws typically authorize force "to the extent that it is reasonably necessary" or "reasonably perceived by the officer as necessary."[247] *Graham* thus remains the polestar under state law.[248] Other than reiterating *Graham*, states tend to install special defenses for an officer arrested or criminally prosecuted for using deadly force.[249] Thus, if

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weighed between 230 and 250 pounds."); *C.B. v. City of Sonora*, 769 F.3d 1005, 1030 (9th Cir. 2014) (implicitly comparing the stature of the subject to the size of the officers in assessing the reasonableness of a use of force).

246. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141(a); *see also* C.R. DIV. U.S. DEP'T OF JUST., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT 3 (Jan. 2017), https://www.justice.gov/crt/file/922421/download [https://perma.cc/DG4X-32AW]. Some states have empowered attorneys general to review local agency compliance with *Graham*, a rarely used lever. California, for example, authorizes the state AG to require policy changes where a department's practices violate state law. CAL. CIV. CODE § 52.3 (West 2021). The law is rarely invoked. Candice Norwood, *Why California is a Case Study for Monitoring Police Misconduct*, ATLANTIC (May 24, 2017), https://www.theatlantic.com/politics/archive/2017/05/police-misconduct-sessions/527664/ [https://perma.cc/Z844-QTEY] (observing in sixteen years, the AG has only used this power a handful of times). This was foreseeable. *See id.* (Rachel Harmon is quoted, saying, "I don't think mirroring the federal statute . . . is likely to be the most successful state reform effort[.]").

247. STOUGHTON, NOBLE & ALPERT, *supra* note 17, at 77–78.

248. Harmon, *supra* note 79, at 777. A majority of states have incorporated aspects of *Graham* into laws regarding the use of less-than-lethal force. STOUGHTON, NOBLE & ALPERT, *supra* note 17, at 71, 73, 77–78. Some states provide limitations on deadly force that reflect aspects of *Garner*, *Graham*'s more restrictive predecessor. *Id.* at 84.

249. As to arrests: Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1224–26 (2016) (analyzing state laws protecting officers from interrogation tactics); Keenan & Walker, *supra* note 219, at 203–41 (providing a survey of such state statutes). As to prosecutions: Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 654–56 (2018) (observing officers are often relieved from "requirements of traditional self-defense doctrine," like proportionality or necessity). Prosecutors must often prove the officer violated *Graham*. *See* Mary M. Cheh, *Are Lawsuits the Answer to Police Brutality?*, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 262

a prosecutor overcomes institutional resistance to charge an officer, she faces unique state law obstacles that "reduce the number of prosecutions that are likely to be brought and won."[250]

Graham's gravitational pull was on display in California in 2019, when Black Lives Matter co-sponsored a policing bill there.[251] Before the bill's proposal, state courts had turned to *Graham* for guidance on use-of-force questions.[252] The proposal prohibited an officer from acting on "a fear of future harm" (a key privilege of *Graham*),[253] and prohibited deadly force unless there was "no reasonable alternative" and the person had the "present ability, opportunity, and apparent intent to immediately cause . . . serious bodily injury" to the officer or another.[254] The Deputy Sheriffs' Association borrowed *Graham*'s language to protest that the proposal "holds officers trying to make split-second decisions in rapidly evolving circumstances to an 'impossible standard[]' . . . ."[255] Law enforcement groups introduced a competing bill.[256] Black Lives Matter withdrew its

(William A. Gellar & Hans Toch eds., 1996). Some states even privilege force violating *Graham*. *See* Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After* Garner, 35 ST. LOUIS U. PUB. L. REV. 109, 121 (2015).

250. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 466 (2004); *see also*, STOUGHTON, NOBLE & ALPERT, *supra* note 17, at 61 (detailing ethical, procedural, and structural barriers to prosecuting police); Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS U. L.J. 363, 377 (2016) (identifying only fifty-four officer indictments in thousands of shootings).

251. Shaun Rundle, *Legislature Hit with Two Use of Force Proposals* (Feb. 20, 2019), cpoa.org/legislature-hit-with-two-use-of-force-proposals/ [https://perma.cc/Q9PV-4GSQ]; *ACLU of California Launches Radio Ad Campaign in Support of AB 392 to Reduce Number of Police Shootings*, ACLU N. CAL. (Mar. 19, 2019), aclunc.org/news/aclu-california-launches-radio-ad-campaign-support-ab-392-reduce-number-police-shootings [https://perma.cc/CPD4-ER7P].

252. CAL. PENAL CODE § 835a (West 2018) (Officer may "use objectively reasonable force to effect the arrest, to prevent escape or to overcome resistance."). *Brown v. Ransweiler*, 171 Cal. App. 4th 516, 527 (2009) ("A state law battery claim is a counterpart to a federal claim of excessive use of force. In both, a plaintiff must prove that the peace officer's use of force was unreasonable." It must also be "analyzed under the reasonableness standard of the Fourth Amendment . . . ." (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989))). In California, an officer "committed in overcoming actual resistance to the execution of some legal process" could use deadly force, a facially unconstitutional law. CAL. PENAL CODE § 196(2) (enacted by 1872 Stat. ch. 1).

253. *See Graham*, 490 U.S. at 396.

254. Rundle, *supra* note 251 (follow "AB 392 Fact Sheet" hyperlink).

255. Razi Syed, *Dueling Use-of-Force Bills Bring Different Takes to Reform*, LOMPOC REC. (Jan. 2, 2020), lompocrecord.com/news/local/state-and-regional/dueling-use-of-force-bills-bring-different-takes-to-reform/article_0ebdc730-e015-58d9-8752-d716aab65250.html [https://perma.cc/BU7N-NNA9].

256. *Id.*; Anthony DiMartino, AB 392: California Act to Save Lives Fact Sheet 5, https://a79.asmdc.org/sites/a79.asmdc.org/files/pdf/AB-392-Fact-Sheet.pdf [https://perma.cc/WRE8-6PCB] (last visited Mar. 19, 2021).

support as the proposal was diluted.[257] Perhaps unsurprisingly, the new compromise drew on *Graham*.[258] As to deadly force, the law limited its use to (1) "apprehend a fleeing person for any felony" that threatened serious bodily injury if the officer reasonably believed the person would go on to cause "serious bodily injury to another[,]" or (2) in any situation to defend against what a reasonable officer deemed an "imminent threat" of serious bodily injury within the "totality of the circumstances," based not just on "fear of future harm" but also on a "present ability, opportunity, and apparent intent to immediately cause . . . serious bodily injury . . . ."[259] Stephon Clark's Law,[260] touted as a significant victory in limiting use of force, remained rooted in *Graham*'s language.[261] The California example reflects the difficulty of freeing use-of-force conceptions from *Graham*'s orbit.

Finally, it bears mentioning that virtually all state legislatures create Commissions on Police Officer Standards and Training (POSTs) or their equivalent to regulate local agencies.[262] POSTs will impose hour requirements on types of training but often leave content choices to the local agencies.[263] In sum, legislatures have "largely delegate[d] the creation and governance of the police to local municipalities[.]"[264] In acting as pass-throughs for *Graham*, state legislatures reinforce *Graham*'s application beyond constitutional questions, extending its applicability to

257. *Black Lives Matter Global Network Withdraws Support from California's AB 392*, BLACK LIVES MATTER (May 29, 2019), https://blacklivesmatter.com/black-lives-matter-global-network-withdraws-support-from-californias-ab-392/ [https://perma.cc/9RED-XPJW].

258. CAL. PENAL CODE. § 835a (amended by Stats. 2019, ch. 170, § 2 (AB 392)) (Use of force "shall be evaluated from the perspective of a reasonable officer . . . based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.").

