

MANAGING POLICE USE OF FORCE

POLICY AND TRAINING ISSUES FOR ADMINISTRATORS


BY:

STEVEN P. SOLOMON

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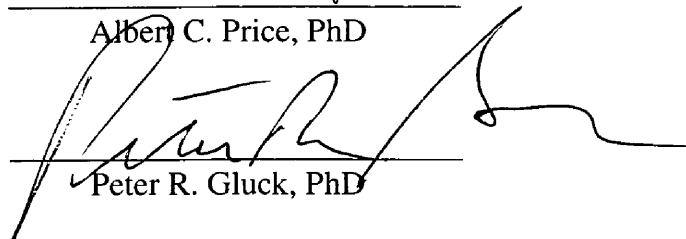
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First Reader



Albert C. Price, PhD

Second Reader



Peter R. Gluck, PhD

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Introduction

Within a 10-month period, four New York City police officers were killed in the line of duty. In a tense aftermath, a city policeman shot and killed a fleeing suspect in an unrelated case. A *New York Times* editorial was sharply critical, declaring “if a policeman needs to defend his life, the use of force is permissible, but if he is chasing a suspect, he has no right to shoot the man. (Geller, 1988, p. 1)

These events and the resulting controversy occurred in 1857 and 1858, but over a hundred and twenty years later the Director of the U.S. Justice Department’s Community Relations Service still called police shootings “the most volatile and potentially divisive force in the nation” (Geller and Karales, 1981, p. 1814). Recent developments have confirmed that there is still great concern and controversy over the use of force by police in America today. Such high profile incidents as the Rodney King arrest in Los Angeles, the death of Malice Green in Detroit, the recent shootings in Cincinnati, and any of the several incidents in New York, have brought the issue of police use of force and the monetary costs of such actions to the front pages of America. For example:

POLICE KILL GUNMAN IN ELECTRONICS STORE (*San Francisco Chronicle*, February 14, 2001).

POLICE KILL MAN, 87, WIELDING SHOTGUN (*Miami Herald*, February 27, 2001).

POLICE KILL KNIFE WIELDING MAN (*Rocky Mountain News*, Denver, CO, March 15, 2001).

POLICE KILL CAR THEFT SUSPECT; They say he claimed to have a gun and threatened to use it (*Baltimore Sun*, March 20, 2001).

POLICE KILL MAN IN DOMESTIC CALL (*Los Angeles Times*, April 2, 2001).

POLICE KILL MAN DURING BURGLARY CALL (*Arizona Republic*, April 3, 2001).

POLICE KILL TWO MEN AFTER ARMED ROBBERY (*Los Angeles Times*, April 21, 2001).

POLICE KILL MAN HOLDING GIRLS HOSTAGE (*Los Angeles Times*, April 22, 2001).

POLICE KILL SUSPECT IN GANG SCUFFLE (*Chicago Sun- Times*, April 24, 2001).

POLICE KILL MAN AFTER STATION ATTACK (*San Francisco Chronicle*, May 29, 2001).

POLICE KILL SUSPECT IN CRIME SPREE (*Arizona Republic*, June 5, 2001).

POLICE KILL SUSPECT IN CAR THEFT (*San Diego Union-Tribune*, June 11, 2001).

CITY TO PAY MAN SHOT BY POLICE \$3.2 MILLION (*Los Angeles Times*, April 28, 1999).

PAYOUT WILL SAP RESERVE: SUIT TO COST CITY MORE THAN \$2 MILLION (*The Columbus Dispatch*, June 18, 1999).

PHILADELPHIA AGREES TO PAY \$700,000 to Settle Lawsuit Over Police Shooting (*The Legal Intelligencer*, July 28, 1999).

DENVER PAYS \$712,000 IN CLAIMS AGAINST POLICE during first four months of this year – more than all of 1998 or 1999 (*Denver Rocky Mountain News*, April 12, 2000).

DETROIT'S POLICE LAWSUIT TAB HITS \$32 MILLION OVER 3 YEARS (*Pittsburgh Post-Gazette*, August 5, 2000).

COUNCIL TO PAY \$1.2 MILLION FOR SETTLEMENT PROPOSED IN SHOOTING (*Denver Rocky Mountain News*, January 21, 2001).

This small sampling of headlines reinforces the importance of reviewing and analyzing public policy. The goal of public policy analysis is “to improve the quality of future governmental decisions; and to work toward improving the quality of some aspect of human life” (Portney, 1986, p. 216). One area in which public policy plays a key role

in the quality of human life is police use of force, because the actions taken by these governmental actors who carry out the policy may include the taking of human life. The importance of continuously reviewing and analyzing public policy is reinforced by this paper, which will hopefully be used to assist administrators in their future decision-making regarding police use of force.

One of the core functions of the police is their ability to use force. Policing is one of the few occupations granted the legal right to use force to accomplish its objectives. In the course of their work police officers must sometimes resort to the use of force to control resisting subjects or to protect themselves and others from injury. According to Bittner (1970):

Whatever the substance of the task at hand, whether it involves protection against an undesired imposition, caring for those who cannot care for themselves, attempting to solve a crime, helping to save a life, abating a nuisance, or settling an explosive dispute, police intervention means above all making the use of the capacity and authority to overpower resistance to an attempted solution in the native habitat of the of the problem. There can be no doubt that this feature of police work is uppermost in the minds of people who solicit police aid or direct the attention of the police to problems, that persons against whom the police proceed have this feature in mind and conduct themselves accordingly, and that every conceivable police intervention projects the message that force may be, and may have to be, used to achieve a desired objective. (p. 40)

When police use force it affects citizen's attitudes toward the police specifically and toward government in general. The police are "best understood as a mechanism for the distribution of non-negotiably coercive force" (Bittner, 1970, p. 46). Since the police are the only institution with this authority, the evaluation of police performance must focus on their use of force.

The purpose of this paper was to conduct an examination of the information available on police and use of force related issues. After outlining the research questions and the methodology used in this research, the examination began with an extensive review of the literature regarding: the role and purpose of the police as an agency authorized to use coercive force; the ethical dilemmas of policing a democratic society; the dynamics of police-citizen encounters; and the use of force by police in America. By exploring the debate regarding the police role, and using the knowledge gained from research that has already been conducted by experts in the field, this in-depth literature review provides the reader with a more comprehensive understanding of the problems associated with policing in America.

The second part of this examination included a review of the laws and liability issues related to the use of force by police; an investigation of court cases that have been decided on municipal liability, use of force, and police training; and an analysis of the Michigan Force Continuum*. This examination provided the foundation for suggestions to administrators regarding use-of-force policy and training issues.

Throughout the literature, laws, and court decisions, the terms “police officer” and “law enforcement officer” were found to be used interchangeably. This paper will use “police officer” when referring to those officers employed by municipal police agencies in America. The term “law enforcement officer” will be used whenever the literature, law, or court decision being discussed uses that term.

* The Force Continuum is a guide that police officers use in confrontation or arrest situations to assist them in determining the appropriate amount of force that may be used to gain control of the situation.

Research Question

Controversy surrounding police officers using force is one of the leading causes of public distrust and civil litigation against the police in the United States. This is especially true in the post Rodney King and Malice Green era. Thus it has left law enforcement administrators with the question: *How can the performance of police officers involved in use-of-force situations be improved so that it is proper, ethical, and in compliance with the constitutional and legal mandates of our democratic society?*

There are several relevant issues that should be examined within the realm of improving police use of force. This paper examined two of the most important issues:

1. Can administrators develop a defensible policy to guide the decision-making process of officers involved in use-of-force situations?
2. Can administrators develop defensible training that will better prepare officers to handle use-of-force situations?

This study addressed each question through a broad range of exploratory case studies involving the evaluation of various court decisions and case law, and an examination of policy and training issues related to the use of force. Conclusions were formulated based upon the goal of reducing the physical and monetary risks that arise from police use of force, while also providing police officers with the preparation and guidance to perform their required duty to use force when necessary in an appropriate manner while ensuring the safety of the officer and the public.

Methodology

The focus of this research was in the area of police use of force. The examination included a review of the laws set forth by the State of Michigan and the United States of America pertaining to police use of force, as well as an investigation into the totality of circumstances involved in various use-of-force cases that have been decided by the courts.

The legal decisions of our state and federal courts provide police agencies with guidelines and expectations regarding proper police behavior. An investigation into the prior decisions of these courts, in cases involving police use of force, was an important part of the research for this thesis. Knowledge and information gained from these state and federal court decisions was used to identify use-of-force policy and training issues that are important to consider when developing policies and training designed to guide officers in using force. In addition, the new Michigan Law Enforcement Officer-Subject Control Continuum and training objectives, developed by the Michigan Law Enforcement Officers Training Council in 1997, were evaluated to determine if they comply with the standards identified by this research. Finally, municipal police agencies in an urban Michigan county were contacted to learn about the current status of use-of-force policy and training, and adoption of the Michigan Force Continuum.

The ultimate goal of this research was to provide guidance and assistance to police administrators in the development of policy and training for their individual agencies in the area of use of force. By providing this resource to policymakers, it is hoped that they will use it as a guide so that future decision-making is conducted in a manner designed to improve the quality of human life for our citizens.

Review of the Literature

Any study of the police must of necessity begin by examining their role, because “the difficulties and limitations of law-enforcement are seldom completely understood by the public” (P. Murphy, 1973, p. 18). Many researchers have tried to explain the often confusing and multifaceted role of the American police officer with limited results. Alpert and Dunham (1988) claimed that our image of the police is framed by entertainment and the news media. Klockars (1985) continued the idea that people’s definitions of the police are based on beliefs about what they want or expect police to do or be rather than what the police actually do or who they are. Klockars felt that this was a problem when trying to create a definition of the police. Mead (1973) also believed that Americans build upon their own experiences, myths, and fictional accounts, to formulate contradictory definitions of what police officers should be. These definitions seem to change with time, place, and circumstances.

Saunders (1973) claimed, “the increasing attention paid the police reflects widespread misunderstanding of their role” (p. 409). He provided an examination of the historically poor image of the police as being large, dumb, politically aligned, corrupt figures. Vollmer (1936/1971) provided a rebuttal to the historical figure of the dumb cop when he described the role and responsibilities of the police officer. Vollmer wrote:

The citizen expects police officers to have the wisdom of Solomon, the courage of David, the strength of Samson, the patience of Job, the leadership of Moses, the kindness of the Good Samaritan, the strategical training of Alexander, the faith of Daniel, the diplomacy of Lincoln, the tolerance of the Carpenter of Nazareth, and, finally, an intimate knowledge of every branch of the natural, biological, and social sciences. If he had all these, he *might* be a good policeman. (p. 222)

Another influential police reformer O. W. Wilson wrote in his police administration text that the role of the police is “conspicuously identified” with crime. He believed “the primary purpose of a police department is the preservation of peace and protection of life and property against attacks by criminals and injury by the careless and inadvertent offender” (Wilson & McLaren, 1972, pp. 4-5). This was in line with Fuld (1909/1971), who had written decades earlier that the police function “is that function of government which protects its existence against unlawful attack and promotes the welfare of the people by means of restraint and compulsion, with a view to obtaining the greatest good for the greatest number” (p. 1).

The National Advisory Commission on Criminal Justice Standards and Goals (1973) laid out standards for police operations in America. Standard 1.1 outlined the police function and stated “Agency policy should articulate the role of the agency in the protection of constitutional guarantees, the enforcement of the law, and the provision of services necessary to reduce crime, to maintain public order, and to respond to the needs of the community” (p. 12). The commentary on this standard declared, “the fundamental purpose of the police throughout America is crime prevention through law enforcement” (p. 13).

Harring (1983) provided an opposing description of this clean and neat protector of the constitution role when he described the correlation between the development of the police and the development of capitalism. He believed the police role was to protect the interests of the bourgeoisie by repressing the working class. “Clearly the police serve as an instrument of the bourgeoisie in the class struggle. Moreover, the general evolution of capitalist institutions as a result of the class struggle fundamentally shaped the police

institution through such processes as bureaucratization, centralization, division of labor, and rationalization” (p. 19).

Stang (1973) defined the police role as keeping the peace, providing services, and combating crime. Stang believed that the role conflicts led to police ineffectiveness. Fuld (1909/1971) asserted that part of the problem with carrying out the police function was that police administration was far from satisfactory and conflicting demands on the police posed problems for efficiency. The National Commission on Law Observance and Enforcement (1931/1999), commonly known as the Wickersham Commission, blamed this ineffectiveness and general failure of the police on the fact that “there are too many duties cast upon each officer and patrolman” (p. 140). According to Bittner (1990), a police officer handles any problem that may involve “*something-that-ought-not-to-be-happening-and-about-which- someone-had-better-do-something-now!*” (p. 249, italics in original).

Walker (1999) provided an excellent discussion on the factors that shape the police role. He found that among the several factors contributing to the complexity of their role, the most important factor is that police services are available twenty-four hours a day. The police are “a general-purpose emergency service, available to handle problems that arise”, and “the police acquired many responsibilities simply because they were the only agency available” (p. 9). Similarly, in his analysis of actual police performance, Moore (1985) found that “the police perform many duties which they have assumed by default of other government agencies or by virtue of their being the only primary municipal agency available at all times (p. 3). Guyot and Martensen (1991) agreed:

A police department is a city’s multipurpose agency for dealing with a wide variety of social disorders. The longer an organization has been in

existence the more functions it is likely to perform, because it picks up new functions in response to changing demands. This tendency to diversify is reinforced when an organization is open twenty-four hours a day and its services are free. (p. 433)

H. Goldstein, (1977) summarized the factors shaping the police role and explained how they require various compromises that place the police in a no-win situation. He offered the following ideas for consideration:

Statutes usually require – and much of the public, in theory, expects – the police to enforce all the laws all of the time. Yet the public will not tolerate full enforcement of many laws, and the police would be held up to ridicule were they attempt full enforcement.

The public holds the police responsible for preventing crime and apprehending criminals, and the police endeavor to live up to this expectation. But the police, omnipotent as they may seem, are in reality extremely limited in their ability to cope with crime.

The police are expected and equipped to act in a coercive authoritarian manner in some situations. The same officers, however, must also be capable of being supportive and friendly in the vast majority of circumstances in which they become involved.

The image that the police seek to project is one of complete neutrality, achieved by uniform objective application of their authority. But the incredible array of circumstances with which they must deal demands all kinds of flexibility in their day-to-day operations.

The police have come to be viewed as capable of handling any emergency. In reality, however, they have neither the authority nor the resources to deal effectively with much of the business that comes their way.

Policing is grounded on the existence of a system of criminal justice that operates with reasonable effectiveness in adjudicating guilt and in imposing sanctions upon those found guilty. But the system as it exists in many communities today – and especially in the large urban areas – is so overcrowded and disorganized that it is capable of neither achieving justice nor administering punishment.

And finally, there is the basic pervasive conflict between crime-fighting and constitutional due process which is inherent in the police function in a free society. The police are expected to deal aggressively with criminal conduct, but must do so in accordance with procedures that prohibit them from engaging in practices which – from the standpoint of poorly informed citizens – appear to be most expeditious and potentially most effective. (pp. 9-10)

Though many authors have written about the varied aspects of the police role and the problems in providing a clear definition about what it is the police should be doing, there seems to be one clear aspect of policing that most authors feel is at the core of the police role: the capacity to use force. The literature suggests that modern societies are held together by the state's capacity to use force to control threats to social order. According to their perspective, the main unifying aspect of most police tasks is control over violence.

Jacobs & Helms (1997), Reiman (1985), and Winright (1995), theoretically approached the use of force as a police function, while several other authors concurred with and supported Bittner's capacity to use force definition as being at the core of the police role (Klockars, 1985, 1988; Manning, 1977; Muir, 1977; Sykes & Brent, 1983; Walker, 1999). Klockars based his definition on the fact that all police everywhere and at all times have claimed a right to use, and they are distinguished by their right to use "coercive force" (1985, p. 9).

In his study of police and violence, Sherman (1980b) discussed the essence of government having a monopoly on the use of force, and that modern governments delegate this monopoly to police officers. As a result of this monopoly on the use of force, Sherman believed that, "despite the tremendous variety and complexity of the many tasks and roles the police perform, violence and its threat are always present" (p. 12). Alpert and Smith (1994) added, "the authority of the police to use force represents one of the most misunderstood powers granted to representatives of government" (p. 481).

Manning (1977) stated, “the contemporary American police act within their understandings of the mandate. . . . to employ violence in an officially and legally sanctioned manner” (p. 89). Manning explained there was a necessity for coercion because police services “are grounded in values with a high potential for conflict . . . and thus coercion is inevitable” (p. 99).

Betz (1985) also addressed the issues of violence and coercive force. He used the terms “violence” to mean morally unjustified behavior, and “coercive force” if it could be morally justified. He stated:

I believe violence is properly defined as physical force defeating ends and human rights. . . . In human violence, a human agent defeats the ends or violates the rights of another human being . . . through the use of physical force, as when a mugger wrenches the pocketbook from the hands of an old lady. I would consider coercive force to be the kind of physical force, sometimes needed in the struggle against human violence, that protects or defends the ends or rights of another. Just as human violence is physical force immorally employed, so is coercive force physical force morally used. The police, then, should never be violent, but should use coercive force when necessary. (p. 177)

Betz explained the situations in which police tend to become violent and then related police violence to the two models of the policing process: military and social service. He believed the military model encourages violence and he argued for the adoption of the social service model. Consistent with this model, Toch (1996) explained, “there exist subgroups of young officers who manifest a ‘hot dog’ syndrome that includes overaggressive or inappropriate proactivity” (p. 106).

Muir (1977) focused on coercion and how police officers use coercion as “a means of controlling the conduct of others” (p. 37). Muir noted that “the reality, and the subtle irony, of being a policeman is that, while he may appear to be the supreme practitioner of coercion, in fact he is first and foremost its most frequent victim” and

“contrary to the more unflattering stereotypes of the policeman, it is the citizen who virtually always initiates the coercive behavior.” The police officer is repeatedly the victim of coercive behavior, “and only rarely does he initiate coercive actions as victimizer” (pp. 44-45). Muir discussed the pitfalls of coercion, specifically the paradoxes of coercive power:

1. The paradox of dispossession: The less one has, the less one has to lose.
2. The paradox of detachment: The less the victim cares about preserving something, the less the victimizer cares about taking it hostage.
3. The paradox of face: The nastier one’s reputation, the less nasty one has to be.
4. The paradox of irrationality: The more delirious the threatener, the more serious the threat; the more delirious the victim, the less serious the threat. (p. 44)

Sykes and Brent (1983) focused on Bittner’s definition and compared and contrasted it with H. Goldstein’s (1977), Manning’s (1977), Muir’s (1977), and Rubinstein’s (1973) interpretation of coercion. “One implication of Muir’s analysis” they pointed out, “is that the officer may present himself as dispossessed, detached, nasty, and irrational precisely so others will be deterred from using coercion against him. His manner is his best protection against the attempts of his antagonist to coerce him” (p. 17).

This analysis is similar to Rubinstein’s observation that the police officer “must also learn how to establish and express authority by cajoling, requesting, threatening, ‘bullshitting them,’ as patrolmen say, to avoid using force. He must learn to use his body to express with his whole self the authority represented by the appearance he presents” (p. 274).

Walker (1999) began his discussion on police use of force with the statement, “the authority to use force is one of the most important factors shaping the police role” (p. 10). Manning (1980) examined violence and the police role and wrote “the police represent the power and authority of the state and thus must be violent. . . . Several aspects of the role of the police in American society, are founded on the violence potential they possess” (136).

Sykes and Brent, writing in 1983, claimed that “The last decade of police research was inaugurated by the publication of a small monograph that has become a classic, Egon Bittner’s *The Function of the Police in Modern Society*. . . . His monograph is not an empirical study but an integration and interpretation of historical documents, prior empirical studies, legal treatises, and then current questions by both police and public” (p. 11).

When discussing the role of the police, Bittner (1970) stated:

In sum, the role of the police is to address all sorts of human problems when and insofar as their solutions do or may possibly require the use of force at the point of their occurrence. This lends homogeneity to such diverse procedures as catching a criminal, driving the mayor to the airport, evicting a drunken person from a bar, directing traffic, crowd control, taking care of lost children, administering medical first aid, and separating fighting relatives. (p. 44)

Bittner finished his discussion with the now famous suggestion that “the role of the police is best understood as a mechanism for the distribution of non-negotiably coercive force employed in accordance with the dictates of an intuitive grasp of situational exigencies”. Bittner also stated that this “definition of the police role entails a difficult moral problem. How can we arrive at a favorable or even accepting judgment about an activity which is, in its very conception, opposed to the ethos of the polity that authorizes it?” (p. 46). It is

to this area of the literature that we now turn in an attempt to investigate the problem of policing in a democratic society.

H. Goldstein (1977) observed:

The police, by the very nature of their function, are an anomaly in a free society. They are invested with a great deal of authority under a system of government in which authority is reluctantly granted and, when granted, sharply curtailed. The specific form of their authority – to arrest, to search, to detain, and to use force – is awesome in the degree to which it can be disruptive of freedom, invasive of privacy, and sudden and direct in its impact upon the individual.

Yet a democracy is heavily dependent upon its police, despite their anomalous position, to maintain the degree of order that makes a free society possible. . . . The strength of a democracy and the quality of life enjoyed by its citizens are determined in large measure by the ability of the police to discharge their duties. (p. 1)

Though they were writing about the same concept of democracy, it was between 335-322 B.C. that another academic, Aristotle (trans. 1946), had written “The proper application of the term ‘democracy’ is to a constitution in which the free-born and poor control the government – being at the same time the majority” (p. 164). Democracy is an old idea, but the fundamental belief is the same, and it can be applied to the concept of democratic policing.

Skolnick (1999) commented that Aristotle did not discuss the role of police in modern democratic society, but he uses the idea that “democratic police forces are not supposed to be insular, self-contained, or cut off from the communities from which their power derives. Openness to the free and the poor should be a master ideal of democratic policing” (p. 2). This is in agreement with Misner’s (1973) assertion that the concept of policing a democratic society “rests on the assumption that a cooperative public acts as a substitute for the omnipresent policeman” (p. 123). However, H. Goldstein, (1978), J.

Goldstein, (1978) and Reiss, (1978, 1980), warned that in a modern democratic society, government is accountable to the citizens it serves, and the discretion exercised by the police in carrying out the will of the people must be limited and controlled, while Atkins and Pogrebin (1978) argued “if discretionary decisions are inevitable, then the issue is not whether or not they should occur but rather determining the degree of impact the exercise of discretion has upon the administration of justice” (pp.1-2).

The challenge of controlling, reviewing, and changing the police is not new to America. Fogelson (1977) reported on control efforts over the twentieth century and found the debate is still the same as when the Lexow Committee was formed in 1895 to improve the police. However, though presidential commissions have been around since George Washington’s 1794 Whiskey Rebellion Commission, Germann (1973) found that only recent commission reports have dealt with controlling the American police (p. 374).

Skolnick (1999) also argued that openness and accountability are the signposts of democratic policing which “is concerned not only with the ends of crime control, but also with the means used to achieve those ends” (p. 6). This was a reinforcement of what he had first written 33 years earlier in 1967:

The phrase “law and order” is misleading because it draws attention away from the substantial incompatibilities existing between the two ideas. Order under law suggests procedures different from achievement of “social control” through the threat of coercion and summary judgment. Order under law is concerned not merely with the achievement of regularized social activity but with the means used to achieve it. (Skolnick, 1975, p. 9)

This is also consistent with Skolnick’s (1973) claim that the police in a free society “must accustom themselves to the seemingly paradoxical yet fundamental idea of the rule of law” (p. 68), Sherman’s (1978b) belief that law was the main factor guiding the police,

and Rojek, Wagner, and Decker's (2001) assertion that "the rule of law constrains the behavior of public agencies in U.S. society" (p. 317).

Misner (1973) believed that this attention should not focus on "law and order but law *or* order, and the dilemma arises from the conflicting set of instructions which society has historically given to policemen" (p. 121, italics in original). "Democratic policing is always in a tension among the touchstones of public safety, openness, and accountability. As police enforce the laws of democratic governments in a free society, the balance among these touchstones should be properly maintained to reflect democratic values" (Skolnick, 1999, p. 7).

The National Advisory Commission on Criminal Justice Standards and Goals commented on this tension in 1973 when it wrote "The degree to which society achieves public order through police action depends on the price that its members are willing to pay. . . . a balance must be struck that permits enough freedom to enjoy what is secured by sacrificing unlimited freedom. That balance must be determined by the people if a productive relationship with their police is to be achieved" (p. 13). Finckenauer (1978) supported this comment when he suggested, "if the police are more aware of and responsive to community attitudes and expectations, not only will their actions be given greater legitimacy and police-community relations improved, but the ambiguity in the exercise of police discretion should be reduced" (p. 94).

Klockars (1985) summed up this discussion on the police in a democratic society when he asked "why should it be that in a modern democratic society the state should create an institution with a general right to use coercive force? What does a police make available in modern democratic society that no other institution can adequately provide?"

He answered these questions with the explanation “that even in the most free and democratic societies there are situations requiring the attention of someone with a general right to use coercive force” (p. 14).

The literature is conclusive that there is a need for the police to deal with all those problems on which coercive force may have to be used, even in a democratic society. This conclusion leads to the explanation of the ethical and character issues involved with those who police in a democratic society. According to Pollock (2001), “a dilemma can be defined as a difficult decision in which two or more choices of behavior are possible” and “police officers face myriad dilemmas during the course of their careers” (p. 356).

Delattre (1989) observed “no one who does not already care about being a good person and doing what is right can have a serious ethical question. A person must have achieved a disposition to do the right thing in the right way at the right time for the right reasons before any moral perplexities can arise” (p. 5). Delattre emphasized:

A police officer’s fitness to wear the badge depends on the acquisition of habits of just behavior. Officers who respect justice will have nothing to do with racial prejudices, will not exceed their authority in the exercise of discretion, abuse the powers of their office, falsify reports, or give perjured testimony.

None of these considerations is more important than the use of force. . . . Respect for justice holds them back from using threats when reasoned persuasion will suffice, from force when threats will suffice, and from greater force when lesser force will suffice.

There is fulfillment in acting with fairness toward others and peace of mind in knowing one has neither exceeded one’s authority nor been more coercive than a situation demanded. The use of force is never as satisfying to a person of excellent character as a resolution by persuasion and reason. (pp. 10-11)

In addition, Muir (1977) believed that good police officers not only understand human suffering but also resolve the tension between respect for justice and the use of

coercion to achieve it (pp. 3-4), Scharf, Linninger, and Marrero (1979) found in their study of the relationship of moral judgment to police shooting behavior that “few officers fully understand the moral and legal logic implied in justifiable homicide by police,” and “education must play a critical role in preparing police officers to exercise reasonably the ultimate power to take human life” because “only legally and morally educated police officers can use this power reasonably and justly in a manner consistent with law and circumstances when human lives are almost certainly endangered” (p. 97).

It is this strength of character that Delattre suggests as a requirement of good policing, not the strength of coercion, brutality or violence. This idea was asserted 70 years ago in a follow up to the Wickersham Commission’s Report on Lawlessness in Law Enforcement published in 1931. Hopkins (1931/1999) stated “our national need is for stronger police; brutality and violence are not strength” (p. 143), and Harrison (1999) added, “if the law represents an expression of moral sentiment, then police officers stand as instruments of that morality” (p. 1).

Niederhoffer (1967) commented on the unfortunate results of not having this strength of character in his study on police officers and why a minority “goes wrong”. Niederhoffer claimed “police action provoked the disastrous series of racial disturbances in Rochester, Philadelphia, Harlem, Hough, Watts, and Newark. . . . The intimate connection between law enforcement and the fate of our society was spelled out clearly as far back as Little Rock, Oxford, Birmingham, and Selma” (p. 1-2).

Actually, Plato 428-348 B.C. was writing about this connection when he related a discussion Socrates was having with Glaucon about the guardian’s temperament. Socrates said “they must be gentle to their own people and dangerous only to enemies;

otherwise they will destroy themselves without waiting till others destroy them” (1990, p. 64). Socrates believed an instinctive love of wisdom and understanding was required for these guardians to make the right decisions on how to deal with their own people, and over twenty three hundred years later scholars are still studying, and trying to understand the moral dimensions of policing.

Cohen and Feldberg (1991) studied the moral dimensions of police work, a social contract perspective on the police role, and the moral standards of police work. They concluded, “police work is . . . a moral crucible in which the risks of the individual officer and the opportunities for moral action are magnified. . . . Policing throws its practitioners on a regular basis into extremely difficult and often complicated situations in which the officer has enormous potential to do harm or good” (p. 3). The dilemmas that police officers face, especially when deciding whether to use or not to use force and if so, how much, can be especially distressing for the officer (Sewell, 2001, p. 187).

With a cognizance of popular culture, Klockars (1980) referred to the moral dilemma faced by police officers who are placed in situations where the ends to be achieved are urgent and unquestionably good and only dirty means will work to achieve them as the “Dirty Harry” problem. This dilemma could lead to a loss of moral proportion and cynicism, or allow the officer’s passionate caring to lead them to employ dirty means too readily (p. 33).

Vollmer (1936/1971) argued “because the police department is a governmental unit, designed to serve the public interest and welfare, and because in all its operations it deals directly with human beings, its success or failure is determined in large measure by the quality of the men selected to discharge its function” (p. 216). Vollmer believed that

in order to ensure this success, police officers “must have character traits which will ensure integrity, honesty, and efficiency” (p. 222). Former Berkeley police officer John Holstrom recalled Vollmer’s rule “on force. . . .I heard it from him when I was a police recruit. It was that no Berkeley policeman should ever strike any person, particularly a prisoner, except in extreme self-defense; and then he said, if you ever do, you have just resigned. You needn’t bother to come in and discuss it, and this one he meant” (quoted in Carte & Carte, 1975, p. 46).

Vollmer laid out a clear ethical guideline on use of force. Curran (1972) believed the analysis of police ethics should “look beyond the behavior of individuals to their character. . . . to look beyond the individual practitioner, at what might be called the character or normative pattern of that collectivity of persons called a profession. . . . to the collective behavior of the group of people engaged in . . . law enforcement” (p. 368).

The difficulties and complexities of studying police ethics were addressed by Elliston and Feldberg (1985). They asserted that police are among the most powerful agents of the state, and the moral issues that arise in police work affect a wide and diverse range of people. They suggested that the study of police ethics should “address a basic but complex issue: what are the police authorized to do, and what is the proper way for them to do it?” (p. 11).

Guyot (1991) provided one example where the police profession was examined collectively through information on a study of the methods taken to improve the delivery of police services. Guyot stated the “quality of police service in a city strongly affects the quality of life for the residents, the commuters, and the visitors. Nationally the quality of police service has been rising and can be expected to continue to rise” (p. xv).

The forward to the National Institute of Justice and Office of Community Oriented Policing Services report *Police Integrity: Public service with Honor* included a definition of integrity:

Integrity is universal to the human experience; it can be considered the measure of an individual, an agency, an institution, a discipline, or an entire nation. Integrity is a yardstick for trust, competence, professionalism, and confidence. Deep within every human being is the subconscious ability to interpret behavior and events as a mark of integrity or a violation. It is this universal tendency that makes the study of integrity complex, challenging, and important.

Policing in a democracy requires high levels of integrity if it is to be acceptable to the people. (Brann & Travis, 1997, p. iii)

One of several research projects related to police practices measured police integrity. Klockars, Ivkovich, Harver, and Haberfeld (2000) presented findings from their study that explored police officers' understanding of agency rules concerning misconduct and the extent of their support for these rules. Researchers asked officers in 30 police agencies across the United States for their opinions about 11 hypothetical cases of police misconduct and measured how seriously officers regarded police corruption, how willing they were to support its punishment, and how willing they were to report it. According to this NIJ Research in Brief, the more serious the officers considered a behavior to be, the more likely they were to believe that more severe discipline was appropriate, and the more willing they were to report a colleague for engaging in that behavior.

Another project examined police attitudes toward abuse of authority. Weisburd and Greenspan (2000) discussed the general findings of a national survey that explored police officers' views on the abuse of authority. They noted the roles that race, class, rank, sex, demeanor, and ideals of community-oriented policing play in determining the likelihood of abuse of authority. The survey showed positive evidence of American

police officers' integrity. The majority of officers believed that it was unacceptable to use more force than is legally allowable, and surveyed departments generally took a tough stand on the issue of police abuse. However, the results also suggested that police abuse still needs to be addressed by policymakers and police professionals.

In an examination of the police and their problems, Wilson (1973) claimed that a "police force can, in theory, make one or the other of two general responses to the moral problem. Each response can be thought of as a 'code' prescribing 'correct' behavior and providing a . . . definition of a 'good cop'" (p. 3). There have been various "codes of ethics" for police officers that have been promulgated over the years. For example;

1937, Hugh H. Clegg, a former professor and J. Edgar Hoover's assistant director for training wrote and published in the FBI Law Enforcement Bulletin the FBI Pledge for Law Enforcement Officers.

1957, the International Association of Chiefs of Police (IACP) adopted a Law Enforcement Code of Ethics as the standard for ethical police conduct.

1979, the General Assembly of the United Nations, adopted a Code of Conduct for Law Enforcement Officials.

1989 the Executive Committee of the IACP replaced their 32-year-old Law Enforcement Code of Ethics with an entirely new code. In 1991, the IACP reinstated the 1957 version of the Law Enforcement code of Ethics with some minor revisions and additions. At the same time, the 1989 code was renamed the Police Code of Conduct.

The basic theme that ran through all of these codes of conduct was police integrity. In his keynote address to the National Symposium on Police Integrity in 1996, Vicchio provided an excellent overview of police integrity. Vicchio spoke about the

decline in public trust in the police, the concept of integrity, and presented a list of core virtues. These seven virtues are:

Prudence: Practical wisdom, the virtue of deliberation and discernment. The ability to unscramble apparent conflicts between virtues while deciding what action (or refraining from action) is best in a given situation.

Trust: This virtue is entailed by the three primary relationships of the police officer: the citizen-officer relationship, the officer-officer relationship, and the officer-supervisor relationship. Trust ought to engender loyalty and truthfulness in these three areas.

Effacement of self-interests: Given the “exploitability” of citizens, self-effacement is important. Without it, citizens can become a means to advance the police officer’s power, prestige, or a means for advancing goals of the department other than those to protect and serve.

Courage: As Aristotle suggests, this virtue is a golden mean between two extremes; cowardice and foolhardiness. There are many professions – surgery and police work, to name two – where the difference between courage and foolhardiness is extremely important.

Intellectual honesty: Acknowledging when one does not know something and being humble enough to admit ignorance is an important virtue in any professional context. The lack of this virtue in police work can be very dangerous.

Justice: We normally think of justice as giving the individual what he or she is due. But taking the virtue of justice in a police context sometimes requires the removal of justice’s blindfold and adjusting what is owed to a particular citizen, even when those needs do not fit the definition of what is strictly owed.

Responsibility: Again, Aristotle suggests that a person who exhibits responsibility is one who intends to do the right thing, has a clear understanding of what the right thing is, and is fully cognizant of other alternatives that might be taken. More importantly, a person of integrity is one who does not attempt to evade responsibility by finding excuses for poor performance or bad judgment. (1997, p. 15)

However, Winright argued that “simply possessing a clear set of ethical criteria concerning use of force will not necessarily produce police officers who will always

conform their behavior to those principles” (p. 52). Similarly, Delattre (1989) claimed, “Codes of ethics do not motivate people to behave well. . . . They assist only people who already want to do so.” (p. 33).

On a broader scope beyond these codes of ethics and officer principles, Sherman (1978a) believed “police departments are so closely linked to their environments that any reform . . . may ultimately hinge on a ‘reform’ of the police environment – the community itself” (p. 13); however, when Sherman (1980a) tried to quantitatively determine the causes of police behavior, he found only weak relationships between individual officer characteristics, situational, organizational, and community characteristics, and legal variables. The key component seems to be the actual interaction between the officer and the community.