259. *Id.*

260. *Id.* The title reflected the catalyst of reform, the killing of Mr. Clark, a 22-year-old Black man with his hands up shot eight times in his grandparents' backyard. *Id.*

261. Jamilah King & Samantha Michaels, *California Just Passed New Limits on Police Use of Force. Not Everyone is Happy with the Compromise*, MOTHER JONES (Aug. 19, 2019), https://www.motherjones.com/crime-justice/2019/08/california-newsom-police-use-of-force-bill-stephon-clark-black-lives-matter-opposition/ [https://perma.cc/SZ4H-7ZSQ].

262. STOUGHTON, NOBLE & ALPERT, *supra* note 17, at 62–63.

263. *See* Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 60–61 (2019); *see also* Harmon, *supra* note 79, at 806 (noting "little has been written about how [POSTs] should be organized to avoid undue influence" by the local agencies they regulate).

264. Harmon, *supra* note 92, at 397–98; Harmon, *supra* note 79, at 803–04.

all questions of force and validating the doctrine's full embrace by local agencies.[265]

And, so, though *Graham* did not require states and localities to adopt its standard, rather than reimagine a regulatory approach, localities and states have just adopted *Graham*'s. The rule-resistant narrative flourishes in this environment.

IV. POTENTIAL CONSEQUENCES OF THE RULE-RESISTANT VIEW

The absorption of *Graham* by governmental institutions shapes the regulatory space, not just in terms of process and compliance (how use-of-force practices are formed and enforced), but also in terms of language (how we conceive of force) and culture (the fostering of departmental insularity). Department representatives tell members of the public that rules have no place in regulating use of force. And yet, departments internally construct unwritten rules that limit officer discretion, iron out factual variance, and often require the application of preemptive force against civilians.

From a theoretical perspective, too, the rule-resistant view potentially does much to define the regulatory space. As Frederick Schauer observed:

> [R]ules . . . allow the rule-maker to make many of the decisions (and thus determine the outcomes) in advance . . . . [But standards] . . . permit the rule-maker to delegate decisions (and thus outcomes) to the rule-interpreter, the rule-enforcer, or even at times the rule-subject. . . . [Standards allow the rule-subject] to look at each decision individually and to tailor the outcome to the needs of the particular situation.[266]

This observation comports with the rule-resistant narrative of departments, the "rule-subjects." At the front end, public input is limited to proposing vague standards, not hard and fast rules. For example, a community might propose that before using deadly force, an officer must "wait to confirm whether an individual has a firearm and intends to use it against the officer or another." The department would argue that this is a rule that deprives an officer of exercising discretion under different, ever-changing circumstances as described in *Graham*.

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265. This deference to *Graham* is consistent with American Bar Association (ABA) Policing Standards. Intended to influence legislative action, the ABA Policing Standards regarding to use of force accept *Graham* as the guiding principle: "[P]olice should be restricted to using the amount of force reasonably necessary in responding to any situation." POLICE FUNCTION STANDARDS § 1-2.4(d) (AM. BAR ASS'N 2020) [hereinafter ABA].

266. Schauer, *supra* note 8, at 305, 310.

Consequently, the community would be limited to offering up vague standards, like "officers must attempt, when feasible, de-escalation techniques." This proposal would not be inconsistent with the rule-resistant narrative, as the meaning of "de-escalation" would be defined by the officer depending on the circumstances. A department may even interpret such a standard to call for the immediate use of a high level of force.[267] Perhaps the public, discovering this departmental interpretation, then attempts to define de-escalation—an officer should "express calm, explain officer presence, slow down the intervention, request resources (e.g., behavioral health personnel), or re-position." This is arguably a standard. But it also limits the options available to an officer and appears to dictate the sequence an officer considers (i.e., rather than immediately rushing a subject, the officer must consider these options). The public would, in effect, be regulating how officers must act in the future. Underlying this proposal, then, is contestation over who exerts control over policing. As the public begins to demand reforms that trend toward characteristics of a rule (the ex ante limitation of officer discretion), one would expect the department to employ the rule-resistant narrative in its effort to preserve officer discretion. In this way, the rule-resistant narrative facilitates departmental efforts to deflect attempted public interventions.

The rule-resistant view also shapes the compliance space. In a rule-based system, the question is whether a condition of compliance was satisfied or not. Compliance with a standard, however, permits factually rich justifications for use of force based on particular circumstances of the incident.[268] Relatedly, institutional calls for time and patience to permit such an investigation serve to dampen public frustration following an incident.[269] The department's central role in the investigation legitimates

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267. "Last week, there was a guy in a car who wouldn't show me his hands," the officer said. "I pulled my gun out and stuck it right in his nose, and I go, 'Show me your hands now!' That's de-escalation." Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-Escalate*, N.Y. TIMES (June 27, 2015), https://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html [https://perma.cc/298N-AJT4]. This article also quotes Harvey Hedden, Executive Director of the International Law Enforcement Educators and Trainers Association, as saying, "Sometimes using the least amount of force turns out to be a bad idea." *Id.*

268. Private lawsuits often generate too little leverage to result in institutional change. Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 453.

269. *See, e.g.*, Aisha Morales, *Police Chief Asks for Patience During Investigation of Chase Suspect Shooting*, WBAY (Sept. 4, 2019), wbay.com/content/news/Police-investigate-overnight-incident-in-Kaukauna-559234431.html [https://perma.cc/4LV5-4PWG]; Nassim Benchaabane & Joel Currier, *Man Shot Near Galleria Had Raised His Gun Toward Officer, Police Say*, ST. LOUIS POST-DISPATCH (Sept. 4, 2019), stltoday.com/news/local/crime-and-courts/man-shot-near-galleria-had-raised-his-gun-toward-officer-police-say/article_a458b940-6116-59fd-8df0-f6714a179cdd.html [https://perma.cc/F9MS-XG57] (quoting prosecutor, who "asked the public for patience during the investigation"); Chris Nakamoto, *Police Chief Asks for*

its resulting assessment of reasonableness. If litigation ensues, courts tend to credit departmental justifications, however new, for force based on the facts of an incident.[270]

There is also a cultural aspect to the rule-resistant view. As the standards-based approach facilitates departmental control over of use-of-force practices, it communicates that one must be an officer to understand what constitutes reasonable force. When a POST representative, for example, learned that we were wondering whether use of force could be governed by rules, she quipped, "[Y]ou've never been on a ride-along, have you?"[271] The question captures what Professor Erik Luna calls departmental "assumptions of omniscience" and "paternalism."[272] "We," stated a trainer, "have to educate the courts. The courts are not experts in our field. So that [police] report is educating the court."[273] This sense of expertise defines much of policing.[274] Departments internally establish use-of-force practices.[275] This insulation, perceived as a benefit (protecting departments from public input), also threatens to foster "us versus them" paranoia; as Professor David Sklansky writes: "The police officer . . . came to 'regard the public as an enemy.' The collective alienation of police officers drove them to create a distinctive set of group norms."[276]

To address these pathologies, scholars propose public intervention, sharing a conviction that policing should not be excepted from "ordinary processes of democratic governance."[277] Scholars initially raised concerns

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Patience as Investigation into Officer-Involved Shooting Continues, WBRZ (Aug. 29, 2018, 5:51 PM), wbrz.com/news/police-chief-asks-for-patience-as-investigation-into-officer-involved-shooting-continues/ [https://perma.cc/576J-FZK9] ("Baton Rouge Police Chief Murphy Paul is asking for the community's patience as his department investigates an officer-involved shooting where there is no body camera, dash cam, or rear cam video.").