It is this interaction that is not only an ethical concern, but also a concern because it is a potential source of police-citizen violence. People who directly serve the public and grant access to government by providing services are typically health workers, teachers, social workers, and police officers. Lipsky (1980) pointed out that:

The actions of most public service workers actually constitute the services “delivered” by government. Most citizens encounter government (if they encounter it at all) . . . through their teachers and their children’s teachers and through the policeman on the corner or in the patrol car. Public service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work are street-level bureaucrats. (p. 3)

Police–citizen encounters that are improperly handled may lead to violence and use of force by the police. Alpert and Dunham (1988) pointed out that “unfortunately, not all officers act appropriately in their attempt to control citizens verbally. Often, the verbal confrontation escalates too quickly and without provocation. A situation that

could be resolved easily, or certainly without force, can erupt into a violent one” (p. 154).

Muir (1977) and Riley (1973) provided detailed discussions on the issue of police being street-corner politicians and how this is a factor in whether police-citizen encounters are successful. Wilson (1978) found that even though the legal and organizational constraints that police work under are pretty similar throughout the country, police behavior differs from community to community based on the demands the city places on them, style of the police administration, and influence of local politics (p. 95).

Mastrofski, Snipes, and Supina (1996) claimed “much of policing consists of getting people to do things they might not otherwise do”. Since police are among the most visible officials seeking compliance, they conducted a study of police citizen encounters and statistically tested the effects on compliance of several potential influences. They found that having more officers present during the encounter does not necessarily help compliance because it may force the officer to react more harshly in front of their peers (pp. 269-270). Yet Adams (1999b) claimed officers “may use force more frequently when they are alone, because they feel more vulnerable or believe they can get away with it” (p. 12).

According to Lipsky (1970), “the study of the ways police interact with other citizens is of primary importance for anyone concerned with public policy and the just resolution of contemporary urban conflict” (p. 1). One reason to support this claim was found by Sigelman, Welch, Bledsoe, and Combs (1997), who conducted national and local opinion surveys during the highly publicized police beatings of Rodney King in

Los Angeles, and Malice Green in Detroit. They found that “both blacks and whites are sensitive to highly publicized incidents of police brutality” and these incidents tend to confirm “many African Americans’ belief in the seamlessness of racism in America” (p. 789-790).

The perception of racism and brutality is important because Uchida (1989) reported that “the National Advisory Commission on Civil Disorder . . . cited police actions . . . as contributing to the disorders. Direct police intervention had sparked the riots in Harlem, Watts, Newark, and Detroit. In Watts and Newark the riots were set off by routine traffic stops. In Detroit a police raid on an after-hours bar in the ghetto touched off the disorders there” (p. 27). The way the community perceives the police will not only affect how much they support the police, but also how they react in police-citizen encounters.

Reiss (1967) reported in a research study submitted to the President’s Commission on Law Enforcement and Administration of Justice that there is a high degree of ambivalence on the part of the public toward the police. However, most residents do not perceive the police as following any universal standard of justice. They see them as exercising their treatment in a manner that varies depending upon “who you are”. (pp. 40-41). “When respondents were asked to report the most serious thing they ever saw an officer do that they thought was wrong, 14 percent mentioned the undue use of force as the most serious thing” (p. 77). This 14 percent is out of the 30 percent that ever saw or heard about an officer doing something improper, 68 percent never saw or heard about any improper actions and 2 percent did not answer the question (p. 73).

Decker (1981) investigated the variables that contribute to the explanation of citizen attitude toward the police. “Of the four individual variables – race, age, socioeconomic status, and sex – only the first two were of clear importance” (p. 85). Decker also found that of contextual variables, neighborhood culture and negative or involuntary contacts with the police were of considerable importance in explaining negative attitudes toward the police (p. 85). Kerstetter (1995, 1996) found that the attitudes citizens have about the police are impacted by how fair the citizen complaint process is perceived to be. The many variables that influence citizen attitudes can sometimes be changed, and other times, such as race, ethnicity, etc., cannot be changed.

Flanagan and Vaughn (1995, 1996) examined the public view of law enforcement and found that citizens perceive the police as friend and enemy, much like the police perception of the citizenry. “The police are loved and admired but, at the same time, hated and feared. This relationship places the police in a difficult situation” (1996, p. 113). In a similar study conducted by Walker (1997), focus groups confirmed the powerful effect that race, ethnicity, and age have on citizen’s perceptions of the police. Walker also found that the category “racial and ethnic minorities,” which is used in most research, is inappropriate because it masks important distinctions between minority groups (p. 221).

Johnson (1973) approached the problem of police-citizen encounters by suggesting that the conception of the police officer’s role is of major importance in terms of defining the nature of the interaction. Johnson summarized “the problems of conflict that are manifested by many of the police-citizen interactions suggest that, once again, structural and organizational deficiencies are the real forum to address concerning police

community relations” (p. 216). Skolnick and Bayley (1986), in their study of the urban crime problem, found that positive police-citizen interactions are the key to implementing new ideas to overcome these deficiencies and for re-gaining public confidence in the police. Thus, police-citizen interactions must be handled properly for many important reasons, and officers must be provided the guidance necessary to be able to handle these interactions properly.

In an earlier study, Skolnick (1975) concentrated on “analyzing certain outstanding elements in the police milieu, danger, authority, and efficiency, as they combine to generate distinctive cognitive and behavioral responses in police: a ‘working personality’. . . . distinctive cognitive tendencies in police as an occupational grouping” (p. 42). Skolnick believed this personality is developed with the principal variables danger and authority and the constant pressure to be efficient. Along this same line, Neiderhoffer (1969) believed that “authoritarianism develops after appointment as a result of socialization and experience in the police system” (p. 140). Chervigny (1969) also did not believe police work attracted sadistic or authoritarian people; rather, the police do what they are allowed to do and encouraged to do by those in administrative positions.

Chervigny (1969) found the characteristic police reactions are a logical product of the police role. In his investigation into the patterns of abuse within the New York City Police Department, he found silent encouragement by American society for the improper actions of the police. He concluded that the difficulty lies in the conflict between what society pretends it wants and what it really wants. So long as society desires oppression, the police will be oppressors. So long as society denies that it desires

oppression, the police will lie about it (pp. 279 – 280). The police role in a democratic society must be clarified and ethical standards of conduct must be maintained, so that the police and the community can interact in a positive manner and avoid the problems associated with the improper conduct of the police.

One possibility in reducing the tension of police-community interactions is by providing good service to all citizens. Mastrofski (1999) examined the area of police-citizen encounters and tried to determine what “policing for people is, and could be, in terms of service to people” (p. 2). Mastrofski identified six characteristics that Americans associate with good service from their police. These six characteristics are: Attentiveness, Reliability, Responsiveness, Competence, Manners, and Fairness. Unfortunately, Mastrofski found that when interacting with citizens who had been traumatized by some event, the police comforted the citizen in less than one third of the interactions. In addition, Bayley (1985) examined police-citizen encounters in various countries and found that service demand is increasing among the most disadvantaged groups who are considered to be the most disposed to criminal behavior, and the police are caught in the middle of this conflict (pp. 154-155). Failing to provide good service could not only cause a negative attitude toward the police but could also lead to violence.

Since part of the police function is to intervene into situations that are fraught with tension and uncertainty, it is important that these situations be handled in a manner that does not lead to violence between the citizen and the police officer and result in the use of force. Similar thoughts on understanding violence in citizen encounters came from other researchers of police behavior (Fyfe, 1989, 1995, 1996; Kelling & Kliesmet, 1995, 1996; Muir, 1980; Toch, 1980). Muir thought officers should learn to redefine the

crowd's definition of honorable conduct. Others believed that by including the officers that have been involved in these encounters (Toch) and the police unions (Kelling & Kliesmet) in the research, training could be developed to reduce the use of excessive force in police-citizen encounters (Fyfe).

Bayley and Garofalo (1989) conducted a study on the dynamics of potentially violent encounters between police officers and the public. Using the systematic observation method, they compared the tactics and resulting outcomes found in the encounters handled by officers believed to be skilled in these situations with other officers. They found that “(1) violence, even verbal aggression, is relatively rare in police work; (2) most conflict is dampened by the arrival of the police leaving little scope for the use of defusing tactics; and (3) the behavior of officers judged to be skilled in minimizing violence is measurably different from the behavior of ‘average’ patrol officers” (p. 1). Bayley and Garofalo concluded that one of the policy implications of their research is that officers need to be trained to avoid obvious provocations. White (1974) believed that stressful conditions could provoke almost any police officer to use excessive force, and examined methods of controlling police behavior; while Chervigny (1969) believed the basis of nearly all street abuses is defiance of authority real or imagined.

The conclusions of these studies are in line with instructions officially published in 1829 for members of England's new police force, the London Metropolitan Police. According to the British historian Charles Reith, the instructions to constables contained the following statement, “There is no qualification more indispensable to a Police Officer than a perfect command of temper, never suffering himself to be moved in the slightest

degree, by any language or threats that may be used” (as cited in Skolnick, 1973, p. 63). Avoiding provocation and minimizing violence has been a goal of the police for a very long time but it does not seem to work in every situation.

Unfortunately in America today, too many of these police-citizen encounters do erupt into violence and the use of force by police. Not only does this result in negative perceptions of the police, but also in injury or death to one or more of the participants in the encounter, or sometimes even to innocent third parties. In fact, one group, the National Association for the Advancement of Colored People (1995), claimed that “excessive force has become a standard part of the arrest procedure,” (p. 29) and the use of force by “police officers is not unusual or aberrational” (p. 36).

Some researchers (Carter, 1985, 1991; R. Friedrich, 1980) believed that the study of use of force by police officers has both theoretical and practical importance. Friedrich claimed that the results of his study on police-citizen encounters shows that:

more than anything else, policeman – like most of the rest of us – tend to respond in kind to the actions of the people they meet. If they can learn that their position imposes on them special responsibilities to respond as judiciously as possible, their use of force may become much less of a problem. (p. 97)

Friedrich’s suggestion is similar to the instructions that had been given to London’s Metropolitan Police 151 years earlier, and may be as valuable for controlling police use of force today as it was in 1980 and 1829.

Sykes and Brent (1983) presented a comprehensive technical analysis of police-citizen encounters. They believed the police officer’s primary task is talking, and spent considerable effort analyzing how police officers carry out this task while getting their work done. By examining the patterns of decision making and using mathematical

models of symbolic interaction and directed graphs of the transition probabilities for each police-citizen encounter, they were able to explore the implications of these models through simulation. They summarized their contributions to social psychology and to the study of police-citizen interaction as follows:

For the first time we have gathered data on, analyzed, and described the process of utterance-by-utterance interaction between police officers and civilians. We have estimated the actual probabilities of certain kinds of acts and responses to these acts by police, suspects, and complainants. . . .

We have shown that a change by only one actor in an interaction can make the other actor seem like a different person. We have proven the paradox that habitual modes of response which usually lead to cooperation, and which make the actor appear cooperative under the one set of conditions. Differences in the probability distribution of acts from one civilian to another may account for differences in officer behavior without even considering any variables external to the interaction itself.

We have described how officers take charge, supervise, regulate, and solve problems in encounters by talking, and how civilians aid in this task. We have shown that discretion is exercised at many phases of the encounter, not just in deciding outcomes.

We have shown that officers do not always have to control interaction for cooperation to develop between them and civilians. . . .

We have shown that officers do dominate interaction by initiating encounters, regulating when new speakers enter the conversation, interrupting civilians talking to each other, often defining the cognitive domain, using controlling statements when necessary, and influencing the last social act of the encounter. . . .

We have shown that officers and civilians in the same encounter experience quite different situations.

We have shown that the dispatcher's definition of the situation has little effect on initial interaction.

We have shown that proactive and reactive encounters have a different phase structure in terms of problem solving when sets of utterances are analyzed, and that officers use somewhat different decision patterns in proactive and reactive encounters.

We have shown that police probably are helpful in interrupting and preventing civilian-civilian confrontation.

We have shown that interactional as well as structural variables have an effect on seriousness of outcome.

We have developed methods for quickly analyzing data using both matrix algebra and log-linear models. (pp. 250-252)

Though the information provided by Sykes and Brent was complicated and hard to understand, they believed that investigators would get used to reading and interpreting this type of information once they have used these techniques more frequently. They claimed it will take some time “to get used to thinking about ‘Did what I said, before you said what you said, affect both what you said and what I am saying now?’ in mathematical terms” (p.252).

Binder and Scharf (1980) studied the violent police-citizen encounter and also considered it a “developmental process in which successive decisions and behaviors by either police or citizen, or both, make the violent outcome more or less likely” (p. 111). They believed that there was a dual responsibility of police officers and citizens in these encounters, that police decision making should begin well prior to the decision to use force, and that it was important for administrators to understand “all components in the transaction faced by the officer in the process of assessing performance and recommending administrative change. Too often after-the-fact evaluations and, perhaps, policy decisions are based upon superficial aspects of the encounter or upon data available only after the decision to use physical force has been made” (p. 119).

Police-citizen encounters are multidimensional in the sense that all those involved contribute in some way to its development and outcome. “Understanding the transactional nature of police use of force is important because it emphasizes the role of police actions in increasing the chances that force will be used” (Adams, 1999b, p. 12). The police-citizen encounter is a dynamic event that may be resolved peacefully or may explode into violence depending on the actions taken by the citizen or the police officer. The methods used to handle the encounter are important for the officer, the department,

and the community because of the negative perceptions that the public develops when the encounters are not handled properly. As Goldsmith (1996) observed, “trust . . . is ultimately a practical, intersubjective accomplishment. In other words, it depends upon the quality of interactions at the ground level” (p. 39).

Even though there is a perception by many citizens that the police are continually using violence and excessive force, research data consistently indicate that only a small percentage of police-citizen interactions actually involve the use of force. The Bureau of Justice Statistics’ (BJS) 1996 pretest of its Police Public Contact Survey resulted in preliminary estimates that nearly 45 million people had face-to-face contact with police over a 12-month period and that only approximately 1 percent, or about 500,000 of these people were subjected to use of force or threat of force (p. 12).

Many researchers have also found that, compared to the total number of police-citizen contacts, police shootings of civilians are extremely infrequent events (Alpert, 1989; Bayley & Garofalo, 1989; Croft, 1986; Fyfe, 1982, 1988; Garner & Maxwell, 1999; Garner, Buchanan, Schade & Hepburn, 1996; Geller & Karales, 1981, 1982, 1985; Sherman 1980/1991). This is not to say, however, that only a few citizens are killed by police each year. Gellar (1985c) estimated that police use of deadly force accounted for the deaths of between 368 – 818 citizens annually between 1949 and 1980 (p. 200). In 1986 Geller estimated 600 people were killed each year by police (as cited in Loftus, Porter, Suffoletta, & Tomse, 1989, p. 140). Fyfe (1988) used statistics gathered in a study by Matulia to estimate that the number of people killed by the police in the United States annually has exceeded 1,000 during recent years (p. 177).

It is important to study police shootings because as Van Maanen (1980) pointed out, “police kill people. It is not a part of their job descriptions, a part of their routine procedures, a part of their administratively urged activities, or a part of their socially esteemed and appreciated tasks.” However, when they do kill, “it is usually without grand logic or preformulated strategy, but as an individualized response to an immediate, particular, and always peculiar situation” (p. 145). “Shootings are a part of the routine unpredictability of police work. They will occur, but the practical circumstances surrounding their occurrence will vary and therefore so will their meaning” (p. 156). This routine unpredictability shows that greater effort must be applied to gathering information on every shooting and every use-of-force situation so officers can better prepare for these unpredictable situations.

Bittner established the need for police to use various levels of force when required. Deadly force is the highest level of force used by the police and results in the most severe injuries to citizens. When studying the use of deadly force, the majority of empirical studies of police shootings have collected data only on the fatal shootings of civilians, although researchers have more recently begun to recognize the importance of examining all incidents in which shots were fired by or at the police, including shots that missed altogether, hit an unintended target, or merely wounded the suspect or officer (Gellar, 1985; Scharf & Binder, 1983).

Most deadly force studies concentrated on shootings in a single city (Alpert, 1989; Fyfe, 1980b, 1982; Geller & Karales, 1981, 1982, 1985; Meyer, 1980; Margarita, 1980), and some studies compared several cities (Garner & Maxwell, 1999; Milton, Halleck, Lardner, & Albrecht, 1985). One study, (Massey, 1984), examined one county

(Dade County, FL), and another study (Horvath, 1987), compared the characteristics across a sample of police agencies in a single state (Michigan). “A few studies compare states (Kania & Mackey 1977; Lester 1978a) or focus on national data (Kobler 1975a, 1975b; Robin 1963; Sherman 1977; Takagi 1974; Vaughn & Kappeler 1986)” (as cited in Geller and Scott, 1991, p. 447), and one study examined the use of deadly force by off-duty police officers (Fyfe, 1980a).

In 1977 Milton, Halleck, Lardner, and Abrecht (1985) conducted a study of shooting incidents in seven cities for the Police Foundation. They examined the cities of Birmingham, Alabama; Detroit, Michigan; Indianapolis, Indiana; Kansas City, Missouri; Oakland, California; Portland, Oregon; and Washington, D.C. These cities were chosen for their high rate of shooting of civilians. The researchers examined department policies on shootings, analyzed available reports, conducted extensive interviews, and rode in patrol cars as observers in each of the cities. One of the key findings of Milton et. al was that all seven of the departments had adopted formal policies and procedures on police use of firearms but they varied widely among departments (p. 96-97). They felt that all police departments should adopt formal written firearms policies using model policies as a guide (p. 105).

Also in 1977, the Chicago Police Department opened its files concerning police-involved shootings to inspection by a public interest group, the Chicago Law Enforcement Study Group. This was the first study in which a major city police department voluntarily opened its confidential files on shootings of citizens for further inquiry on the nature and extent of proper and improper use of deadly force (Geller &

Karales, 1981, 1982, 1985). [The information from this study is found throughout the literature, and referred to in this paper as well]

Reiss (1971), reported observations he made while riding with police officers in Boston, Chicago, and Washington, DC. He recorded the circumstances of encounters between citizens and police. He noted, “Precise estimates of the extent to which the police engage in unwarranted conduct toward citizens is lacking” (p. 141). Reiss was not attempting to determine the incidence of use of force by police officers, but his observations led him to conclude that police use of force is rare. He also found that “there is evidence that many situations that provoke police to use undue force closely resemble those that give rise to assaults by private citizens. In both cases, the force is exerted in quick anger against real or imagined aggression” (p. 149-150).