270. *See, e.g.*, *Crawley v. City of Syracuse*, No. 5:17-CV-1389, 2020 WL 6153610, at *10 (N.D.N.Y. Oct. 21, 2020).

271. Interview with POST Representative Four (Mar. 2020).

272. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1144 (2000) (observing that an institution holding onto uninterrogated discretion will justify insularity under "assumptions of omniscience . . . paternalism . . . or authoritarianism").

273. *Liability Issues in Use of Force*, *supra* note 194, at 3:49–3:55.

274. *See generally* DAVID A. HARRIS, FAILED EVIDENCE 99–127 (2012) (discussing how the insular nature of policing makes departments resistant to outside input).

275. Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 704 (1974) (noting that much "police policy" is "kept secret from those who are affected by it").

276. Sklansky, *supra* note 217, at 1732 (quoting William A. Westley, *Secrecy and the Police*, 34 SOC. FORCES 254, 256 (1956)).

277. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1827 (2015). Many proposals are inspired by features of administrative review. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 80 (1969); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 421–22 (1974); Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement*

as to what laws police enforced,[278] what community members were being targeted,[279] and why certain practices were being tolerated by command staff.[280] Concerns were later raised as to law enforcement surveillance techniques,[281] stop and frisk programs,[282] use of force,[283] and internal disciplinary processes.[284] To increase departmental accountability to the public, there has been a resurgence of interest in exploring rule-based approaches that Professor Maria Ponomarenko identified as a "rulemaking renaissance."[285] As Professor Jocelyn Simonson observes, these efforts "represent a turn away from the focus on regulating constitutional

Agencies, 36 L. & CONTEMP. PROBS. 500, 502–06 (1971); Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1130 (1967); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 676–81 (1972); Gregory Howard Williams, *Police Rulemaking Revisited: Some New Thoughts on an Old Problem*, 47 L. & CONTEMP. PROBS. 123, 180–81 (1984); Samuel Walker, *Controlling the Cops: A Legislative Approach to Police Rulemaking*, 63 U. DET. L. REV. 361, 382–91 (1986); LaFave, *supra* note 207, at 449–51; Jonathan M. Smith, *Closing the Gap Between What Is Lawful and What Is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L., 315, 336 (2016).

278. Goldstein, *supra* note 277, at 1126–28; DAVIS, *supra* note 277, at 81–83.

279. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 658–63 (1997).

280. *See* Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 594–608 (2000).

281. Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 134–40 (2016).

282. I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 71–74 (2008) (observing that police culture contributes to stop-and-frisk practices to police place by race); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 168–69 (2015).

283. Luna, *supra* note 280, at 603–04 (advocating transparent police rulemaking to inform use of force policies); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 536–45 (2015) (noting features of insularity and an unjust distribution of physical harm through use of force); Kami Chavis Simmons, *New Governance and the New Paradigm of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 398–99, 419–20 (2010) (proposing a bottom-up approach consistent with principles of new governance and democratic experimentalism that facilitates participation of institutional and community stakeholders to address features of insularity that hinder reform).

284. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 67–68 (2000) (detailing how the code of silence can prevent civilian complaints from being corroborated); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 481 n.60 (1992) (describing how code of silence obstructs efficacy of efforts to investigate wrongdoing).

285. Ponomarenko, *supra* note 263, at 4, 60–61 (proposing a commission to facilitate public input in amending and crafting use-of-force rules); Chavis Simmons, *supra* note 283, at 401 ("[S]cholars have advocated administrative rulemaking within police departments to serve as a check on this discretion."); Slobogin, *supra* note 281, at 134–49 (proposing that administrative law procedures inform regulation of policing).

violations against individual officers" and a turn toward community responsiveness.[286] Within this rich literature, it is presumed that police functions can be reduced to rules.[287] In contrast, departments (along with courts and legislative bodies) disagree, observing that rules cannot govern the fluid environment of a police encounter.

That a rules approach tends to invite the public in for a much closer, up-front assessment of police practices does not mean that rule-making is inherently democratic; this Article argues that departments are internally (and undemocratically) adopting (unwritten) rules. But if the public begins to agitate for rule-making powers, departments will employ the rule-resistant narrative and falsely assert that rules are incompatible to regulating force. This all suggests that departmental adherence to the rule-resistant narrative is entangled with who has the power to define the dynamics of a police encounter, the police or the public.

The cost of excluding public input can undermine institutional responsivity to community norms.[288] Professor Dan Kahan showed viewers video from the *Scott v. Harris* case, in which Officer Scott rammed Harris off the road during a high-speed chase.[289] Conservative viewers tended to find the force reasonable.[290] Liberal viewers tended to find the officer's actions unreasonable, revealing that community preferences may diverge from constitutional norms.[291] As to the values that use-of-force practices reflect—the purpose of force, what interests are furthered through state control, and who bears risks of harm in encounters—this has been left to departments to answer.

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286. Simonson, *supra* note 221, at 399.

287. Ponomarenko asserts that the functionality of rule-based policing depends on what police function is being regulated. Ponomarenko, *supra* note 263, at 17 (noting, as to use of force, where "rules are not feasible, agencies can still develop guidelines").

288. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009).

289. *Id.* at 849.

290. *Id.* at 867–68. Following consent decrees in pattern and practice cases brought by the DOJ, a study found a corresponding decline in civil rights lawsuits, attributing this to community satisfaction with new practices. Zachary A. Powell, Michele Bisaccia Meitl & John L. Worrall, *Police Consent Decrees and Section 1983 Civil Rights Litigation*, 16 CRIMINOLOGY & PUB. POL'Y 575, 575 (2017).

291. Kahan, Hoffman & Braman, *supra* note 288, at 867–68, 904; *see also* Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297, 300, 308 (2015) (Citizens "are not particularly sensitive to whether police officers . . . are actually acting in ways that are consistent with constitutional standards." Rather, people "desire to be treated with courtesy and dignity . . . .").

Insulation also permits departments to define the scope of regulated conduct. For example, on May 30, 2020, two NYPD police vehicles drove into protestors:[292]

> Journalist: "Was that in violation of your use of force policy?"
> Commissioner: "No. . . . [W]e have officers in a situation where they're essentially being penned in by protesters."
> Journalist: "[T]he police car was an appropriate use of force?"
> Commissioner: "I'm not saying that the police car was used as a use of force."[293]

Increased public participation in this space likely would result in contestation over the question of *what* constitutes use of force. A rule-based system may facilitate community policing goals by making expected officer responses more defined.[294] And where unfettered discretion emboldens state actors to enforce racially oppressive norms,[295] a rule-based system potentially mitigates this aspect of police harassment.[296]

Professor Barbara Armacost observes a sense that departments have a sort of "imperviousness to legal solutions."[297] This imperviousness seems enabled by the rule-resistant narrative that interferes with building

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292. Michelle Mark, *Video Shows NYPD Cruisers Ramming a Barricade and Sending Bodies Flying*, INSIDER (Mar. 31, 2020, 2:38 AM), https://www.insider.com/nypd-cruisers-ram-down-protesters-video-2020-5 [https://perma.cc/64R4-Z9DA].

293. Tamar Lapin, *NYPD Commissioner Says Cops Who Drove into Group of Protestors Didn't Violate Policy*, N.Y. POST (June 22, 2020, 11:13 PM), https://nypost.com/2020/06/22/nypd-commissioner-says-cops-were-not-wrong-to-drive-into-protesters/ [https://perma.cc/48GY-QNVQ].

294. If one of the goals of community policing is mutual trust between civilian and officer, clear boundaries are essential to forming such bonds. Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 WM. & MARY L. REV. 1865, 1885 (2013) ("Policing should . . . play a role in the production of self-identity that helps to 'construct and sustain our "we-feeling" . . . .'" (quoting IAN LOADER & NEIL WALKER, CIVILIZING SECURITY 164 (2007))); *see also* Livingston, *supra* note 279, at 584–85; WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING: CHICAGO STYLE 6–8 (1997).

295. Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1, 1, 24 (2021); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1424 (2016) ("It is possible for police to selectively invoke their powers against African-American residents, and, at the same time, act consistently with the law.").

296. Harassment has structural features. Simonson, *supra* note 221, at 398, n.25 (noting in New York "stops and frisks are concentrated in areas with a high percentage of Black and Hispanic residents") (first citing Report of Jeffrey Fagan at 3, *Floyd v. City of New York*, 959 F. Supp. 2d 668, 682 (S.D.N.Y. 2013) (No. 08 Civ. 01034); then citing Robert J. Sampson & Dawn Jeglum Bartusch, *The Neighborhood Context of Racial Differences*, 32 L. & SOC'Y REV. 777, 800 (1998) (noting that dissatisfaction with police is highest in disadvantaged neighborhoods and among minority populations)).

297. Armacost, *supra* note 250, at 515.

a departmental relationship with the community.[298] Part of the "us versus them" culture endemic in policing is a function of a perceived "outsider role in the community."[299] Armacost concluded any solution that does not contend with "the power of the police organization" is doomed to fail; if insularity itself is a source of departmental power, more direct control by the public over police functions potentially shifts the source of departmental power to the community.[300] As Professor Kami Chavis Simmons observes, "The opportunity for police officers and community members to deliberate about police conduct and police-citizen interactions is key to dismantling the 'us versus them' mentality."[301]

V. SOME OBJECTIONS TO A RULE-BASED APPROACH, SOME RESPONSES

Departments will likely contend that the public lacks the use-of-force expertise necessary to impose rules of engagement on officers. But much suggests that police can lack expertise in de-escalating human encounters and could gain critical insights from professionals outside the policing space.[302]

> [In police academies] I haven't seen a lot of communication training . . . I think [a retail clerk] gets more training pertaining to how to deal with interpersonal communication. [P]olice officers [] communicate with people from every extreme, from a basic contact, to a traumatic event, to a violent encounter, and then of course where do they get these communication skills? They don't. . . . [And so] they don't see the value for it . . . . You know, what are we going to do, hug a thug? It's nothing like that. You got to learn to communicate with these people.[303]

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298. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 44 (2d ed. 1975).

299. John Van Maanen, *Observations on the Making of Policemen*, 32 HUM. ORG. 407, 408 (1973).

300. Armacost, *supra* note 250, at 521–30 (observing injunctive remedies have potential to make police practices more transparent, with resulting audits facilitating action by command staff).

301. Chavis Simmons, *supra* note 283, at 409.

302. Sklansky, *supra* note 217, at 1733 (discussing studies that concluded the "worldview of the police included a simplistic, acontextual understanding of criminality, an apprehensive traditionalism, an intolerance for nonconformity" (citing JEROME H. SKOLNICK, THE POLITICS OF PROTEST 259–62 (1969))).

303. *Kevin Dillon: De-Escalation Tactics*, POLICE1, at 0:36 (June 28, 2011), https://www.police1.com/officer-safety/videos/kevin-dillon-de-escalation-tactics-SOEXP7Rr9u6qy5jT/ [https://perma.cc/3Y9A-NQZP]. A few jurisdictions consider a layperson's perspective. In Los Angeles, an officer responding to an emergency is taught drivers may not hear sirens, and if they do, due to disorientation, may appear non-

One suspects an increase in public intervention would facilitate the use of public health experts and behavioral health professionals in training how to best manage an encounter.[304] In addition, use-of-force tactics may be effective to gain control, but their appropriateness should still be subject to public review.[305] The proliferation of surveillance is also eroding departmental efforts to control the narrative over use of force.[306] Surveillance undermines departmental insularity,[307] as it serves to "increase the police's accountability to the public, while decreasing their account ability."[308] Video accounts can also encourage public input, as videos make "the use of excessive force or profiling 'real' to those who, because of race or class, will likely never experience it."[309]

Another objection relates to the heavy-handedness of rules. POST representatives voiced concerns over rules leading to too little or too much force in any encounter.[310] This concern is likely overblown. Though rules constrain discretion, limited exceptions are likely to emerge.[311] Departments would also likely argue that a rule-based approach undermines scenario-based thinking essential to training. The opposite is arguably true.[312] Take the rule that officers must unholster their firearm if a car is reported stolen. Officers would present scenarios in which this rule

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compliant. *See Emergency: Lights & Sirens Audibility*, L.A. POLICE DEP'T (Dec. 7, 2001) (on file with author).

304. *Training for Police-Mental Health Collaboration Programs*, BUREAU OF JUST. ASSISTANCE, https://bja.ojp.gov/program/pmhc/training [https://perma.cc/XJ5V-34KC] (last visited Mar. 19, 2021).

305. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 39–51 (1996) (discussing values informing deliberation and how they affect the democratic process of governing).

306. Simonson, *supra* note 221, at 419. A POST representative warned against the public knowing more. "Body cam footage is showing bad people doing bad things. Do you really want that to be public? I've seen a dead child in the grill of a car. Do you want to know about that or just be happy that I took care of it?" POST Representative Two, *supra* note 29.

307. *See* I. Bennett Capers, *Crime Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959, 962–64, 986 (2013) (observing a profusion of cameras operated by officers, cities, bystanders, and businesses leaves officer one of many interpreters). Video permits third-party assessments that are not dependent on first-person accounts. *See, e.g.*, *Scott v. Harris*, 490 U.S. 372, 378–80 (2007).

308. Andrew John Goldsmith, *Policing's New Visibility*, 50 BRIT. J. CRIMINOLOGY 914, 915 (2010).

309. Capers, *supra* note 307, at 988.

310. *See supra* Part I.

311. Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 871–72 (1991); *see also* Schauer, *supra* note 8, at 314–15 (observing judicial review will free a subject from an unreasonable application of a rule, or by narrowing the scope of the rule, or by narrowing the rationale of the rule).

312. Chavis Simmons, *supra* note 283, at 409 ("[I]n the context of police reform, different groups of community members . . . might come to value each other's perspective.").

sounds reasonable. But a public forum allows, for example, the voicing of additional scenarios not considered by the department, like the student of color held at gunpoint on the side of the road when officers thought she was driving a stolen car.[313] Was it reasonable that her life was put in danger when there was no exigency that required the show of deadly force? With this example, the community learns that officers approach with a firearm whether a car was stolen yesterday or two years ago. Another civilian stands up. Her son was shot after he disobeyed an order—he stood up after one of the officers started hitting his mother. Her son—a Black man in a white neighborhood—was pulled over in front of his parents' home for driving a stolen car (the officer had keyed in the wrong license plate number).[314] The question is raised: should officers approach with deadly force based upon unverified information, especially when they are conducting "random" checks? And is there a pattern of racial disparity that needs to be addressed? Despite the variability regarding a reported stolen vehicle, it becomes apparent that it is the department that is attempting to flatten out that variability. With more public participation, even if rules are the final product, one expects the consideration of a more diverse set of scenarios to better inform practices going forward.[315]

Another objection looms. Where democratic, rule-based reform of use of force might be thought to have transformative potential, some warn that doing so will serve to legitimize existing, violent practices.[316] Professor Devon Carbado raises concerns that police violence is already responsive to structural pathologies and questions whether a transparent and public intervention would mitigate or reinforce these pathologies.[317] Professor Simonson observes that communities bearing the brunt of police violence are in political decline, weakening any attempted intervention.[318]

313. This is based on an actual event in Madison, Wisconsin. Robert Chappell, *She Found Her Stolen Car and Tried to Drive It Home. Police Held Her at Gunpoint and Handcuffed Her.*, MADISON 365 (July 22, 2020), https://madison365.com/she-found-her-stolen-car-and-tried-to-drive-it-home-police-held-her-at-gunpoint-and-handcuffed-her/ [https://perma.cc/57H8-MPEN].