Several researchers have called for expanded databases at both the local and national level on all use of force not just deadly force (Fyfe, 1988; Geller, 1985b; Geller and Scott, 1992; Geller & Toch, 1995, 1996; Moore, 1998; Sherman & Langworthy, 1979). Even though the FBI already collects voluntarily submitted data on deaths from police actions for its Supplementary Homicide Reports, several studies have noted problems with this limited data collection effort, especially the inconsistencies between numbers reported to the FBI and numbers reported in other data collection efforts (Binder & Fridell, 1984; Fyfe, 1988; Sherman & Langworthy, 1979).

In addition, the National Center for Health Statistics (NHS) compiles coroner’s data and other health information, using an international classification of “death by legal intervention – police” to collect data on persons killed by the police. Several problems with this data have also been found, including attributing killings to the department

where a victim lived instead of where he was killed and inconsistent reporting leading to estimates of underreporting to be as high as 50 percent at the state and national level, and by as much as 75 percent in certain cities (Geller, 1982, pp. 154-155, 1985c, pp. 197-200; Sherman & Langworthy, 1979, 548-555).

Researchers have been reviewing the available data and studying police shootings for several years now, trying to determine the causes behind the use of deadly force. One of the areas being examined is the relationship between violent crime and police use of deadly force (Brown & Langan, 2001; Fyfe, 1980b; MacDonald, Kaminski, Alpert, & Tennenbaum, 2001; Massey, 1984; Sorensen, Marquart, & Brock, 1993/2001). In reviewing shootings by police, Fyfe found that a relationship does exist, and MacDonald et. al confirmed a temporal relationship between predatory crime and police use of deadly force. However, as Sorensen et. al cautioned, “failure to consider the level of economic inequality will result in findings of a strong relationship between violent crime rate and the rate of felon killing. The violent crime rate, however, acts at best as a mediator between other social forces and the rate of felon killing by police officers” (p. 274).

After reviewing the research available at the time, Geller and Karales (1981) noted:

A pattern seems to emerge which, stated without qualification, supports the following broad assertion:

The most common shooting of a civilian by a police officer in urban America is one in which an on-duty, uniformed, white officer shoots an armed, Black male between the ages of 17 and 30 at night in a public location, in connection with an armed robbery. Typically, the shooting is subsequently deemed justifiable by the police department following an internal investigation. Even if the officer is criminally prosecuted, a jury is unlikely to convict. (p. 1818)

However, despite this assertion, many of the researchers have found that *race is not the leading factor in determining whom the police shoot* (Blumberg, 1985, 1989, 1991; Brown, 1984; R. Friedrich, 1980; Fyfe, 1981a, 1981b, 1982, 1988; Geller, 1982, 1985c; Geller & Karales, 1981; Geller & Scott, 1991, 1992; Massey, 1984). In addition, studies show that black police officers are more likely to be involved in both on-duty and off-duty shootings than white officers (Fyfe, 1981b, 1988; Geller, 1982, Geller & Karales, 1981, 1982; see also Police Foundation, 1985). These studies measured the rate of shootings by black police officers in proportion to the rate of shootings by white police officers and do not mean that black officers are involved in more shootings than white officers but that they are involved in shootings at a higher rate than white officers.

These findings supported Reiss' (1970) claim that "the rate of excessive force for all white citizens in encounters with the police is twice that for Negro citizens" (p. 73), and "policemen, both Negro and white, are most likely to exercise force against their own race" (p. 75). This was also found in a study measuring the degree to which race influences police decisions. Smith, Visher, and Davidson (1984), stated that race was not the "axis around which such" decisions revolve (p. 249).

Twenty years ago Fyfe predicted future research would reveal:

Black shooting opponent disproportion is neither a consequence of "overreaction" by individual police officers nor some racially varying predisposition toward violent crime. Conversely, it would point up . . . blacks are the mode among . . . police shooting opponents because they are also the mode among the lower socio-economic groups which most frequently participate in the type of activity likely to precipitate extreme police-citizen violence. (cited in Geller, 1982, p. 164)

Fyfe was a proponent of further research on police use of deadly force because it had only begun in the 1960s. Fyfe (1988) observed that “20 years ago, those who had studied deadly force could have driven to dinner in the back seat of a compact car” (p. 166), and “in his *Police Administration*, almost certainly the most widely read police text of the time, O. W. Wilson said nothing about police deadly force or firearms” (p. 167).

Since that time, research on police use of deadly force, as well as non-deadly force, has continued to be carried out and a growing body of knowledge is being developed. Previously, the emphasis has been on reducing police use of deadly force, but according to Scrivner (1994), “The trend for psychologists, criminal justice researchers, and practitioners to address police shootings and killings with comparatively more vigor than they address the use of nonlethal violence appears to be changing” (p. 25). (See Adams, 1995, Table 1, pp. 92-95, for a listing of research findings on police use of force chronologically ordered by data period).

One of the earliest observational studies in this area (Reiss, 1968) concluded that use of force occurred infrequently. More recent studies have supported Reiss’ findings. Bayley and Garafalo (1989) observed officer tactics, and reported that use of force, including verbal commands, occurred on few occasions. Their study identified three decision points in violent encounters: the initial contact, the processing, and the exit stages (p. 12-16). Klinger’s (1995) observational study found that force was rarely used, most confrontations were handled with verbal commands alone, and when force was required, officers had a strong tendency to use the lowest levels of force available.

The need for improved data collection systems has been a consistent theme throughout the research. According to McEwen (1996), “the basic problem is the lack of

routine, national systems for collecting data on incidents in which police use force during the normal course of duty and on the extent of excessive force” (p. 2). The lack of reliable data on the extent of excessive force received the attention of the United States Congress when they were enacting the Violent Crime Control and Law Enforcement Act of 1994. The Act requires the Attorney General to collect data on excessive force by police and publish an annual report from the data. Public Law 103-322, Title XXI, Subtitle D, § 210402, was enacted on September 13, 1994 and has now been codified as 42 USC § 14142 (2001):

Data on use of excessive force.

- (a) The Attorney General shall, through appropriate means, acquire data about the use of excessive force by law enforcement officers.
- (b) Data acquired under this section shall be used only for research or statistical purposes and may not contain any information that may reveal the identity of the victim or any law enforcement officer.
- (c) The Attorney General shall publish an annual summary of the data acquired under this section.

There currently are several Federally funded efforts by the Bureau of Justice Statistics (BJS) and the National Institute of Justice (NIJ) underway to collect national data on police use of force in a routine matter.

The process began in May 1995, when the National Institute of Justice and the Bureau of Justice Statistics sponsored a Police Use of Force Workshop to discuss provisions of § 14142. The workshop included police chiefs, lawyers, researchers, police union representatives, police trainers, and civilian review board representatives who met to discuss the obstacles to acquiring data on excessive force and debate the most appropriate collection procedures (McEwen, 1996, p. 5). McEwen summarized:

The Police Use of Force Workshop brought out several important points. . . . the first is that no single data collection mechanism can provide a full picture of police use of force. Several methodologies (use of court

records, citizen complaints to police, use-of-force reports by officers, surveys of citizens, etc.) were discussed at the workshop. Each was viewed as having advantages and disadvantages.

A related point is that the lack of accepted definitions of use of force and excessive force will remain a fact of life even after a fuller understanding of these incidents is developed. As a consequence, it is important that any data collection effort provide enough detail to examine these issues under different definitions.

Finally, the aim of progressive police departments is to reduce the amount of force needed to resolve conflicts, not just to identify and deal with excessive force. Workshop participants therefore believed that data collection should be expanded beyond the section's requirements. (p. 8)

It is important to note that what citizens often refer to as police brutality is quite different from the concept of excessive force. Reiss (1970) wrote, "what citizens mean by police brutality covers the full range of police practices" (p. 58). These practices include:

the use of profane and abusive language,
commands to move on or get home,
stopping and questioning people on the street or searching them and their cars,
threats to use force if not obeyed,
prodding with a nightstick or approaching with a pistol, and
the actual use of force or violence itself. (p. 59)

One of the problems is that researchers do not agree on how to measure and obtain data on these important topics. Adams (1995, 1996, 1999a) has commented on the difficulty in defining use of force, use of excessive force, and excessive use of force, and the problems it poses for researchers. He believed that use of excessive force means that police applied too much force in a given incident, while excessive use of force means that police apply force legally in too many incidents. Kappler (2001) claimed, "excessive force is any force that is unreasonable or unnecessary to accomplish a legal objective" (p.620), while Klockars defined excessive force as " the use of any more force than a

highly skilled police officer should find necessary to use in a particular situation” (1995, pp. 17-18, 1996, p. 12).

Fyfe (1995) distinguished between two types of excessive force; extralegal violence and unnecessary force:

Extralegal violence is “the willful and wrongful use of force by officers who knowingly exceed the bounds of their office.”

Unnecessary force, by contrast, is the result of ineptitude or carelessness, and “occurs when well-meaning officers prove incapable of dealing with the situations they encounter without needless or too hasty resort to force.” (p. 163)

Geller and Toch (1995, 1996) defined the aggregate problem of excessive force as a series of sub-problems, some of which overlap and sometimes appear together. These sub-problems include:

- any force when none is needed;
- more force than is needed;
- any force or a level of force continuing after the necessity for it has ended;
- knowingly wrongful uses of force;
- well-intentioned mistakes that result in undesired uses of force;
- departmental constraints that needlessly put officers in the position of using more force – and/or using it more often – than otherwise would occur (e.g., problems with training, supervision, deployment, assignment practices, equipment, procedures, and policies precluding use of certain tactics or tools); and
- frequent use of force by particular officers, particular units or departments, even if each instance seems justifiable. (pp. 292-293)

The definition and collection of data on use of force is not only important for researchers but administrators as well. McEwen (1996) argued “the incidence of excessive use of force should be important to police departments because it may serve as an indicator of weak policies on use of force; weak enforcement of policies; inadequate training, supervision, or equipment; or potentially violent police officers” (p. 47). Geller

and Toch (1996) added that even “justifiable force may be seen as illegitimate by some in the community” (p. 293), and the Independent Commission on the Los Angeles Police Department (Christopher Commission) concluded that officers who use force at an above average rate might tend eventually to use excessive force. That is, excessive use of force may lead to the use of excessive force (pp. 31-48).

As mentioned, efforts are underway to try and gather more reliable data at both the national and local levels so that a more complete understanding of police use of force can develop. Two recently completed studies illustrate different approaches that can be used to collect data on police use of force. The first one examined national data (Pate & Fridell, 1995), and the second examined local data (Garner, Schade, Hepburn, & Buchanan 1995; Garner, Buchanan, Schade, & Hepburn, 1996).

To obtain a national picture on police use of force, Pate and Fridell (1995) selected a representative sample of 1,697 law enforcement agencies from the total universe of 15,801 agencies in the United States. This study asked about a wide range of degrees of force, from firm grips to firearms. The 1,111 completed surveys were placed into a computer-readable format for analysis, and the results were statistically rated to show reported incidents of police use of force per 1,000 sworn officers. They found less serious types, such as handcuffs and bodily force, occur more frequently than more serious types of force, such as vehicle ramming and shooting of citizens. The Pate and Fridell study provided a one-year snapshot of police use of force in 1991.

To measure the extent and types of force applied by and against police officers in the Phoenix Police Department, Garner et. al (1995, 1996) collected data during two weeks in June 1994 on 1,585 adult custody arrests. This result was 85% of the 1,826

adult custody arrests for the two-week period, and did not include citation and warrant arrests. Officers completed a two-page form for each adult arrested and taken into custody during the two-week period. The form included sections for recording types of force used, injuries to citizens and to officers, and medical attention given and received.

The results show officers:

- Used threats or shouts less than 4 percent of the time.

- Pursued a fleeing suspect 7 percent of the time.

- Placed cuffs or restraints on 77 percent of the suspects.

- Used a weaponless tactic (holding, hitting, etc.) in 17 percent of the arrests.

- Threatened to, but did not, use a weapon 3.7 percent of the time.

- Used a weapon in 2 percent of the arrests. (1996, p. 5)

Officers also reported that the weapon most frequently used by them against a suspect was a flashlight (12 arrests). This study also showed that force was rarely used by either police officers or suspects, and when some type of force was used, it typically was at the lower end of the study's measures (1996, p. 5).

Garner et. al (1996) concluded that the "results did not support the notion that the race of officers or suspects directly or indirectly affects the amount of force used in adult custody arrests. The popular focus on racial factors in use of force seems to be unsupported by this study and other research evidence" (p. 10). They did find that the single best predictor of police use of force is whether the suspect used force. Other predictors are whether the suspect is involved with a gang, impaired by alcohol, the suspect is known to be resistive, assaultive, or armed with a weapon, both the suspect and police officer are male, and the offense suspected is a violent one (pp. 6-9). In a similar study, Worden (1995, 1996) also found there were several variables that have statistically significant effects on the use of force. He reported, "force is more likely in

incidents that involve violent crimes and against suspects who are male, black, drunk, antagonistic, or physically resistant to the police. Physical resistance has by far the greatest effect on the use of force” (1996, p. 37)

There are currently two national projects ongoing to continue this data gathering process. The first is being conducted by the Bureau of Justice Statistics (BJS) using a police-public contact supplement to the National Crime Victimization Survey (NCVS), which is the second largest ongoing household survey sponsored by the Federal Government (Greenfield, Langan, & Smith, 1997, 1999). The NCVS is based on interviews conducted with a nationally representative sample of U.S. households and results in approximately 200,000 interviews annually. The results of the 1996 pretest, which was updated in 1998, were mentioned earlier in this paper.

The second is the International Association of Chiefs of Police (IACP) National Police Use of Force Database Project, designed to collect use-of-force information from law enforcement agencies across the United States. The project is a voluntary, secure, comprehensive, computer-automated police use-of-force data collection and reporting system for defining and managing use-of-force information issues. Unlike other attempts to develop information on the patterns and practices of police use of force, the IACP Use of Force Project is designed specifically to establish a nationally representative statistical baseline of the various levels of police force, force-related complaints, and complaint outcomes throughout the United States. In order to deal with the problems associated with the many different use-of-force definitions, the IACP has defined police use of force “as the amount of force required by police to compel compliance by an unwilling suspect” (Henriquez, 1999, pp. 19-20).

An area in which the research is growing is in measuring the relationship between police use of force and subject resistance. Alpert and Dunham (1999) examined the Eugene and Springfield, Oregon Police Departments, and Miami-Dade Police Department. Garner and Maxwell (1999) examined the police departments of Charlotte-Mecklenburg (NC), Colorado Springs (CO), Dallas (TX), St. Petersburg (FL), San Diego (CA) and the San Diego County (CA) Sheriff's Department. Kavanagh (1997) examined the Port Authority of New York and New Jersey Public Safety Department, and R. Murphy (1996) examined the Kansas City, Kansas Police Department. Ross (1996, 1999) studied seventeen police departments chosen from a random sample of twenty-five departments across the nation using a force continuum designed by B. K. Siddle. All of these studies examined the dynamics of the police-citizen encounter and the role of subject resistance in police use of force. A common finding was that a use-of-force continuum and use-of-force policy could aid the police officer in use-of-force decision making during these confrontations.

The information presented thus far has led us to the point where we now understand that the police-citizen encounter is a dynamic situation that has the potential for violence. It is clear that the manner in which the police officer handles the encounter may have lasting repercussions for police-community relations, result in injury or death to either the citizen or the police officer, and lead to civil litigation against the police. When discussing the methods for controlling police use of force, most researchers are not as extreme as Manning's (1980) call for the disarming of police and strict gun control. Rather, it is in policy and training where improvement is most often advocated.

What some have referred to as perhaps the most important policy contributions of two decades of research on use of force comes from a series of studies on the control of police use of deadly force. Fyfe (1979, 1980a, 1980b, 1981a, 1981b, 1982, 1988) discovered a significant impact on the nature and frequency of police-citizen violence from strict departmental guidelines and shooting review procedures. Other researchers have also reported on restrictive shooting policies as methods of controlling and reducing police shooting incidents (Binder & Fridell, 1984; Geller & Karales, 1981; Geller & Scott, 1991, 1992; Milton et. al, 1985; Scharf & Binder, 1983; Sherman, 1980b; Tennenbaum, 1994, Waegel, 1984/2001; see also Police Foundation, 1985).

The debate over the role of administrative policy goes back to the classic exchange between Friedrich (1940/1978) and Finer (1941/1978), but more recently, many researchers have made the need for policies on use of force clear (Alpert, 1989; Binder & Scharf, 1980; Blumberg, 1989; Carter, 1991; Donnelly, 1985; Fairchild, 1979; Geller, 1985a; Geller & Scott, 1991, 1992; Goldstein, 1985; Kelling, 1999; Klockars, 1995, 1996; Mastrofski, 1999; McCreehy, 1985; G. Meyer, 1999; Milton et. al, 1985; Mullins, 1999; Olson, 1998; Pinizzotto, Davis, & Miller, 1998; President's Commission on Law Enforcement and Administration of Justice, 1971; Reiss, 1980; Scharf & Binder, 1983; United States Department of Justice, 1999, 2001; White, 1974; O. Wilson & McLaren, 1972).

In addition to policies on use of force, there has also been a call for training that prepares police officers to handle the police-citizen encounter properly, and avoid violence if possible (Alpert, 1989, Alpert & Dunham, 1988, 1999; Armstrong & Nibler, 1999; Bayley & Garofalo, 1985; Blumberg, 1989; Brave, M. A. & Edblad, J. D., 1996;

M. Brown, 1984; Carter, 1991; Fyfe, 1989, 1995, 1996; Geller, 1985a; Geller & Scott, 1991, 1992; Goldstein, 1985; Independent Commission on the Los Angeles Police Department, 1991; Mastrofski, 1999; G. Meyer, 1999; Olson, 1998; Parham, 1998; Pinizzotto et. al, 1998; Ross & McLaughlin, 1993; United States Department of Justice, 2001; Weisburd & Greenspan, 2000; Weissberg, 1999; White, 1974). Research has shown that policies and training should be based on what is referred to as a use-of-force continuum (Alpert & Dunham, 1988, 1999; Alpert & Smith, 1994; Garner, Buchanan, et. al, 1996; Garner & Maxwell, 1999; Garner, Schade, et. al, 1995; Geller & Scott, 1992, Moore, 1998; Ross & McLaughlin, 1993). Some studies are even examining the role police pursuits play in use of force, where the pursuit falls on the force continuum, and how restrictive policies and training in this area can impact police use of force as well (Alpert & Anderson, 1986/2001; Alpert, Kenney, & Dunham, 1997/2001).