314. Based on *Tolan v. Cotton*, 572 U.S. 650, 651–52 (2014).

315. Harmon, *supra* note 79, at 778 ("[E]ven perfectly constitutional activity can impose serious harms that deserve attention beyond constitutional law."). A police practice may be constitutional, even effective, but may still be undesirable to the community. *Id.* at 793.

316. Jaime Alison Lee, *"Can You Hear Me Now?": Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405, 413–17 (2013) (describing the problem of "cosmetic participation" in New Governance initiatives); *see also* Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 362 (2009) ("[P]articipatory structures may rhetorically include disempowered stakeholders but actually cede little or no power.").

317. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1482–84 (2016).

318. Simonson, *supra* note 221, at 398–99; *see also* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 34 (2012) (observing that communities affected by

Professor Paul Butler writes that policing, and visitation of violence on communities of color, is already doing the majority's bidding:

> [M]any of the problems identified by critics are not actually problems, but are instead integral features of policing and punishment in the United States. They are how the system is supposed to work. This is why some reforms efforts are doomed. They are trying to fix a system that is not actually broken. The most far-reaching racial subordination stems not from illegal police misconduct, but rather from legal police conduct.[319]

And Professor Rachel Barkow worries that democratic interventions will potentially result in more draconian policing.[320]

These warnings are well-heeded. Still, the lack of community engagement coupled with the insularity of departmental regulation is a likely contributor to draconian practices.[321] Professor Tom Tyler speaks of a culture of insularity that engenders "a spiral of conflict that increases the risks of harm for both the police and for the public."[322] Scholars have observed that insulation itself tends towards violent pathologies.[323] Professor Jerome Hall's concern, first stated in the 1950s as police became more professional, hierarchical, and militaristic, expressed the need for a public check, remarking, "Certainly we do not want our police to be a Praetorian Guard . . . ."[324] Perhaps it is too on the nose to observe that Police1, the largest private company used by departments for training and policy support,[325] is owned by the Praetorian Group.[326] Under existing

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violence have special insights to the problems with policing but lack the political power to effectuate change).

319. Butler, *supra* note 295, at 81.

320. Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1154–59 (2016).

321. Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. Rev. 41, 101–05 (2001).

322. Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 369 (2001).

323. Michael Sierra-Arévalo, *American Policing and the Danger Imperative*, L. & SOC'Y REV. (forthcoming 2021).

324. Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 155 (1953); Sklansky, *supra* note 217, at 1742 (noting the transformation of police into a "quasi-military" force, referred to as the "second wave" of policing, emerging in the 1950s and 1960s).

325. *Our Mission*, POLICE1, https://www.police1.com/info/about/ [https://perma.cc/WY6K-YDJZ] (last visited Mar. 21, 2021).

326. *Praetorian Group Expands Online Training Division with Acquisition of LocalGovU*, POLICE1 (May 31, 2013), https://www.police1.com/police-products/press-releases/praetorian-group-expands-online-training-division-with-acquisition-of-localgovu-wXO88eT85iYOP4Vo/ [https://perma.cc/98MZ-Q65H] (indicating Praetorian Group's ownership of Police1).

conditions, where departmental regulation is beholden to *Graham*, and the focus is on "the behavior of individual officers and the police mentality," a counter-effort by scholars, non-profits, and activists to attend to structural defects grows in strength, signaling the potential for change.[327]

VI. IMAGINING A PROGRESSIVE RULE-BASED APPROACH

As a counterexample to the Lexipol jurisdiction, where rules reflect departmental self-interest, this Part first articulates a contrasting set of training principles to inform officer-civilian encounters. From these progressive training principles, this Part then proposes a contrasting set of rules that emerge from a community demanding its police reject pathologies that contribute to community traumas, many of them recently identified by movements like Black Lives Matter.[328]

A. An Alternative Training to Inform Officer-Civilian Encounters

A caller to dispatch often misperceives or fabricates an incident,[329] reflecting racism, classism, and caller privilege.[330] Seeing a Black person arouses suspicions of criminality.[331] Studies reveal a prevalence of racially-motivated calls, often whites reporting that a person of color, for example, is looking in car windows, walking up driveways, acting strange,

327. Sklansky, *supra* note 217, at 1750.

328. *About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ [https://perma.cc/5KMA-LZWA] (last visited Mar. 21, 2021).

329. *See, e.g.*, Sarah Maslin Nir, *How 2 Lives Collided in Central Park, Rattling the Nation*, N.Y. TIMES (June 14, 2020), nytimes.com/2020/06/14/nyregion/central-park-amy-cooper-christian-racism.html [https://perma.cc/XG8J-HC3R].

330. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1147 (2012); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1575, 1594, 1602 (2013).

331. Jennifer L. Eberhardt, Valerie J. Purdie, Phillip Atiba Goff & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 889 (2004).

or appears threatening.[332] Much of this civilian policing is based on a person of color being "out of place."[333]

> When the anonymous black person enters the white space, others there immediately try to . . . figure out "who that is," or to gain a sense of the nature of the person's business and whether they need to be concerned . . . whites and others often stigmatize anonymous black persons by associating them with [criminal intentions].[334]

In these calls, it is the subject of the call who is most likely in danger.[335] Police interaction increases that danger, especially in cross-racial interactions.[336] On April 17, 2020, for example, an off-duty officer shot a 14-year-old Black child in the head:

> [Officer Short] confronted the teen after a burglar alarm sounded outside of his Metairie home. He said he shot the boy in the head after mistaking the teen's flashing cell phone light for a muzzle flash from a gun.[337]

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332. Chan Tov McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 346–47 (2019); *see also* Carbado, *supra* note 317, at 1494 ("Between 2009 and 2014, nonemergency calls to [San Francisco police], including . . . non-serious conduct like loitering, 'increased 291 percent from 9,946 . . . to 28,950.'" (quoting Adam Hudson, *How Punitive and Racist Policing Enforces Gentrification in San Francisco*, TRUTHOUT (Apr. 24, 2015), https://truthout.org/articles/how-punitive-and-racist-policing-enforces-gentrification-in-san-francisco/ [https://perma.cc/TS2H-UNVM])); *see, e.g.*, Melodi Smith & Ed Payne, *Visiting from India, Grandfather Badly Hurt in Encounter; Officer Arrested*, CNN (Feb. 13, 2015), https://www.cnn.com/2015/02/12/us/alabama-police-beating [https://perma.cc/VN9F-7PYD].

333. Capers, *supra* note 282, at 66; Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. (forthcoming 2021) (manuscript at 63) (on file with CALIF. L. REV.).

334. Elijah Anderson, *The White Space*, 1 SOCIO. RACE & ETHNICITY 10, 13 (2015).

335. *See, e.g.*, Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Feb. 28, 2021), nytimes.com/article/ahmaud-arbery-shooting-georgia.html [https://perma.cc/RLK5-JXQ4].

336. *See generally* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCH. 181, 181–92 (2001); Eberhardt, Purdie, Goff & Davies, *supra* note 331, at 876.

337. Michelle Hunter & Matt Sledge, *3 Months After Boy, 14, Shot by JPSO Deputy During Foot Chase, Terrytown Mom Is Still Asking, 'Why?,'* NOLA.COM (June 19, 2020, 8:15 PM), https://www.nola.com/news/crime_police/article_0a851242-b1d3-11ea-90c4-d3afc8a293d6.html [https://perma.cc/49GV-F6FZ].

Police, too, over-surveil Black people.[338] The Constitution provides "an open border across which a range of law enforcement officials can travel to intrude on black bodies and spaces."[339] In practice, officers can stop a person on the street to detain, search, and check for warrants.[340] Officers can stop any motorist at any time.[341] In Boston, Black residents make up 25% of the population but are subject to 70% of traffic stops.[342] A similar racist pattern emerges as to arrests for disturbing the peace.[343] A profusion of low-level criminal laws, like disorderly conduct, "confer vast amounts of discretion to law enforcement, and private citizens, to select individuals for behavior regulation, physical removal, and community exclusion."[344]

> By concentrating these aggressive policing efforts in low-income, communities of color, enforcing disorderly conduct offenses has functioned as a means to . . . contain . . . not only conduct that was labeled as social and physical disorder in these public spaces, but also regulate the people constructed as disorderly.[345]

These practices provide "officers with a kind of . . . free-floating reasonable suspicion . . . that they can use to justify their repeated interactions with African-Americans" and result in "predatory policing."[346] These dynamics reinforce associations between race and criminality, increasing racial anxiety. Dean L. Song Richardson writes of the deadly potential of racial anxiety, observing its "predictable cognitive and physiological effects" on an officer that pose danger to the subject.[347] "African-Americans' ongoing experiences with the police may cause them

338. Carbado, *supra* note 317, at 1497.

339. *Id.* at 1508.

340. *Utah v. Strieff*, 136 S. Ct. 2056, 2060 (2016); *Minnesota v. Dickerson*, 508 U.S. 366, 370 (1993).

341. Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1552–53 (2019); *Whren v. United States*, 517 U.S. 806, 810 (1996).

342. Daniel Medwed, *BPD Data on Traffic Stops and Racial Profiling*, WGBH (June 16, 2020), https://www.wgbh.org/news/local-news/2020/06/16/bpd-data-on-traffic-stops-and-racial-profiling [https://perma.cc/9DDA-P6WR].

343. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 154–55 (2018).

344. Morgan, *supra* note 333 (manuscript at 6).

345. *Id.* (manuscript at 20).

346. Carbado, *supra* note 317, at 1485, 1490.

347. L. Song Richardson, *Police Use of Force*, *in* ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 189 (Erik Luna ed., 2017).

to resist police authority, assert rights, or flee upon seeing or encountering the police, each of which increases the likelihood of police violence."[348]

As to individuals who suffer mental illness or substance abuse, police encounters generally provide no public safety benefit.[349] As to these populations, officers should minimize interactions, avoid imposing criminal consequences, mediate disputes, and coordinate engagement with community resources.[350]

Officers are often taught to be violent. In some agencies and academies, "[o]fficers learn to treat every individual they interact with as an armed threat and every situation as a deadly force encounter in the making. *Every* individual, *every* situation—no exceptions."[351] In other words, "[r]ecruits were taught in various ways that aggressive, misogynist forms of masculine identity were favored and expected. . . . [F]ighting and violence were emphasized both in and out of class."[352] According to empirical evidence developed by Professor Jordan Blair Woods, such training is dangerous to civilians and the officer:

> [V]iolence against the police during routine traffic stops occurs when the stops escalate after officers invoke their authority in a substantial way during the stop (for instance, ordering drivers or passengers out of cars, touching drivers or passengers, or searching them or their vehicles). In this regard, the exact things that officers [are often trained to do] to protect their safety . . . may be the exact things that officers should not do.[353]

De-escalation is designed to "resolve conflict that has already manifested."[354] A civilian will experience stress, which can manifest as resistance.[355] Like a civilian, an officer makes choices: her body language,

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348. Carbado, *supra* note 317, at 1510; *see, e.g.*, *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016) (finding a black person running from officer, given police treatment of black persons, is not indicative of suspicion).

349. Morgan, *supra* note 333 (manuscript at 15–16, 35).

350. *See* Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051, 1081–83 (2013) (identifying deficiencies in the training of line officers to investigate, undermining investigation and prosecution of serious violations of law).

351. Stoughton, *supra* note 225, at 228.

352. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 132 (2014).

353. Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 694–95 (2019) (footnote omitted).

354. Garrett & Stoughton, *supra* note 94, at 265.

355. There is a torrent of examples of civilians in distress who panic and evade. *See, e.g.*, Daryl Khan, *Louisiana Law Enforcement Won't Say Who Shot Teen in Back*, JUV. JUST. INFO. EXCH. (June 16, 2020), https://jjie.org/2020/06/16/louisiana-law-enforcement-wont-say-who-shot-teen-in-back/ [https://perma.cc/YHK8-ECKN]. Officers can experience physiological stress responses as well. *See* Gordon Graham, *Why You Must*

her tone, what she says, any show of force. Law enforcement's attempt to frame the civilian as the one making choices is narratively effective, but de-escalation is a relational concept. In jurisdictions that adopt officer-initiated de-escalation techniques, use-of-force complaints decrease.[356]

Police encounters implicate the safety of the officer, subject, and bystanders. A show of deadly force constitutes a serious use of force, as doing so raises the stakes of noncompliance, rendering the incident highly unstable, uncertain, and dangerous to the subject.[357] Use of deadly force against civilians is too high, with Black men disproportionately killed, indicating a significant number of shootings are racially motivated.[358] Each year, approximately 245 officers[359] and 3,000 subjects are shot.[360] Approximately 50 officers[361] and 1,130 subjects are killed.[362] This gross disparity is unacceptable. In 2020, for example, 1,127 subjects were killed

Train Like You Fight, POLICE1 (Dec. 30, 2019), https://www.police1.com/police-products/training-products/videos/why-you-must-train-like-you-fight-zGbrQe62w0LkBcq3/ [https://perma.cc/XRH7-LLLK]. Training compensates for these physiological reactions. *Id.* ("Intensive and realistic scenario-based training helps condition both the body and the mind.").

356. *See* Gilbert, *supra* note 185 (noting that the Dallas Police Department, which trains its officers in de-escalation techniques, has seen an eighty-three percent decrease in use-of-force complaints since 2010).

357. As part of a DOJ consent decree with Chicago, "[o]fficers must notify the [Department] of investigatory stops and arrests in which a CPD officer points a firearm at a person. All reported incidents will be reviewed . . . ." OFF. OF ILL. ATT'Y GEN., Fact Sheet, CHICAGO POLICE DEPARTMENT CONSENT DECREE, http://chicagopoliceconsentdecree.org/wp-content/uploads/2019/02/Consent-Decree-Fact-Sheet-Jan-31-2019.pdf [https://perma.cc/V2AP-ZWUJ] (last visited Feb. 27, 2021); *see also Espinosa v. City of San Francisco*, 598 F.3d 528, 537 (2010) (noting that in the context of a residential confrontation, "pointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force").

358. *See* Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1510–12 (2017) (connecting Fourth Amendment pathways that distribute harms to civilians in racially discriminatory ways).

359. Michael Sierra-Arévalo & Justin Nix, *Gun Victimization in the Line of Duty: Fatal and Nonfatal Firearm Assaults on Police Officers in the United States, 2014–2019*, 19 CRIMINOLOGY & PUB. POL'Y 1041, 1046 (2020).

360. Lynne Peeples, *What the Data Say About Police Shootings*, NATURE (Sept. 4, 2019), https://www.nature.com/articles/d41586-019-02601-9 [https://perma.cc/3J4T-QBSZ].

361. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., *Officers Feloniously Killed, in* LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED, 2019, at 1 (2020), https://ucr.fbi.gov/leoka/2019/topic-pages/officers-feloniously-killed.pdf [https://perma.cc/BBB9-JQSK] (noting that forty-eight officers died in 2019 from injuries sustained during felonious incidents).

362. *See 2020 Police Violence Report*, MAPPING POLICE VIOLENCE, https://policeviolencereport.org/ [https://perma.cc/X9UN-CYHY] (last visited Feb. 27, 2021).

by police.[363] Of these, 348 did not have a firearm.[364] Of these 348 civilians, some had knives, and some reportedly "had a vehicle as a weapon,"[365] conditions that, in other countries, almost never result in an officer shooting.[366] As to the 670 civilians who were killed and did have a firearm, 105 never threatened anyone with the firearm.[367] With little additional threat to the officer, therefore, at least 453 (348 + 105) lives could have been saved with different rules of engagement, a 40% reduction in deaths of subjects, with a relatively slight increase in officer injury and death.

In the deadly force arena, the "action is faster than reaction" principle introduces unnecessary injury and death to civilians. Of civilians in Los Angeles shot because an officer perceived the civilian holding or reaching for a weapon, 61% had no intention of using force (a search at the time of the shooting revealed no weapon).[368] Only 39% were found to have some kind of weapon at the time of the shooting.[369] According to an FBI trainer, if the officer had waited to confirm the presence of a weapon, it "could easily be used against the officer before he or she has an opportunity to respond."[370] Thus, in an "action is faster than reaction" jurisdiction, in 100 encounters where the officer perceives the civilian to have or be reaching for a weapon, 100 civilians will be shot, of which 33 will die.[371]

How would harms be distributed differently in a jurisdiction in which an officer must confirm the presence of a weapon and the

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363. *Id.*

364. *Id.*

365. *Id.* This description of using a vehicle is often an overstatement. *See, e.g.*, *Police Officer Who Killed Zachary Hammond Fired a Year After Shooting*, GUARDIAN (Sept. 4, 2016, 11:10 AM), https://www.theguardian.com/us-news/2016/sep/04/zachary-hammond-police-south-carolina [https://perma.cc/N352-LNBX].

366. The "no shooting at a vehicle" policy is also adopted by the Los Angeles Police Department as harm-reducing to *officers*. *See Policy on the Use of Force*, L.A. POLICE DEP'T: 2020 3D QUARTER MANUAL, VOL. 1, § 556.10, http://lapdonline.org/lapd_manual/volume_1.htm [https://perma.cc/KM64-RX5G] (last visited Mar. 21, 2021); *see also* OFF. OF THE CHIEF OF POLICE, L.A. POLICE DEP'T, SHOOTING AT OR FROM MOVING VEHICLES POLICY 1–2 (2005), http://www.aele.org/law/2010all09/lapd-uodf-vehicles05.pdf [https://perma.cc/YY9Y-8RQM].

367. *See 2020 Police Violence Report*, *supra* note 362.

368. BOBB, MAZAR, MIDDLETON, NAGUIB, SHUGRUE & TOLLIVER, *supra* note 232, at 3, 51, 58 ("[S]tate of mind shootings" are "principally those where officers invoke the justification that they perceived the suspect reaching for his waistband and feared the suspect was armed, or saw an unknown object they feared to be a weapon.").

369. *Id.* at 58–59.

370. Crawford, *supra* note 179.

371. *See* Rob Arthur, Taylor Dolven, Keegan Hamilton, Allison McCann & Carter Sherman, *Shot by Cops and Forgotten: Police Shoot Far More People than Anyone Realized, a VICE News Investigation Reveals*, VICE NEWS (Dec. 11, 2017), https://news.vice.com/en_us/article/xwvv3a/shot-by-cops [https://perma.cc/5TZ3-PLU3] ("Two-thirds of the people cops fired at survived.").

subject's intent to use it?[372] Of 100 stops in which officers perceive the subject is holding or reaching for a weapon, 61 subjects are actually *unarmed*. Of the 39 other subjects, 12 would likely be holding a weapon, while the remaining 27 would have a concealed weapon.[373] Of the 27 subjects in possession of a concealed weapon, how often might an officer incorrectly perceive to be reaching for their waistband?[374] If officers are incorrect 50% of the time, then 13 waistband shootings would not occur in the wait and confirm jurisdiction—by waiting, the officer would be able to confirm the subject is not in fact reaching for a weapon. This leaves 26 encounters in which the subject will have a weapon in his hand, which will most often be a handgun, but will also be things like a knife or an object.[375] Some of these 26 subjects will evince the intention to use the weapon, some will not. (For example, in the Adam Toledo shooting in Chicago, the video indicates that Toledo had a firearm in his hand, but as he rotated towards the officer, he dropped the weapon.[376])

372. The following hypothetical is initially based on data presented in BOBB, MAZAR, MIDDLETON, NAGUIB, SHUGRUE & TOLLIVER, *supra* note 232. Using that data only as a starting point, it then makes several assumptions.

373. *See* BOBB, MAZAR, MIDDLETON, NAGUIB, SHUGRUE & TOLLIVER, *supra* note 232. From 2005–2010, 70% of all "perception" shootings, those where an officer perceived a weapon, were "waistband" shootings, meaning that the officer perceived the subject was reaching for his own waistband. Therefore, 30% of the remaining 39 subjects, 12 in total, would not be waistband shootings while the other 70%, 27 in total, would be.

374. Because officers have already shown an error rate of 61% for perceiving if a subject was armed, we will assume that their next judgment call—whether or not the subject is actually reaching for their waistband—is similarly flawed. Some may assume that of the 39 remaining subjects who the officers correctly perceived to be armed, the error rate would be lower because the subject indeed has a weapon, increasing the possibility that any movement detected by an officer is correctly interpreted as the subject going for a weapon. Of course, some subset of these subjects would be bringing a knife to a gunfight. Therefore, instead of applying the same error rate of 61%, this hypothetical will assume that only 50% of officers are incorrect.

375. In police encounters, in addition to knives, the following objects have been described as weapons that justified the officer's use of deadly force: a plastic, wood-handled snow shovel (Erin Alberty, *DA Finds Utah Police Officer Justified in Shooting Man During Shovel Attack*, SALT LAKE TRIB. (Feb. 23, 2015, 4:49 PM), https://archive.sltrib.com/article.php?id=2202371&itype=CMSID [https://perma.cc/S9UZ-WPF2] (describing James Dudley Barker's attack on an officer in Salt Lake City, Utah)); an ashtray (Jeff Proctor, *Lawsuit: Officer 'In La-La Land'*, ALBUQUERQUE J. (May 17, 2011), https://www.abqjournal.com/news/metro/17238408908newsstate05-17-11.htm [https://perma.cc/K8HR-QTZ3] (describing an incident with Andrew Lopez in Albuquerque, New Mexico)); and a screwdriver (Dennis Romero & Andrew Blankstein, *Utah Officer Cleared in Shooting of Woman Holding a Screwdriver*, NBC NEWS (Aug. 8, 2018, 2:01 AM), https://www.nbcnews.com/news/us-news/utah-officer-cleared-after-shooting-suspect-holding-screwdriver-leg-n898576 [https://perma.cc/6XPP-FHAN] (describing an incident with Ivonne Casimiro in Enoch, Utah)).