The literature is consistent in concluding that policy and training are key components of providing guidance to officers in use of force. As a matter of public policy, it is important to provide these guidelines so that police in a democratic society are accountable to the people they serve. In order for administrators to ensure that officers are provided with guidance and held accountable for improper actions, they must be given policy and training that is consistent with the laws that society has enacted. We turn now to an examination of the legal system so that we can understand society's laws.

Constitutional and Legal Issues

No area of the law can be studied without first looking at the Constitution of the United States of America and the constitution of the particular state in which the person resides, which in this research is the constitution of the State of Michigan. The constitutions provide a framework for everything that is done and legally sanctioned in our society. To understand the authority of the police officer and the study of criminal and civil procedures, one must understand the system of federalism as the form of government in America, and how the constitutions affect everyday society.

By 1779 all thirteen states had adopted their own constitutions. The history of our United States Constitution began in early 1787, when there was a call to revise the articles of confederation, which the states had enacted in 1781. On September 17, 1787, thirty-nine delegates signed the United States Constitution, which contains seven articles. The first article creates the legislative branch of government, the second creates the executive branch of government, and the third creates the judicial branch of government. The other four articles provide foundations necessary for our federal form of government. The three main provisions of the Federal Constitution are: to establish the framework of government; delegate and assigns power to the individual branches of government; and act as a restraint on the power of government officials in order to protect individual rights and liberties, (Steffel, 1995, pp. 1-3).

There was a strong objection by many people to the original Constitution because there was no safeguarding of individual rights, and this was the reason several delegates did not sign the document (Maier, 1998). The situation was remedied four years later when 10 amendments were ratified by $\frac{3}{4}$ of the states and went into effect December 15,

1791. These amendments, which came to be called the Bill of Rights, ensure certain freedoms, guarantees, and immunities, and are the foundation of free society.

At the state level, the current constitution of Michigan was adopted in 1961 by the constitutional convention and approved by the voters in 1963. Its provisions closely parallel the Federal Constitution. The Michigan Constitution is comprised of twelve articles. Article four concerns the legislative branch, article five concerns the executive branch, and article six concerns the judicial branch of state government. Other articles concern elections, central government, local government, education, taxation, public offices, and amendment revision.

The Bill of Rights is also important in the Michigan Constitution and is similar to the Federal Bill of Rights. Article one provides for equal protection, right to assembly, freedom of religion, freedom of speech, freedom from unreasonable searches, unreasonable arrest, a right to a speedy trial, and trial by jury. An examination of the courts in our legal system is necessary at this point so that we will understand both their function and the actions they take.

The key to our understanding of the legal system leads us back to article III of the U.S. Constitution, which provided for the separate judiciary branch of government. The important role the courts play in the control of police use of force lies in their power of judicial review; which is to declare actions of the President, Congress, or any other government agency at any level to be invalid or unconstitutional. It was almost as soon as the Supreme Court went into operation that it began to lay the foundation for judicial review through a series of three cases decided in the 1790s.

The first case was *Ware v. Hylton* (1796). On the 20th of October, 1777, the legislature of the commonwealth of Virginia passed a law to sequester British property. An action was brought before the Court on a debt due prior to the Revolution from an American to a British subject. Future Supreme Court Justice John Marshall argued the case in favor of the Virginia law, but the Court ruled against the law and found that the Treaty of Peace with Britain overrode conflicting provisions of state law. Justice Chase wrote, “A treaty cannot be the supreme law of the land . . . if any act of a State Legislature can stand in its way. . . . It is the declared will of the people of the United States that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual State” (*Ware*, pp. 236-237).

Ware v. Hylton asserted review power over a state law. A similar power was exercised in *Calder v. Bull*, (1798), dealing with a Connecticut law. The opinion delivered in this case left no doubt of the Court’s power to strike down the state law if it had been found to violate the Constitution. Justice Chase declared, “I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control. . . .An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority” (*Calder*, p. 388).

In *Hylton v. United States* (1796), it was argued that a fixed federal tax on all carriages used for conveyance of persons was a direct tax and hence invalid, because it was not apportioned among the states according to population. The Court held that the tax at issue was not a direct tax within the meaning of article I, section 9 (*Hylton*, pp. 172-173). More important than the ruling in *Hylton* is the fact that the case was the first

in which the Supreme Court reviewed an act of Congress. The fact the Court even considered the claim that the federal statute was unconstitutional and void indicates that they believed the Court did possess the power of review. This was an important step on the way to the Court's landmark decision in *Marbury v. Madison* (1803), when Chief Justice John Marshall declared the Supreme Court had the power of judicial review.

The *Marbury* case grew out of the election of 1800, when President John Adams was defeated for re-election by Thomas Jefferson who was to take the oath of office on March 4, 1801. On March 2, 1801, President Adams appointed several Justices of the Peace for the District of Columbia in accordance with an act of Congress passed on February 27, 1801 (*Marbury*, p. 154). President Adams signed the Commissions and the Great Seal of the United States was placed on them. In the last hours of the Adams administration, the Secretary of State failed to deliver the commissions to the appointees. On March 4, 1801 Thomas Jefferson was sworn in as President of the United States and would not deliver the commissions and refused to recognize the appointments.

William Marbury, one of the appointees who did not receive their Commission, petitioned the Supreme Court to compel Jefferson's Secretary of State to deliver his commission. The case was decided in favor of Marbury, and the Court issued a *mandamus* [court order] to Secretary of State James Madison requiring him "to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia" (*Marbury*, p. 154).

The importance of this case is found in the claim that it is the duty of the judiciary to say what the law is, including explaining and interpreting the law. Chief Justice Marshall relied upon the decisions laid out in the previous cases when he concluded:

In declaring what shall be the supreme law of the land, the constitution itself is first mentioned, and not the laws of the United States generally. . . . Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle . . . that a law repugnant to the constitution is void. (*Marbury*, p. 179)

Though *Marbury* confirmed the right to review the constitutionality of acts of Congress, it was not until the *Fletcher v. Peck* (1810) case that the Supreme Court first exercised the power to hold a state law unconstitutional. In ruling that a Georgia statute violated the Constitution, the Court declared that “Georgia cannot be viewed as a single, unconnected sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. . . . She is part of the American union; and that union has a constitution the supremacy of which all acknowledge” (*Fletcher*, p. 136).

In addition to this concept of judicial review at the state and federal level, there has evolved another important doctrine of the courts known as *Stare Decisis* where lower courts are bound by rulings of the Supreme Court. The first case to be decided establishing this doctrine was *Martin v. Hunter’s Lessee* (1816), when the Supreme Court rejected the Virginia holding that it was not subject to the highest court’s appellate power. In the second case to be decided, *Cohens v. Virginia* (1821), Virginia again claimed that the Supreme Court had no appellate power over the state courts. Chief Justice Marshall delivered the opinion of the Court declaring such an argument was contrary to the Constitution. The third case was *McCulloch v. Maryland* (1819) where the Supreme Court held the law passed by the State of Maryland, imposing a tax on the Bank of the United States was unconstitutional and void. Justice Marshall stated “the government of the United States . . . is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land” (*McCulloch*, p. 406).

These cases have shown how the role of the Supreme Court developed since its creation by the United States Constitution. Cases may begin their journey in the state or federal courts depending on the circumstances. The Federal District Courts are the trial courts of the federal system. They hear both civil and criminal matters. After adjudication at the district court level the case may be appealed to the Federal Circuit Court of Appeals that has jurisdiction over the matter (Michigan is under the jurisdiction of the sixth circuit). The final court of appeal is the United States Supreme Court, which has appellate jurisdiction from the U.S. Court of Appeals and may review constitutional issues from state supreme courts. Appeals to the Supreme Court are on *writ of certiorari*, meaning it is discretionary on the part of the Court whether they will hear the case. The Court attempts to limit the amount of issues that come before it so that questions requiring constitutional decisions will not need to be made often (*Ashwander v. Tennessee Valley Authority*, 1936).

At the state level, the District Courts are responsible for civil suits of \$25,000 or less; criminal trials for one year misdemeanors and all lesser offenses; arraignments; setting bail, preliminary examinations for felonies, and issuing search and arrest warrants. The Circuit Courts are responsible for civil suits in excess of \$25,000; criminal trials for felonies; personal protection orders; and supervisory control over District Courts. The Michigan Court of Appeals hears appeals from the lower courts, and the Michigan Supreme Court hears appeals from the Court of Appeals. Cases involving Constitutional issues may be appealed from the Michigan Supreme Court to the United States Supreme Court by *writ of certiorari*.

The federal courts hear cases involving violations of the Federal Civil Rights statutes, which were enacted as legislative protections. Applicable statutes include:

CRIMINAL - Title 18 of the United States Code Service:

18 U.S.C.S. § 241. Conspiracy against rights

18 U.S.C.S. § 242. Deprivation of rights under color of law

CIVIL - Title 42 of the United States Code Service:

42 U.S.C.S. § 1983. Civil action for deprivation of rights

42 U.S.C.S. § 1985. Conspiracy to interfere with civil rights.

42 U.S.C. S. § 1986. Action for neglect to protect

42 U.S.C.S. § 14141. Cause of action.

(See *Appendix A* for the complete text of these statutes)

The United States Supreme Court has repeatedly stated that the Civil Rights Act is not itself a source of substantive rights but merely provides a method for vindicating federal rights conferred elsewhere (*Baker v. McCollan*, n3, 1979). This Act is the basis of most litigation involving police actions, and is the key to controlling use of force at the federal level.

In addition to federal protections, there are also state remedies for controlling police actions. These state actions are separate from or in addition to any federal actions that may be taking place since double jeopardy does not apply to the separate venues of state and federal court. These remedies involve criminal prosecution for assault, battery, and homicide, as well as civil suits involving torts, or civil wrongs, for which a person can recover damages.

Liability Issues

Police officers have liability under both state and federal law. State civil causes of action include: assault and battery, false arrest or imprisonment, malicious prosecution and abuse of process, wrongful death, and negligence. People bringing tort actions must show by a mere preponderance of evidence that the defendant caused the harm by acting in an unreasonable manner.

The first cause of action is assault and battery, which is codified in the *Michigan Penal Code* (2000) as:

750.81 Assault; assault and battery

- (1) A person who assaults or assaults and batters an individual, if no other punishment is prescribed by law, is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$500.00, or both. (p. 427)

Criminal Law and Procedure (2000) outlines what is required for an assault or assault and battery under 750.81, and includes the following:

Suspect either attempted to commit a battery, or did an illegal act that caused victim to reasonably fear a battery.

Defendant intended to commit a battery, or to make the victim reasonably fear a battery.

Defendant, at the time, had the ability, appeared to have the ability, or thought he had the ability

Battery is a forceful, violent, or offensive touching of the person or something closely connected with the victim. The touching must not be accidental and must be against the victim's will. (p. 4/4)

This form of conduct does not require that the officer intended to inflict harm or that the officer realized the conduct was offensive to a person. It need only establish that the officer acted without consent of the party and made some form of offensive contact.

False arrest and false imprisonment are torts that usually arise when an officer arrests someone without a sufficient or legal reason. It is any restraint of a person without their consent. It is not necessary for the person to be physically restrained, only that a reasonable person under similar circumstances would believe they were not free to go.

Malicious prosecution and abuse of process provide citizens with a legal cause of action against an officer who misuses the legal process with malice or bad faith, or to harass or cause harm to the citizen.

A wrongful death action is brought by the surviving family or relatives (plaintiffs) of a person whose death was caused by the intentional or negligent act or omission of the police officer (defendant). Any time someone dies as a result of the officer's action or inaction the person bringing the action must prove the tort of negligence as a means to recover for wrongful death (del Carmen, 1991).

Negligence is inadvertent behavior that results in damage or injury. The standard applied in negligence tort is whether the officer's act or failure to act created an unreasonable risk to another person. The tort of negligence does not require that the officer intentionally caused harm to someone; it only requires a citizen to show that:

- A police officer owed the citizen a legal duty;
- The officer breached that duty;
- There was actual damage or injury to the citizen; and
- The officer's act or omission was the proximate cause of the person's injuries.

(Brave, 1993, Brave & Peters, 1993; del Carmen & Smith, 2001)

Unless there is a special relationship, officers do not owe a duty to any one individual. To demonstrate a special relationship the plaintiff must show that the officer made assurances of protection or assumed, by his actions, the protection of the individual; the police officer knew that without his action, harm could come to the victim; the police

officer was in direct contact with the victim; and the victim relied on the officer's assurances of protection (*White v. Beasley*, 1996, p. 320). According to del Carmen and Smith (2001), "negligence is the most commonly used tort theory in lawsuits brought against the police" (p. 183).

Some of the key terms used in our discussion of liability are defined in *Black's Law Dictionary* (200?):

Duty: An obligation that one has by law or contract. Obligation to conform to legal standards of reasonable conduct in light of apparent risk. Obligatory conduct or service. Mandatory obligation to perform. An obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks. (p.505)

Felony: A crime graver or more serious in nature than those designated as misdemeanors . . . any offense punishable by death or imprisonment for a term exceeding one year. (617)

Force: Power, violence, compulsion, or constraint exerted upon or against a person or thing. (p. 644)

Deadly force: Force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. (p. 645)

Unlawful force: Force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort. (p. 645)

Injury: Any wrong or damage done to another, either in his person, rights, reputation, or property. The invasion of any legally protected interest of another. (p. 785)

Harm: The existence of loss or detriment in fact, of any kind, to a person, resulting from any cause. (p. 718)

Intentionally: To do something purposely, and not accidentally . . . willfully or purposely, and not accidentally or involuntarily. (810)

Knowingly: With knowledge; consciously; intelligently; willfully; intentionally. (872)

Misdemeanor: Offenses lower than felonies and generally those punishable by fine, penalty, forfeiture or imprisonment otherwise than in a penitentiary. (p. 1005)

Negligence: The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.

Negligence is the failure to use such care as a reasonable prudent and careful person would use under similar circumstances; it is the doing of some act, which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances. (p. 1032)

Local governments when formulating, implementing, and revising their policies and procedures use the laws that are promulgated by the legislature and the decisions that are handed down by the courts. Administrators shape the mission, goals, and objectives of their agencies so that the street level bureaucrat has guidelines to use when interacting with citizens in the course of their daily activities. Supervisors can then use these guidelines to review the actions taken by their subordinates to determine if they were proper or not.

Supervisors who do not fulfill their obligations may face liability as well. Supervisors are liable for their actions under federal law if they authorized, participated, directed, or ratified the act; were present and could have prevented the act but failed to do so; and/or created a policy or custom under which the unconstitutional practices occurred. In all of these instances the supervisor directly participated in the act at some level; however, they may also be liable for the actions of their subordinates at the state level when they are grossly negligent in managing the subordinates who engaged in unlawful conduct (Brave & Peters, 1993; del Carmen & Smith, 2001).

“Supervisory liability stemming from negligence is one of the most frequently litigated areas of liability” (del Carmen & Smith, 2001, p. 189). There are several general areas of supervisory negligence:

Negligent Hiring: failing to adequately screen an employee, hiring an employee who is unfit for appointment, and the employee’s act was foreseeable.

Negligent Training: failing to train employees in the safe and proper manner of carrying out their duties and tasks.

Negligent Direction: failing to inform employees of the specific requirements and proper limits on the job to be performed by having in place clear written policies.

Negligent Assignment: failing to ascertain if an employee is competent to do the job, or failing to remove an employee from a job after they are found to be unfit.

Negligent Entrustment: failing to supervise or control an employee who is incompetent, inexperienced, or reckless, and has equipment entrusted to them.

Negligent Supervision: failing to adequately supervise an employee in the performance of their assigned duties.

Negligent Discipline: failing to properly track and take all necessary steps to impose discipline on an employee for their improper conduct.

Negligent Retention: failing to terminate an employee who is not fit to do the job after this has been demonstrated by inappropriate conduct. (Brave & Peters, 1993; del Carmen & Smith, 2001)

Another liability issue at the state level concerns the liability of municipalities for the actions taken by the police officers they employ. Governmental Liability for Negligence, Act 170 of 1964, sets the legal parameters for municipal liability in Michigan. This Act made uniform the liability of municipalities and their employees when carrying out a governmental function. MCL 691.1401 *et seq.*, (Michigan Compiled Laws, 2001) codified this Act into fifteen sections. The two sections that apply to our examination of police use of force are:

691.1405 Government owned vehicles; liability for negligent operation.

691.1407 Immunity from tort liability; intentional torts; immunity of judge, legislator, official.

(See *Appendix B* for the complete text of this Act and the two codified sections)

We have examined various aspects of liability at the state level, and now we turn to an examination of liability issues at the federal level. According to del Carmen (1991) “by far the most widely-used provision of law in the whole arsenal of legal liability statutes is 42 U.S.C. Section 1983, otherwise referred to by lawyers as Section 1983, or civil rights cases. Estimates are that around 80 percent of cases filed against public officers fall under this provision of federal law” (p. 409).

A violation of any of the provisions of the following amendments to the United States Constitution can form the basis for civil litigation under Section (§) 1983. The applicable portions of these amendments are:

FIRST AMENDMENT: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

FIFTH AMENDMENT: No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

SIXTH AMENDMENT: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the assistance of Counsel for his defense.

EIGHTH AMENDMENT: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT: No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment ensures that rights protected in the first ten amendments to the United States Constitution are applied to the states. When a state or local official is alleged to have violated one of the rights protected by the Bill of Rights, the applicable provision is the due process clause of the Fourteenth Amendment. It is § 1983 that provides the means of recourse for these violations.

There are four basic elements of a § 1983 suit:

1. The defendant must be a natural person or a local government;
2. The defendant must be acting under color of law;
3. The violation must be of a constitutional or federally protected right.
4. The violation must reach a constitutional level.