376. Jeremy Gorner, Megan Crepeau, Gregory Pratt & Annie Sweeney, *In Several Fateful Seconds, Video Appears to Show 13-Year-Old Adam Toledo Toss Gun, Turn with Empty Hands Raised Before Chicago Cop Fires Fatal Shot (Warning: Graphic*

To review, in the "action is faster than reaction" jurisdiction, 100 subjects will be shot, 33 will die, and all will be civilians. The "wait and confirm" jurisdiction promises a significant reduction in overall harm. In the "wait and confirm" jurisdiction, 74 civilians will likely avoid injury. Some number of the remaining 26 subjects would be shot by an officer after determining the subject's intent to aggress (with a third of those individuals succumbing to their wounds). In the 26 encounters where an officer confirms the presence of a weapon, an officer or some number of officers will be harmed, even killed.[377] Thus, in a wait and confirm jurisdiction, the numbers of civilians shot or killed would be expected to dramatically decrease, while the numbers of officers harmed or killed would slightly increase.

B. Rules Emerging from Progressive Police Training

Within this guidance on how policing should be employed in a community where use-of-force questions are viewed to be dependent on system hydraulics and social biases, the following set of rules might result:

> Information received from dispatch is not complete or correct. Calls reporting a suspicious person shall be considered mistaken, and the subject is free to ignore any attempt by an officer to make inquiry. Suspicious person calls that indicate a person of color is in a predominantly white neighborhood are presumptively invalid, and the only person subject to any officer encounter shall be the caller.
>
> Officer presence is a use of force; it causes humiliation and embarrassment and impinges on a person's freedom, even if that person is free to leave. An officer shall not approach a person the officer would not approach if the person were white and well dressed. An officer shall take four years off the officer's estimate of a Black male's age. An officer's response to vague and non-serious criminal activity shall generally result in a verbal

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Content), CHI. TRIB. (Apr. 15, 2021, 7:14 PM), https://www.chicagotribune.com/news/breaking/ct-chicago-police-adam-toledo-shooting-video-released-20210415-xn63playebasld36oulootdq6i-story.html [https://perma.cc/6BWT-WSK7] ("On [Officer] Stillman's body-worn camera, Toledo's hands appear to be empty at the moment the officer shoots him.").

377. Of the officers who are shot in the line of duty, 17% on average will succumb to their injuries. *See* CMTY. ORIENTED POLICING SERVS. U.S. DEP'T OF JUST., LAW ENFORCEMENT OFFICERS SHOT IN THE LINE OF DUTY: 2018 YEAR-END SUMMARY, (Jan. 2019), http://www.napo.org/files/9915/5086/1695/2018_Officers_Shot_in_the_Line_of_Duty.pdf [https://perma.cc/UUK9-SAWW]. In 2018 in the United States, 251 law enforcement officers were shot and 51, roughly 20%, succumbed to their injuries. *See id.*

> exchange with no citation or arrest issuing. An officer shall avoid effectuating an arrest if a summons can be issued.
>
> An officer must build in time to collect information before approaching a suspect. An officer must attempt to de-escalate, even when a suspect threatens to use deadly force against an officer or another, including expressing calm, explaining officer presence, requesting resources, and repositioning. An officer shall attempt to avoid physical contact with a suspect. Only one officer shall communicate with the suspect. Any communication failure should first be attributed to a suspect's panic, disorientation, auditory exclusion, or behavioral health or substance use episode.
>
> A show of force is a use of force. A show of deadly force is only reasonable when a suspect actually threatens to use deadly force against an officer or another. If a show of deadly force is warranted, only one officer may produce a firearm.
>
> A suspect's physical reaction to nondeadly force shall first be considered as self-protective in nature, not as resistive. Any stated or observable distress of the suspect shall be presumptively considered a medical emergency. Deadly force may be used only if the suspect actually intends and attempts to use imminent deadly force against the officer or others. Brandishing a weapon does not constitute an attempt to use deadly force. An officer must justify the reason for each shot the officer fires. Any tool used by an officer that is considered "nonlethal" is to be considered "nonlethal" in the hands of a suspect.
>
> An officer's life, as well as any bystander's life, is given the same value as a suspect's life.

This jurisdiction does not exist. And for a significant number of movements that are calling out police abuses, these rules would not go far enough, as they still fall within the confines of traditional approaches that permit an armed, militarized, and hierarchical force that draws on significant public funding to persist, versus a community-led, abolitionist approach that drastically reduces the policing footprint.[378] But the above jurisdiction's approach, in which officer discretion is limited by rules that reflect interests that are broader than the department's alone, suggests the

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378. *See* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1788 (2020).

possibility of reform when one accepts the premise that use of force can be regulated not only by standards, but also by rules.

CONCLUSION

Justice Scalia announced that there is no "magical on/off switch that triggers rigid preconditions" of use of force.[379] He was wrong, as is the rule-resistant view, a view embraced by every branch of government. There are, in fact, on/off switches—rules—that are triggered by preconditions and that, despite denials of their existence, have already been adopted by many departments. These unwritten rules have not been subject to public scrutiny or comment, despite their importance: As Professor Harmon observes, any discussion of policing is inexorably linked to violence.[380] The public has not weighed in on what values should inform encounters between civilians and officers. This absence of public interrogation is reflected in many of the sub silentio rules adopted by departments that protect officers at the expense of civilian safety. What is stunning about many departmental training modules is an atmospheric commitment to the advocation of violence within the portrayal of a dystopic society. Many in law enforcement believe a force-forward approach provides the safest environment—that such conditions facilitate peaceful submission by subjects who know that resistance will be met with force—an argument made, for example, by the city in its briefs to the Court in *Garner*.[381] Yet, after the Court rejected the city's arguments in *Garner*—the high-water mark of judicial enforcement—police violence significantly dropped in jurisdictions most affected by the Court's new restrictions.[382] Prohibiting the use of deadly force to prevent the escape of someone who does not pose a risk of serious injury or death to anyone, as the Court did in *Garner*, resulted in no correlative uptick in police killings.[383]

This Article attempts to excavate and reveal departmental rulemaking not only to challenge claims that rules are incompatible with regulating use of force, but also to suggest that departmental claims to expertise are

379. *Scott v. Harris*, 550 U.S. 372, 382 (2007).

380. *See* Harmon, *supra* note 79, 762–63.

381. *See Tennessee v. Garner*, 471 U.S. 1, 9–10 (1985) (quoting Brief for Petitioners at 14, *Tennessee v. Garner*, 471 U.S. 1 (1985) (No. 83-1035), 1984 WL 566026).

382. *See* Abraham N. Tennenbaum, *The Influence of the* Garner *Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 242, 257 (1994); *Garner*, 471 U.S. at 3.

383. *See* Garrett & Stoughton, *supra* note 94, at 248 (Empirical studies suggest "the connection between use-of-force policies and the actual use of force was stronger than may have been previously estimated, while the connection between the use of deadly force and officer safety was weaker.").

overblown. Surfacing the rules that limit officer discretion shows that these rules not only are accessible to the layperson to consider but also could facilitate a broader conversation as to their justification and the values they reflect. Police have insights to contribute but are unequipped to unilaterally assume this responsibility. Civilians, psychologists, behavioral health professionals, civil rights attorneys, statisticians, sociologists, and historians have much to contribute, too. Unless the community served by officers is comfortable with the implementation of these rules, these rules should not govern police encounters. As the ABA Standards from forty years ago stated, "Decisions regarding police resources, police personnel needs, police organization, and relations with other government agencies should . . . be made in a way that will best achieve the objectives and priorities of a particular locality."[384] The movement to make law enforcement democratically accountable—part of a larger project to disrupt features of the criminal system that contribute to structural oppression and social harm—can and should insist on public participation in the formation of rules, and any standards as well, to govern use-of-force practices.[385]

384. ABA, *supra* note 265.

385. *See* Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1397 (2017); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2143–46 (2017).