A police officer is liable if all of the above four elements are present.

As we can see, Title 42 of the United States Code, especially § 1983, lays the groundwork for determining guidelines that administrators must consider when directing their agencies in general, and controlling use of force in particular. Klockars (1996)

claimed that from the point of view of persons alleging injury, civil actions are preferable to criminal action for several reasons:

1. Proof need only be offered at a level of the “preponderance of evidence” rather than “beyond a reasonable doubt.”
2. There is a substantial economic incentive for attorneys and their clients to pursue such suits.
3. Initiation of such suits may not be prevented and need not pass prior review by police, prosecutors, magistrates, grand juries, or other traditional gatekeepers of the criminal process.
4. Rights of discovery, including the capacity to compel possibly culpable testimony from the defendant, are far more generous than in criminal actions,
5. The plaintiff and the plaintiff’s attorney are free to choose the form and forum in which the action is brought.
6. The cost of defending oneself against such an action is so high and the risk of a devastatingly high damage award is substantial enough to make financial settlements of even marginally credible civil suits a reasonable alternative. (p. 4)

Chech (1996) agreed with Klockars and stated, “the criminal law is not an effective way to prevent excessive force or to cure systemic misbehavior. . . . By contrast, the civil law, because of its greater flexibility and scope, has the potential to serve as the instrument of systematic reform” (pp. 247-248).

Only an injured party may sue for a deprivation of constitutional rights. The victim’s survivors may sue where the use of force has resulted in the death. The United States may not sue on behalf of a victim to recover damages, and it was not until 1994 that the United States could sue on behalf of affected citizens generally in order to redress a pattern and practice of police abuse in a particular community (Chech, 1996, p. 263). Previously, in *United States v. City of Philadelphia* (1979), the United States government, through the Attorney General, had brought suit against the City of Philadelphia for unconstitutional practices and policies of the Philadelphia Police Department. In dismissing the suit, the Court stated, “the Attorney General of the United States has neither the express, nor the implied, nor the inherent authority to maintain this lawsuit (p.

1267). It was not until Congress enacted the Violent Crime Control and Law Enforcement Act of 1994 that the Attorney General could file suit to eliminate pattern or practice abuses. Public Law 103-322, Title XXI, Subtitle D, § 210402, was enacted on September 13, 1994 and has now been codified as 42 USC § 14141 (2001), (see Chech, 1996, fn 11, pp. 271-272 for a history of the passage of this Act).

In reference to § 1983, there is a triad of issues and concerns, as applied to municipalities, regarding use of force, which includes: policies and customs; use of force; and failure to train issues (see R. Murphy, 1996, who originated the idea of there being a trilogy of § 1983). Since the court ruled in *Patsy v. Board of Regents* (1982) that it is not necessary to exhaust state remedies as a prerequisite to filing a § 1983 claim, and the majority of tort claims use this section as a remedy, we will focus on § 1983 as we examine several court decisions and the case law that has developed to deal with these three issues.

Court Decisions and Case Law

Policies and Customs

The first phase of the Section (§) 1983 triad deals with the policies and customs of agencies. The historical path the courts have taken to determine municipal liability begins with the Civil Rights Act of 1871, which was originally enacted to provide a means of redress, or compensation, for victims of government inaction in the face of Ku Klux Klan activity. In the period following the Civil War, local officials in the South frequently refused to prosecute Klansmen who terrorized African Americans. By enacting this legislation, Congress attempted to give these victims a means of recovering damages from public officials who failed to do their jobs (del Carmen, 1991, p. 409; del Carmen & Smith, 2001, pp. 183-184). This legislation has met with varying interpretations over the years.

Originally, the United States Supreme Court, when it heard *Monroe v. Pape* (1961), shielded municipalities from liability under the Civil Rights Act. It held that municipalities were not “persons” as set out by the Act itself. The Court relied heavily on the legislative history of the Civil Rights Act when it reached its decision, particularly the rejection by Congress in 1871 of the Sherman Amendment. The Sherman Amendment is important to our examination of public policy because it shows an attempt was made two hundred and thirty years ago to hold municipalities liable, in this case for injuries inflicted by private persons. As proposed, the Sherman Amendment was as follows:

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any

person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment.

The congressional conference rejected the Sherman Amendment and substituted the following:

[Any] person or persons having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives. (*Monell v. Department of Social Services*, 1978, 703-704)

This substitution was a drastic reduction from the originally submitted amendment and it was interpreted by the *Monroe* Court as exempting local governments from liability. Freedom from municipal liability was considered public policy for many years.

The exemption of local governments from liability under *Monroe v. Pape* gave the victims of excessive force little or no avenue for compensation. The only chance for compensation was to sue the individual police officers who had actually caused the constitutional violation, but the officers often lacked financial ability and the jury's were reluctant to assess financial compensation. This left any favorable judgment for the citizen pretty much impossible to collect or without compensation.

The courts also struggled with the phrase "under color of law." In *Polk County v. Dodson* (1981), the Court determined that § 1983 was not applicable because under color of law was not a term that extended to the activities of a county funded public defender. Similarly, it decided that a municipality could not be liable under the theory of "respondeat superior", which is a concept that imputes liability vicariously onto the an employer merely because they employed the wrongdoer. This concept is based on policy considerations that the employer is better able to bear economic losses and is rationalized by the belief that employers have control over their employees. The Court, in hearing the *Polk County* case, emphasized the statute's utilization of the words "subjects, or causes to be subjected" as requiring a direct involvement by the municipality rather than permitting liability on any vicarious basis.

This problem of accountability was finally corrected sixteen years later when the United States Supreme Court reversed itself and made it possible for municipalities to be held liable for the actions of their employees. In *Monell v. Department of Social Services*

(1978), the Court held that municipalities could be held liable for their employees' actions that result in constitutional violations. The *Monell* case was a class action suit filed by female employees of the Department of Social Services and the Board of Education of the City of New York. The complaint was that the Department and the Board had, as a matter of official policy, compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.

The District Court that heard the case found that the petitioner's constitutional rights had been violated, but found their claims were mooted by a change in the official maternity leave policy. On another issue, the matter of back pay, the District Court once again used *Monroe* to bar recovery, finding that the officers of local government enjoyed immunity also. The ruling was appealed, and the Court of Appeals affirmed the District Court decision using the same theory. The United States Supreme Court then heard the case, and held that:

1. In *Monroe v. Pape, supra*, after examining the Civil rights Act of 1871, now codified as 42 U.S.C. § 1983, and particularly the rejection of the so-called Sherman amendment, the Court held that Congress in 1871 doubted the constitutional authority to impose civil liability on municipalities and therefore could not have intended to include municipal bodies within the class of "persons" subject to the Act. Re-examination of this legislative history compels the conclusion that Congress in 1871 would *not* have thought § 1983 constitutionally infirm if it applied to local governments. In addition, that history confirms that local governments were intended to be included among the "persons" to which § 1983 applies. Accordingly, *Monroe v. Pape* is overruled insofar as it holds that local governments are wholly immune from suit under § 1983. (pp. 664-689)
2. Local governing bodies, (and local officials sued in their official capacities), can, therefore, be sued directly under § 1983 for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted or promulgated by those whose edits or acts may

fairly be said to represent official policy. In addition, local governments, like every other § 1983 “person,” may be sued for constitutional deprivations visited pursuant to governmental “custom” even though such custom has not received formal approval through the government’s official decision making channels. (pp. 690-691)

3. On the other hand, the language and legislative history of § 1983 compel the conclusion that Congress did not intend a local government to be held liable solely because it employs a tortfeasor – in other words, a local government cannot be held liable solely under § 1983 on a *respondeat superior* theory. (pp. 691-695)
4. Considerations of *stare desis* do not counsel against overruling *Monroe v. Pape* insofar as it is inconsistent with this opinion. (pp. 695-701)
5. Local governments sued under § 1983 cannot be entitled to an absolute immunity, lest today’s decision “be drained of meaning.” (p. 701)

Justice Powell, in his concurring opinion in the *Monell* decision, wrote that:

Few cases in history have been cited more frequently than *Monroe v. Pape*. . . . The *Monroe* Court treated the 42d Congress’ rejection of the Sherman amendment as conclusive evidence of an intention to immunize local governments from all liability. . . . That reading, in light of today’s thorough canvass of the legislative history, clearly “misapprehended the meaning of the controlling provision.” (pp. 704 -705)

This decision has greatly increased the ability of the people, through the courts, to control the actions of local government officials, and is an important public policy guideline for administrators. Unlike it was prior to *Monell*, now, when officers act in an extreme and outrageous manner, they are not covered by governmental immunity (*Johnson v. Wayne County*, 1995, p. 162). Although State governments still enjoy immunity from civil suits based upon the conduct of state officers, lawsuits can still be brought against them in their personal capacities as private individuals (*Will v. Michigan Department of State Police*, 1989).

Generally, qualified immunity is intended to provide government officials with the ability to reasonably anticipate when their conduct may give rise to liability for damages (*Anderson v. Creighton*, 1987, p. 646; *Floyd v. Laws*, 1991; *Guider v. Smith*, 1988). It is an affirmative defense against § 1983 claims (*Quezada V. County of Bernalillo*, 1991). Its purpose is to shield public officials “from undue interference with their duties and from potentially disabling threats of liability (*Harlow v. Fitzgerald*, 1982, p. 806). However, qualified immunity is not a defense when officials’ actions violate clearly established constitutional rights. The questions involved in qualified immunity fit together nicely with the substantive inquiry of a § 1983 action (*Quezada*, p. 718).

Another important aspect of the *Monell* decision is that the Court rejected the doctrine of *respondeat superior* as a basis for liability under § 1983 municipal liability, but it left little framework for determining the meaning of policy or custom. It stated that municipalities can only act through their employees, and the Court must determine which employees are sufficient policy makers or “those whose edicts may fairly be said to represent official policy.” (*Monell*, p. 694). The Court used *Monell* to uphold the directed verdict in favor of the City of Detroit where the plaintiff had alleged liability based on *respondeat superior* theory (*Wincher v. City of Detroit*, 1985). The *Monell* decision seemed to reinforce a decision made by the Massachusetts Supreme Court 141 years earlier in *Thayer v. Boston* (1837). The Massachusetts Court found “As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*; it must further appear, that they were expressly authorized to do the acts, by city government, or that they were done *bona fide* in pursuance of a

general authority to act for the city, on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation” (*Thayer*, pp. 516-517).

In *Owen v. City of Independence* (1980), the issue surrounded the use of the good faith defense by municipalities and municipal officials. That is, if a right was violated while following the provisions of a city policy or custom, were violators entitled to a good faith defense? The Supreme Court ruled that a municipality has no immunity from liability under § 1983 flowing from its constitutional violations and may not assert the good faith of its officers as a defense to such liability. “The doctrine granting a municipality immunity for its ‘discretionary’ functions, which doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality, cannot serve as the foundation for a good-faith immunity under § 1983 since a municipality has no ‘discretion’ to violate the Federal Constitution” (p. 623).

Another case that involved the good faith defense was *Pierson v. Ray* (1967). The Supreme Court determined that the defense of good faith is available under § 1983; however, in this case the officers were not entitled to qualified immunity because the evidence was conflicting as to whether the police had acted in good faith when making the arrest (*Pierson*, pp. 557-558). “Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known (*Harlow v. Fitzgerald*, 1982). The Court found the officers were entitled to qualified immunity in *Wilson v. Layne* (1992) because it was not unreasonable for the officers to have believed that bringing media observers along on an

arrest would be lawful, and in *Cruz v. City of Laramie* (2001) because the rule was not clearly established at the time of the incident.

In *Oklahoma City v. Tuttle* (1985) the Supreme Court was presented with the question of whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality, as required by the decision in *Monell v. Department of Social Services* (1978), sufficient to render the municipality liable for damages under 42 U.S.C. § 1983 for violating the victim's constitutional rights. Policy, as defined by the Court, "generally implies a course of action consciously chosen from among various alternatives" (*Tuttle*, p. 823). The Court ruled that "proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional policy, which policy can be attributed to a municipal policymaker" (*Tuttle*, pp. 823-824). The Michigan Court of Appeals used the same reasoning and reached the same conclusion in *Napier v. Jacobs* (1985).

The Supreme Court has twice ruled on the issue of who is a policy maker for purposes of municipal liability. In *Pembaur v. City of Cincinnati* (1986), the Court held that "municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question" (p. 483). In *St. Louis v. Praprotnik* (1988), the Court held that a municipality may be held liable where "authorized policymakers approve a subordinate's decision and the basis for it" (p. 127).

As far as police policymakers and use of force policy decisions are concerned, *Bordanaro v. McLeod* (1989) ruled that a police chief is “one whose acts or edicts may fairly be said to represent official policy” (p. 1157). Thus, police chiefs are usually considered municipal policy makers (*Eversole v. Steele*, 1995) when they have final decision-making authority (*Comfort v. Town of Pittsfield*, 1996). This has been found to most often be the case when police chiefs are dealing with police operations and law enforcement related policies, but not in other areas such as city personnel policies.

Although the issue of individual immunity is not directly dealt with in the Governmental Immunity Act, (MCL 691.1401 *et seq*), the Michigan Supreme Court in *Ross v. Consumers Power Company* (1984) concluded that in order for governmental officials and lower level employees to be free to perform their functions without fear of incurring personal liability, immunity must be accorded such individuals under certain circumstances. The Court said lower level officials such as police officers are immune from tort liability only when they are:

- 1) acting during the course of their employment and acting, or reasonably believe they are acting, within the scope of their authority;
- 2) acting in good faith; and
- 3) performing discretionary, as opposed to ministerial acts. (pp. 633-634)

(See *Appendix C* for the *Ross* court’s discussion on discretionary and ministerial acts).

The *Ross* Court further stated that maintaining a police department is a governmental function and this position was upheld in the Michigan Court of Appeals case *Markis v. Grosse Pointe Park* (1989). Thus, in the state context, municipalities are essentially immune from tort liability in the operation of a police department. In addition, the Michigan Court of Appeals held in *Fiser v. Ann Arbor* (1981) that the decision of a

police officer to pursue and to continue to pursue a fleeing motorist, under certain circumstances “is a discretionary act which is protected by immunity from tort liability” and the municipality is not liable provided the injury is not caused by the officer’s negligent operation of the police vehicle (p. 372). (See also *Robinson v. City of Detroit*, 2000; *Rogers v. City of Detroit*, 1998; reference further consideration of *Fiser* issues) Now that we have a basic understanding of the court’s interpretation of municipal liability, we need to examine the issues related to use of force and training.

Use of Force

The second phase of the triad deals with police use of force. The first question that arises is whether or not police officers are bound by the same laws that require citizens to retreat from a confrontation where force may be required. This question was answered by the cases *Loveless v. Hardy* (1918) and *Skinner v. Brooks* (1944), which made it clear, officers need not retreat when attempting to make a lawful arrest; however, they must act in good faith and exercise sound judgment. Officers have a privilege to use force in self-defense, in defense of others, to accomplish lawful objectives, to overcome unlawful resistance, and to prevent individuals from harming themselves. It is the question of how much force they can use and the concept of reasonable, necessary, or excessive force that has often troubled and confused law enforcement, courts, and juries. It has been interpreted as meaning the minimum amount of force, only that force necessary, or least intrusive amount of force.

In *Fobbs v. City of Los Angeles* (1957), the Court ruled that officers are permitted to use the degree of force that is reasonably necessary to accomplish their lawful objectives. “The facts in this case show that there was no unnecessary or excessive force

in making the arrest. In fact the evidence shows that the two officers, in the first instance, were unable, by themselves, to cope with the situation without using extreme force, and that instead of using such force they exercised considerable restraint in calling for help” (p. 469).

The use of force is a discretionary decision made by the officer (*Firestone v. Rice*, 1888), but the force must be necessary. In *People v. McCord* (1889), the Court found that only the force necessary to carry out the arrest is allowed and “neither law nor morality can tolerate the use of needless violence, even upon the worst of criminals” (p. 206). *Werner v. Hartfelder* (1982) confirmed that an officer may use “that degree of force reasonably necessary to effect that arrest, including deadly force” (p. 747).

It is important to note that the courts have ruled that the arrest being made by the police officer must be a lawful arrest in order for the force used to be legal. “An unlawful arrest is nothing more than an assault and battery against which the person sought to be restrained may defend himself against any other unlawful intrusion upon his person or liberty.” However, “the right to resist an unlawful arrest can never include the right to use deadly force” (*People v. Eisenberg*, 1976, p. 111-112).

In Michigan, deadly force has been defined by the Attorney General as “that force which could result in the loss of human life” (Kelley, 1976, p. 592). When deciding a case involving deadly force, the Michigan Supreme Court, in *People v. Gonsler* (1930), determined that officers “seeking to prevent a felon’s escape must exercise reasonable care to prevent the escape of the felon without doing personal violence, and it is only where killing him is necessary to prevent this escape, that the killing is justified, and . . . if a killing is not justifiable, it is either murder or manslaughter” (pp. 446-447).

In *People v. Fielder* (1992), the Michigan Court of Appeals decided this very issue when reviewing lower court decisions regarding the shooting death of Norris Maben by Benton Harbor police officer Marvin E. Felder. The Court stated that

The elements of involuntary manslaughter as applied to the facts of this case, are (1) that the defendant caused the death of Maben, (2) that the death resulted from the discharge of a firearm, (3) that, at the time the firearm fired, defendant was pointing it at Maben, (4) that, at that time, defendant intended to point the firearm at Maben, and (5) that defendant caused Maben's death without lawful excuse or justification. (p. 693)

The Court of Appeals reinstated the charges that had been filed against the officer and he was subsequently convicted.

The law in Michigan was that an officer "may use deadly force in defense of his own life, in defense of another, or in pursuit of a fleeing felon" (*Jenkins v. Starkey*, 1980, p. 690). Although Michigan did have a fleeing felon rule, as pointed out by the Michigan Court of Appeals in *Werner v. Hartfelder* (1982, p. 752), since *Tennessee v. Garner* (1985), a police officer's use of force has been limited to those situations where the officer has probable cause to believe that the felon poses a threat of serious physical harm to either himself or others. Furthermore, the decision by a police officer to use deadly force to effect an arrest is considered, for purpose of governmental immunity, to be a discretionary rather than a ministerial act (*Washington v. Starke*, 1988, p. 231).

The problem arises however, when there is a claim that the force used to effect the arrest was excessive. The courts must determine whether a given application of force was constitutionally excessive. In *Johnson v. Glick* (1973), four criteria were established by the Court to determine if the use of force was a constitutional violation under the due process clause of the Fourteenth Amendment. The Court said:

Not every push or shove even if it may later seem unnecessary in the peace of a judge's chambers, violates . . . constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, whether force was applied in a good faith effort . . . or maliciously and sadistically for the very purpose of causing harm. (p. 1033)

In the case of *Wise v. Bravo*, (1981), the Court reaffirmed the *Glick* decision by stating force is unconstitutional if: it causes severe injury; the injury was disproportionate to the need for action under the circumstances; and the action was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience (p. 1333). *Bauer v. Norris* (1983) and *Justice v. Dennis* (1987) also analyzed force issues and supported the previous *Glick* and *Wise* Fourteenth Amendment analysis, while *Gilmere v. City of Atlanta* (1986) and *Owens v. City of Atlanta* (1986) found that the Fourth Amendment was the proper analysis.

Finally, in 1989, the Supreme Court of the United States handed down for the first time their holding on what constitutes reasonable force. In the case of *Graham v. Connor* (1989), Dethorne Graham, a diabetic, felt the onset of an insulin reaction. He asked a friend, William Berry, to drive him to a nearby convenience store so he could purchase some orange juice to counteract the reaction. When Graham entered the store he saw a number of people ahead of him at the checkout line. Concerned about the delay, he hurried out of the store and asked Berry to drive him to a friend's house instead.

Officer Connor of the Charlotte, North Carolina Police Department saw Graham hastily enter and leave the store and made an investigatory stop of Berry's car. Although Berry told Connor that Graham was simply suffering from a sugar reaction, the officer ordered Berry and Graham to wait while he found out what, if anything, had happened at

the convenience store. When Officer Connor returned to his patrol car to call for backup assistance, Graham got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly.

In the ensuing confusion, a number of other Charlotte police officers arrived on the scene and Graham was rolled over on the sidewalk and handcuffed, ignoring Berry's pleas to get him some sugar. Several officers then lifted Graham up from behind, carried him over to Berry's car, and placed him face down on the hood, then threw him headfirst into the police car. Officer Connor received a report from the convenience store that Graham had done nothing wrong, so the officers drove him home and released him. At some point during his encounter with police, Graham sustained several minor injuries. (pp. 388-390).

The District Court granted the officer's motion for a directed verdict after considering "(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the purpose of causing harm" (p. 390). After considering these four factors, the District Court determined that the force used did not rise to a cause of action under § 1983, and the Court of Appeals for the Fourth Circuit agreed.

In overturning the decisions of the lower courts in this case, the United States Supreme Court said, "Today we make explicit what was implicit in *Garner's* analysis, and hold that *all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest investigatory stop, or other 'seizure' of a free citizen

should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach” (p.395).

A key component of this analysis was the fact that a seizure had occurred.

According to the Court in *Brower v. County of Inyo* (1989):

A Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual’s freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*. (p. 597)

The Fourth Amendment applies “whenever a police officer accosts an individual and restrains his freedom to walk away” (*Terry v. Ohio*, 1968, p. 16), “applies to governmental action” (*Burdeau v. McDowell*, 1921, p. 475), addresses the misuse of power, not the accidental effects of otherwise lawful conduct (*Brower*, 1989; *Milstead v. Kibler*, 2001), and must “take into account ‘all of the circumstances surrounding the incident’ in each individual case” (*California v. Hodari*, 1991, p. 628; *Michigan v. Chesternut*, 1988, p. 572).

This new standard for analyzing incidents involving use of force by police officers was carefully explained by the Court in the *Graham v. Connor* (1989) decision:

Determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires a careful balancing of the “nature and quality of the intrusion on the individual’s Fourth Amendment interests” against the countervailing governmental interests at stake. . . . Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. . . . Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the

safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight. . . .With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers . . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officer’s actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional. (pp. 396-397)

The *Graham* decision confirmed the fact that citizens have the right, under the Fourth Amendment to be free from unreasonable and unwarranted intrusion by police officers. However, the Court also articulated that they would evaluate excessive force claims on the totality of circumstances involved in each case.

A detailed analysis of the *Graham v. Connor* (1989) decision was conducted by the Seventh Circuit Court of Appeals in *Chew v. Gates* (1994). The *Chew* Court found that the most important factor was “whether the suspect poses an immediate threat to the safety of the officers or others” (p. 1441). Several other cases have been decided using the Fourth Amendment standard to analyze incidents involving the use of force by police. The holdings in these cases have established that an officer does not have to be perfect or choose the least intrusive method to apply force, rather, the officer’s use of force need only be objectively reasonable (*Collins v. Nagle*, 1989; *Elliot v. Leavitt*, 1996;

Illinois v. Lafayette, 1983; *Plakas v. Drinski*, 1994; *Roy v. Lewiston*, 1994; *Salim v. Proulx*, 1996; *Scott v. Henrich*, 1994; *Tauke v. Stine*, 1997; *United States v. Sokolow*, 1989; *Warren v. Las Vegas*, 1997; *Wilson v. Meeks*, 1995).

The officer's pre-seizure conduct is not an issue in this analysis because reasonableness is to be judged at the moment force is used. Things that occur before, or after, the moment force is used are irrelevant (*Carter v. Buscher*, 1992; *Drewitt v. Pratt*, 1993; *Greenridge v. Ruffin*, 1991; *Mettler v. Whitedge*, 1999; *Napier v. Town of Windham*, 1999; *Plakas v. Drinski*, 1994; *Roy v. Lewiston*, 1994; *Salim v. Proulx*, 1996). Facts unknown to the officer are not an issue in this analysis either, such as when an officer intentionally shoots an individual but shoots the wrong person. In *Millstead v. Kibler* (2001), the Court was faced with this very situation and held that the officer's use of deadly force against the person who emerged from a residence, who he understandably believed under the circumstances to be the intruder, but who was in fact the victim, was reasonable, and did not violate the victim's Fourth Amendment rights

In addition to the cases involving incidents in other states, Michigan officers have also been involved in incidents that have been used to establish case law regarding use of force. There are several examples involving police use of force in Michigan where the courts have affirmed an officer's authority to use force as long as it does not violate a person's Fourth Amendment rights.

In Michigan, it has long been true that "the police have the right to use that force reasonable under the circumstances to effect such an arrest. The police also may take what action is reasonable to protect themselves in the course of an arrest or an attempted arrest" (*Delude v. Raasakka*, 1974, p. 303). The Michigan Court of Appeals affirmed this

finding in *Alexander v. Riccinto* (1991). “In other words, a police officer making a lawful arrest may use that force that is reasonable in self-defense circumstances and is not required to retreat before a display of force by the adversary, unlike a private citizen in similar circumstances. Like a private citizen, though, the officer must have a reasonable belief of great danger before responding with the appropriate amount of force to foreclose the threat” (*Alexander*, p. 69).

In the case of *Butler v. City of Detroit* (1986), police were dispatched to an apartment after several calls had been received from a screaming woman that a man at her address had a knife and a gun. Officers arrived and entered the apartment. Butler, who had a guitar in one hand and a butcher knife in the other, confronted an officer. Butler advanced toward the officer with the knife in a threatening manner. The officer repeatedly told Butler to drop the knife. When Butler got between two to five feet from the officer and had still not dropped the knife, the officer fired two shots at Butler (pp. 712-713). The Court held “it is undisputed that Officer Ford possessed the authority to use deadly force” (p. 716).

In *Nicholson v. Kent County Sheriff's Department* (1993), officers were called to a hospital where Nicholson, who had been diagnosed as having a bipolar chemical imbalance, was experiencing a manic episode, which made him extremely violent. Nicholson was struck several times with batons, without effect and eventually eight officers were needed to handcuff Nicholson. The Court applied the objectively reasonable standard and found the officers did not use excessive force on Nicholson. However, in *People v. Budzyn* (1997), the Michigan Supreme Court found that the use of force was not objectively reasonable and upheld the second-degree murder conviction of

Detroit Police Officer Larry Nevers for using a flashlight to strike Malice Green in the head in an attempt to get him to open his hand. A new trial was ordered for Officer Walter Budzyn.

The ultimate inquiry is whether a reasonable officer, confronted with the same circumstances, would have reacted in the same way (*Sova v. City of Mt. Pleasant*, 1998). Factors the court will consider include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether the suspect actively resists or attempts to evade arrest by flight (*Monday v. Oullette*, 1997).

When the facts regarding what happened in a use-of-force incident vary between the two sides of a case, the court will not grant summary judgment for the officer, and will instead require the facts be brought out and argued at trial (*Walton v. City of Southfield*, 1993). In *Roxbury v. Michigan State Police* (1992) and *Sova v. City of Mt. Pleasant* (1998), the courts concluded that a judge at a summary judgment hearing cannot decide issues of fact that are in dispute and the cases went to trial. The court will also remand for trial when “there is a genuine issue of fact as to whether the officer’s use of force was objectively reasonable” because “then there naturally is a genuine issue of fact with respect to whether a reasonable officer would have known such conduct was wrongful” (*Kostrzewa v. City of Troy*, 2001, p. 642). Other cases, not involving Michigan officers, have been decided with the same result (*Barlow v. Ground*, 1991; *Jackson v. Hoylman*, 1991, 1993; *Gray v. Spillman*, 1991).

Some courts have said that every push, shove, or physical encounter between an officer and a citizen will create jury questions unless courts retain some ability to screen claims via summary judgment. Where the underlying provocation or justification for

force is not in dispute, the court may grant summary judgment (*Dale v. Janklow*, 1987; *Gassner v. City of Garland*, 1989; *Love v. Bolinger*, 1996). Yet, regardless of whether the suspect's injuries left physical marks or caused extensive physical damage, they can still successfully allege that officers used excessive force against him (*Barlow v. Ground*, 1991; *Foster v. Metropolitan Airports Commission*, 1990; *Gray v. Spillman*, 1991; *Ingram v. City of Columbus*, 1999; *United States v. Harrison*, 1982).

The federal courts have consistently ruled that deadly force may be used to effect a seizure, when necessary to protect the officer or others from immanent danger or serious physical injury. This would include a handcuffed, but armed, suspect (*Elliott v. Leavitt*, 1996), a man who shot a police dog (*Mettler v. Whitedge*, 1999), a man carrying a shotgun while running from a police officer was perceived by the court as a present threat rather than a fleeing person (*Montoute v. Carr*, 1997), a man with a concrete slab acting strange (*Pena v. Leombruni*, 1999), a man with a knife (*Reynolds v. County of San Diego*, 1996; *Roy v. City of Lewiston*, 1994; *Sigman v. Town of Chapel Hill*, 1998), a juvenile who grabbed for an officer's gun (*Salim v. Proulx*, 1996), a man with a handgun (*Wilson v. Meeks*, 1995), and a mentally disturbed man with a sharp-edged box cutter (*Wood v. City of Lakeland*, 2000).

The courts have also ruled that deadly force may be used to effect a seizure, when necessary to prevent the escape of a dangerous suspect. This has come to be know as the fleeing felon standard and was established by the United States Supreme Court in *Tennessee v. Garner* (1985). The Court was not persuaded that shooting nondangerous fleeing suspects is so important that it should outweigh the suspect's interest in their own life when it held:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little later or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. (p. 11)

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (pp. 11-12)

This same issue had arisen 102 years prior to *Garner* and the Michigan Supreme Court ruled “no one can be justified in threatening or taking life in attempting an arrest on suspicion, without incurring serious responsibilities. And where the life of an actual felon is taken by one who does not know or believe in his guilt, such slaying is murder” (*People v. Burt*, 1883, p. 202). The Supreme Court of Tennessee had issued a similar ruling in *Reneau v. State* (1879) when it upheld the manslaughter conviction of a constable who shot and killed his fleeing prisoner. The insightful Court added, “it may be a question worthy of consideration whether the law ought not to be modified in respect to the lower grade of felonies . . . whether as to these even escape would not be better than to take life” (p. 722). *Storey v. State* (1882) voiced a similar opinion as *Reneau*, yet *United States v. Clark* (1887) set aside the conviction of a soldier who fired on an escaping prisoner after being ordered to “prevent his escape by any means in his power” (p. 712).

The courts have used the *Garner* fleeing felon rule to determine that deadly force was properly used to stop a fleeing motorist who posed a danger to others with their vehicle (*Fisher v. City of Memphis*, 2000; *Scott v. Clay County*, 2000; *Smith v. Freeland*, 1992) and a burglary suspect who had shot a victim during the burglary but then fled unarmed (*Forett v. Richardson*, 1997). The Court found that “the suspect need not be armed or pose an immediate threat to the officer or others at the time of the shooting” when they have probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm (*Forrett*, p. 420).

The final standard is the Fourteenth Amendment’s due process standard of control, which was clearly articulated by the Court when they overturned a conviction from an arrest that took place on July 1, 1949. In *Rochin v. California* (1952), two deputies of the Los Angeles County Sheriff’s Department had entered the house in which Mr. Rochin lived while investigating a report he was selling narcotics. Mr. Rochin grabbed two capsules from the nightstand and placed them in his mouth. After a struggle to prevent Mr. Rochin from swallowing the capsules was unsuccessful, the officers handcuffed Mr. Rochin and took him to the hospital where they directed a doctor to forcefully pump his stomach. The two capsules, which were later found to contain morphine, were obtained from Mr. Rochin’s stomach contents, and he was convicted in state court of possession of morphine. The Supreme Court of the United States held:

In each case “due process of law” requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this

conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime to energetically. This is conduct that shocks the conscience. . . . this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. (p. 172)

Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend “a sense of justice.” (p. 173)

In those situations where the Fourth Amendment, which covers the use of force involving the seizure of a free person, and the Eighth Amendment, which controls the use of force against convicted and incarcerated persons (*Ingraham v. Wright*, 1977), do not apply, the due process standard of the Fourteenth Amendment controls the use of force. These situations may involve non-seizure incidents where an unintended person is injured or killed.

In *Claybrook v. Birchwell* (2000), Quintana Claybrook was injured by a stray bullet that was fired by police during a shootout between police and her father-in-law. The Court found that the police officers did not know that anyone was hiding in the vehicle during the exchange of gunfire that caused her injuries. Thus, they could not have acted maliciously or sadistically toward her and violate her due process rights (pp. 360-361).

The *Claybrook* Court relied on previous decisions to construct their arguments.

In one case, *Sacramento v. Lewis* (1998), the Court found that:

The police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance. (p. 853)

In the other case, *Plakas v. Drinski* (1994), the Court commented on several other cases involving the use of force:

Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing. (p. 1150)

It is important to note that *Claybrook v. Birchwell* (2000) is different from *Fisher v. City of Memphis* (2000), where officers had also shot an unintended person who was the passenger in a vehicle the police were shooting at. The Court in the *Fisher* case found that the Fourth, rather than the Fourteenth, Amendment was the proper standard to use because the officer intentionally applied force by shooting at the driver of the moving car in an attempt to stop it, effectively seizing anyone inside (pp. 318-319).

Inadequate Training

In the first two phases of the triad, liability was examined from the perspective of how a municipality could be held liable for the improper actions of their employees, and how excessive force suits may impact the municipality. The third phase of the triad deals with issues involving the improper or inadequate training of police officers that arise under § 1983.

The United States Supreme Court first addressed the question of inadequate training and municipal liability in *Oklahoma City v. Tuttle* (1985). Rose Marie Tuttle filed suit in the United States District Court for the Western District of Oklahoma following the death of her husband after he was shot by officer Julian Rotramel who had responded to a robbery in progress call at an Oklahoma City bar. Testimony was

introduced at the trial from an expert in police training practices that officer Rotramel's training was grossly inadequate. The trial judge instructed the jury that a "single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge" (p.813). The Court of Appeals for the Tenth Circuit upheld the District Court's decision and the United States Supreme Court granted the City's petition for certiorari on the issue that a single incident of an unconstitutional act by its officer was sufficient to establish municipal liability under § 1983.

In reversing the lower courts decisions, the Supreme Court concluded that there was a wide difference between the municipal policy at issue in the *Monell v. Department of Social Services* (1978) case and the *Tuttle* case.

The "policy" of the New York City Department of Social Services that was challenged in *Monell* was a policy that by its terms compelled pregnant employees to take mandatory leaves of absence before such leaves were required for medical reasons; this policy in and of itself violated the constitutional rights of pregnant employees. . . . Obviously, it requires only one application of a policy such as this to satisfy fully *Monell's* requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy. (p. 822)

Here, however, the "policy" that respondent seeks to rely upon is far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*. To establish the constitutional violation in *Monell* no evidence was needed other than a statement of the policy by the municipal corporation, and its exercise; but the type of "policy" upon which respondent relies, and its casual relation to the alleged constitutional violation, are not susceptible to such easy proof. (p. 822-823)

Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy,

which policy can be attributed to a municipal policymaker. . . . But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the “policy” and the constitutional deprivation. (p. 824)

Two years later the Court had the opportunity to clarify the issues of *Oklahoma City v. Tuttle*. The issues of whether a city can be held liable under 42 U.S.C. § 1983 for providing inadequate police training, and if so, what standard should govern the imposition of such liability were sent to the Supreme Court in *Springfield V. Kibbe* (1987). In a five to four decision the Court ruled that the writ of certiorari had been improvidently granted where petitioner failed to object to instructions on key issue in Federal District Court or to raise issue in Court of Appeals. A dissenting opinion written by Justice O’Connor, claimed the question was properly before the Court, “that inadequacy of police training may serve as the basis for liability under 42 USCS 1983 only where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city’s domain” and would reverse the Court of Appeals and remand for an entry of judgment in favor of the city (p. 257). It would be two more years before the training issue was finally clarified and a standard established.

In *Canton v. Harris* (1989) officers of the Canton Ohio Police Department arrested Geraldine Harris and brought her to the police station in a patrol wagon. Upon arrival at the station, Mrs. Harris was found sitting on the floor of the wagon. She was asked if she needed medical attention, and responded with an incoherent remark. After she was brought inside the station for processing, Mrs. Harris slumped to the floor on

two occasions. Eventually, the police officers left Mrs. Harris lying on the floor to prevent her from falling again. No medical attention was ever summoned for Mrs. Harris. After about an hour, Mrs. Harris was released from custody, and taken by an ambulance that was provided by her family to a nearby hospital. There, Mrs. Harris was diagnosed as suffering from several emotional ailments; she was hospitalized for one week and received outpatient treatment for a year (p. 381).

Mrs. Harris filed suit against the City of Canton and its officials under 42 U.S.C. § 1983 for violation of her right, under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical attention while in police custody. Evidence was presented that, pursuant to a municipal regulation, shift commanders were authorized to determine, in their sole discretion, whether a detainee required medical care. In addition, testimony also suggested that Canton Police shift commanders were not provided with any special training (beyond first aid training) to make a determination as to when to summon medical care for an injured detainee (pp. 381-382). The District Court jury ruled in favor of Mrs. Harris' claim that the City of Canton failed to provide her with medical attention while in custody. The Sixth Circuit Court of Appeals affirmed the District Court's decision holding that "a municipality is liable for failure to train its police force, where the plaintiff proves that the municipality acted recklessly, intentionally, or with gross negligence (p. 382).

The United States Supreme Court granted the City's writ of certiorari to examine whether the Sixth Circuit's holding represented an impermissible broadening of municipal liability under § 1983. The Court agreed that it did and held:

The inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact (p. 388).

This rule was consistent with the Court's previous findings (*Monell v. Department of Social Services*, 1977, p. 694; *Polk County v. Dodson*, 1981, p. 326) that a municipality can be liable under § 1983 only where its policies are the moving force of the constitutional violation. The Court continued:

Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought a city "policy or custom" that is actionable under § 1983. As Justice Brennan's opinion in *Pembaur v. Cincinnati*, 475 U.S. 469 483-484 (1986) (plurality) put it: "Municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers. (p. 389)

Monell's rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible. The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." . . . it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. (pp. 389-390)

In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had better or more training, sufficient to equip him to avoid the particular injury-

causing conduct. . . . And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable. Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury. (pp. 390-391)

The Court carefully articulated the municipal conduct that would not hold a city liable under the standard of deliberate indifference. The Court also noted two examples when the test would be met and liability imposed. First, the Court said "city policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." The Court further noted "it could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need" (*Canton*, 1989, fn. 10, p. 390).

It is this second ground for imposing liability that has established what is known as "notice." If administrators have been, or should have been, aware of the alleged incidents of constitutional violations taking place then they have been put on notice. The Sixth Circuit Court of Appeals stated in *Leach v. Shelby County Sheriff* (1989), "it is fair to say that the need for more adequate supervision was so obvious and the likelihood that the inadequacy would result in the violation of constitutional rights was so great that the county as an entity could be liable. . . . Further evidence of a policy of deliberate

indifference is found in the Sheriff's failure to investigate and punish the responsible parties" (p. 1248). This shows that if there are enough similar incidents to put an administrator on notice that a citizen might be subjected to constitutional deprivations and they fail to act, then the municipality will be found liable.

Since the *Canton v. Harris* (1989) decision, other courts have applied these principles in use-of force cases. In *Davis v. Mason County* (1991) the Court found "the issue is not whether the officers had received any training – most of the deputies involved had some training, even if it was minimal at best – rather the issue is the adequacy of that training. More importantly, while they may have had some training in the use of force, they received no training in the constitutional limits of the use of force" (p. 1483). The Court in *Swans v. City of Lansing* (1998) found "sufficient evidence to support the jury's findings that the City had adopted policies favoring the use of excessive force by its officers and that the City by its failure to train and deliberate indifference had caused both excessive force and a failure to provide needed emergency medical and psychological care to Mr. Swans" (p. 638).

These rulings supported earlier findings of inadequate training liability. In *Popow v. Margate* (1979) the Supreme Court held "that the City of Margate's training of officers regarding shooting was grossly inadequate. . . .The officers viewed no films or participated in any simulations designed to teach them how the state law, city regulations or policies on shooting applied in practice" (p. 1246). In *Rymer v. Davis* (1985) the United States Court of Appeals for the Sixth Circuit held that " Officer Stillwell had received no training on arrest procedures or the treatment of injured persons. The city's failure to train its police officers and the city's bestowal of carte blanche authority were

directly related to the ultimate abuse Rymer received during the arrest” (p. 201). Yet, one incident of misconduct is not enough to establish a policy or custom of inadequate police training and supervision (*Napier v. Jacobs*, 1985, p. 301).

In *Shoop v. Dauphin County* (1991) the Court found that the department had no specific written internal plan or procedure for training deputies, deputies were given no legal training, and deputies were not trained in how to restrain people. The Court held “that the plaintiffs had produced sufficient evidence to at least create a factual question as to whether the County and the Sheriff’s Department was grossly negligent in the training of its deputies sufficient to establish § 1983 liability” (p. 1337). In another case the Court found “no link between the tragic events that occurred . . . and defendant’s alleged failure to train, supervise, or otherwise screen its employees” (*Davis v. Wayne County*, 1993, p. 584). When no evidence is presented that the police officers received inadequate training, judgment should be granted in favor of the City (*Payton v. City of Detroit*, 1995, pp. 400-402).

The Court followed these same *Canton* principles when it reached its conclusion in a case that had been decided six years earlier. In *Moore v. City of Detroit* (1983) Lieutenant Shoates of the Detroit Police Department was involved in a shoot-out during an armed robbery at a Church’s Fried Chicken restaurant while he was off-duty. During the exchange of gunfire, Pleze Moore was struck in the chest by a bullet that damaged his spinal cord, causing permanent paralysis from the waist down. Lt. Shoates was shot twice and had permanent brain damage. Moore filed suit claiming a violation of his Fourteenth Amendment due process rights. The Michigan Court of Appeals upheld a directed verdict in favor of the city holding that:

Here the record established that Lieutenant Shoates and his fellow police officers received a great deal of training in the use of firearms and in deciding whether to use a firearm in the presence of bystanders. . . . The policy, custom or approval of the police department concerning Lieutenant Shoates's conduct and the conduct itself do not constitute the type of abuse of official power which takes such an incident outside the realm of ordinary tort law and into the category of a constitutional violation which § 1983 was intended to redress. (p. 502)

Likewise, the Court found in *Vine v. County of Ingham* (1995) that "in view of the training records submitted, it can hardly be said that the inadequacy of the training was so obvious and the likelihood of a constitutional violation so great that the Sheriff could reasonably be deemed to have been deliberately indifferent to the need for more or better training" (p. 1160). Additionally, when the officers are found to have not violated the Constitutional rights of the person alleging the City had failed to train its police officers, "no liability can flow from the alleged failure to train" and the City is not liable (*Veneklase v. City of Fargo*, 2001, p. 748; *York v. City of Detroit*, 1991).

The final area of legal information comes from those cases dealing with policy violations. In the State of Minnesota, the Supreme Court, in *Murphy v. City of Minneapolis* (1980), allowed the police department's policy on the use of firearms to be admitted at trial in order to assist the jury in determining if the officer acted as a reasonable police officer would have under the circumstances (p. 754). In another state level case, the Court of Appeals of Georgia upheld a simple battery conviction where the trial judge had allowed the Sheriff's Department's standard operating procedure manual to be introduced at trial as evidence against a deputy who had assaulted a person in the jail (*Bedley v. State*, 1988, p. 91).

The standard at the federal level was established by the United States Court of Appeals for the Sixth Circuit. In *Smith v. Freland*, (1992) the Court granted summary

judgment, and on the issue of whether the officer violated his department's policy the

Court said:

Furthermore, the fact that Officer Schulcz's actions may have violated Springdale's policies regarding police use of force does not require a different result. Under § 1983, the issue is whether Officer Schulcz violated the Constitution, not whether he should be disciplined by the local police force. A city can certainly choose to hold its officers to a higher standard than that required by the Constitution without being subjected to increased liability under § 1983. To hold that cities with strict policies commit more constitutional violations than those with lax policies would be an unwarranted extension of the law, as well as a violation of common sense. Ms. Smith's position, if adopted, would encourage all governments to adopt the least restrictive policies possible. While not expressly saying so, the Seventh Circuit has already recognized that city policies do not determine constitutional law. In *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) (en banc), the Seventh Circuit held that a police officer acted reasonably in shooting at a fleeing bank robbery suspect after giving two warnings, even though he could not be certain the suspect was armed. An expert testified that the officer's actions had violated the city's police manual and generally accepted practices. Rather than considering these local rules, the court limited its attention to whether the officer had violated *Garner*. We believe this is the proper approach, and we adopt it in this case. (pp. 347-348)

Courts have repeatedly upheld summary judgment for police officers and cities against the claim that the officers violated department policies when they used the force. The courts have not allowed this policy violation to enter into the determination of whether the force was reasonable (*Elliott v. Leavitt*, 1996; *Greenidge v. Ruffin*, 1991; *Mettler v. Whitley*, 1999; *Salim v. Proulx*, 1996; *Scott v. Clay County*, 2000; *Scott v. Henrich*, 1992; *Warren v. Las Vegas*, 1997; *Wilson v. Meeks*, 1995). In a case that involved the shooting of an unintended person, the Court said:

Hence, even if, as the plaintiffs have argued, the actions of the three defendant patrolman violated department policy or were otherwise negligent, no rational fact finder could conclude, even after considering the evidence in the light most favorable to Quintana, that those peace enforcement operatives acted with conscience-shocking malice or sadism

towards the unintended shooting victim. (*Claybrook v. Birchwell*, 2000, p. 360)

Our examination of these cases related to municipal liability, use of force, and training, shows that the courts have provided ample guidance for the administrator in the development of use-of-force policy and training. We turn now to some suggestions for policy and training development.

Policy Issues

Klockars (1996) offered his idea for a comprehensive statement of policy on police use of force: “Police officers shall work in ways that minimize the use of force” (p. 12). Though this is not quite complete enough for a workable standard policy and procedure format, it gives us a starting point for our discussion on what a policy is and what it should include. Bard and Shellow (1976) defined policy as “a statement of intent, of general goals, of what an organization is trying to achieve” (p. 31). Policies are usually made by the chief and articulated by the command personnel to those at the lowest level of the organization. The problem with communicating policies in this manner is that they are often disregarded or violated by those responsible for actually carrying out the policy at the line officer level. Ethical leaders must model desired behavior, and enforce them consistently for them to mean anything (Slahor, 1999).

In his 1950 textbook *Police Administration*, O. W. Wilson first laid out the importance of having a formal directive system. “The administrator who depends solely on direction through personal and informal communications with subordinates to get things done runs the risk of inconsistency, lack of coordination, and failure to follow instructions – which are certain to stem from the absence of a formal directive system” (Wilson & McLaren, 1972, p. 128). Wilson claimed that written directives were “the agents of the director” that defined policy, established procedures, and set forth the rules and regulations that guide the efforts of the department. Directives can be classified into the categories of policies, procedures, and rules and grouped into manuals, memoranda, bulletins, and written orders (pp. 128-129). According to Schubert (1981), “ultimately, the name that departments affix to their written directives is not important” as long as

departments actually develop the directives that are required to guide their officer's actions (p. 271). The term policy is commonly used in the literature and among police administrators when referring to the written directive that provides guidelines covering the use of force. For consistency, the term policy will be used in this paper in the same manner.

In *Introduction to Police Administration*, Sheehan and Cordner (1989) stated policies "should reflect organizational goals, objectives and plans. . . . are guidelines for clear thinking and decision making . . . should be consistent. They should also be flexible so that they may be applied to varying situations and changing times" (pp. 450-451). Without a current and well-written policy, officers must rely on common sense, best guesses, and just plain luck in carrying out their duties. A well-written policy demonstrates that the department has shown due regard in directing the actions of its employees and that officers follow approved and recognized procedures. It serves as a powerful communication tool informing departmental personnel of their responsibilities, outlines acceptable procedures to follow, establishes performance standards, and creates consistency among employees (Carpenter, 2000, p. 1-2).

Any policy, no matter how well written, will need periodic review, updating, and revision. This process helps to determine whether the directives are working or not. Carter and Barker (1991) suggested that the evaluative process be predominantly a structured qualitative activity that answers questions in six dimensions:

Concept – Was the subject matter addressed by the directive an important issue in police management? Was the subject matter addressed in the proper format (e.g. policy, procedure, rule, general order, special order, memorandum), Was the subject matter conceptually sound and consistent with accepted principles of organization and administration.

Structure – Was the directive prepared in such a manner that personnel know what is prescribed or prohibited? Was the directive explicit and clear with respect to organizational expectations? Was the directive written in a manner that was easy to understand without conflict and duplication?

Operations – Could the procedures and rules be easily and reasonably followed? Does the directive seek and accomplish intended results? Does the directive’s application ease or complicate the department’s activities?

Comprehension – Did the directive address all issues and alternatives reasonably related to the subject matter addressed? Did the directive provide guidance through its policy statement and procedures? Was the directive clearly articulated in a straightforward manner?

Factual Fairness – Did the directive treat all persons at issue – whether they were criminal suspects, general citizens, police department employees, or other persons with whom the organization has official contact – in an equitable, impartial, non-discriminatory, ethical, and fundamentally fair manner?

Jurisprudence – Were the mandates of the directive consistent with current criminal statutory and case law? Did the directive adequately protect police personnel, the police department, and the jurisdiction from liability? Was the directive consistent with the principles of administrative law? (pp. 21-22)

Another method of developing and reviewing policies was proposed by Munro (1979) who advocated “the use of general systems theory and one of its associated methodologies, role theory, as a means of enriching the structural-legal analysis of criminal justice policy by adding behavioral and systematic dimensions” (p. 11). Munro provided a hypothetical policy problem for purposes of illustration that involved the use of force. Commenting on this incomplete and superficial illustration he said, “in reality the complexity and contextual richness of the analysis would be limited only by the time and intellectual resources of the analyst” (p. 11). Since most police administrators have neither the luxury of unlimited time nor analytical personnel staff available to them, the

following suggestions may assist the administrator in developing and reviewing their use-of-force policy.

The use-of-force policy should establish the guidelines for acceptable behavior and be supported by supervision and training. The Commission on Accreditation for Law Enforcement Agencies (CALEA) (2001) provides standards that administrators can use to assist them in this task. CALEA defines policy, procedure, rules and regulations, and written directive as:

POLICY: A written directive that is a broad statement of agency principles. Policy statements may be characterized by such words as “may” or “should” and usually do not establish fixed rules or set procedures for conduct of a particular activity but rather provide a framework for development of procedures and rules and regulations.

PROCEDURE: A written directive that is a guideline for carrying out agency activities. A procedure may be made mandatory in tone through the use of “shall” rather than “should,” or “must” rather than “may.” Procedures sometimes allow some latitude and discretion in carrying out an activity. (p. A-8)

RULES AND REGULATIONS: A set of specific guidelines to which all employees must adhere. (p. A-9)

WRITTEN DIRECTIVE: Any written document used to guide or affect the performance or conduct of agency employees. The term includes policies, procedures, rules and regulations, general orders, special orders, memorandums, and instructional material. (p. A-13)

The standards regarding use of force that CALEA requires of agencies seeking national accreditation are:

1.3 Use of Force

1.3.1 A written directive states agency personnel will use only the force necessary to accomplish lawful objectives.

1.3.2 A written directive states that an officer may use deadly force when the officer reasonably believes that the action is in defense

of human life, including the officer's own life, or in defense of any person in imminent danger of serious physical injury.

- 1.3.3 A written directive covers the discharge of warning shots.
- 1.3.4 A written directive governs the use of authorized less-than-lethal weapons by agency personnel.
- 1.3.5 A written directive specifies procedures for ensuring the provision of appropriate medical aid after use of lethal or less-than-lethal weapons, or other use of force incidents as defined by the agency.
- 1.3.6 A written report is submitted whenever an employee:
 - a. discharges a firearm, for other than training or recreational purposes;
 - b. takes an action that results in, or is alleged to have resulted in, injury or death of another person;
 - c. applies force through the use of lethal or less-than-lethal weapons; or
 - d. applies weaponless physical force at a level as defined by the agency.
- 1.3.7 The agency has a procedure for reviewing the report required by standard 1.3.6.
- 1.3.8 A written directive requires the removal from line duty assignment, pending administrative review, any employee whose actions or use of force results in a death or serious physical injury.
- 1.3.9 A written directive requires that only weapons and ammunition authorized by the agency be used by agency personnel in law enforcement responsibilities.
- 1.3.10 A written directive requires that only agency personnel demonstrating proficiency in the use of agency-authorized weapons be approved to carry such weapons.
- 1.3.11 At least annually, all agency personnel authorized to carry weapons are required to receive in-service training on the agency's use-of-force policies and demonstrate proficiency with all approved lethal weapons that the employee is authorized to use.
- 1.3.12 A written directive requires that all agency personnel authorized to carry lethal and less-than-lethal weapons be issued copies of

and be instructed in the policies described in standards 1.3.1 through 1.3.5 before being authorized to carry a weapon. The issuance and instruction shall be documented.

- 1.3.13 The agency conducts a documented annual analysis of those reports required by standard 1.3.6.

These guidelines are in compliance with the requirements that police officers using force must follow as established by the courts in their various decisions. Not every one of these standards will be included in the actual use-of-force policy. Those standards not included in this policy should be included in the agency's policies covering use of force review, critical incident management, weapons, and training. These guidelines are a tool the administrator can use to develop policies that meet the requirements as established by the courts.

Today, more than ever, police officers are being held to a very high standard by their administrators, by the community in which they work, and by the courts. These standards may include performance, behavior, conduct, and ethics. When an officer fails to reasonably adhere to these standards they may find themselves before a criminal court, a civil court, or a departmental review. A well-written policy can help lay the foundation for officer accountability.

Policies must be within the bounds of the law, comprehensive, consistently enforced, current with appropriate standards, and allow reasonable officer discretion. Use-of-force policies must conform to the legal standards as identified in the previous chapters, especially with respect to *Graham v. Connor* (1989) and *Tennessee v. Garner* (1985). Administrators may develop policies more restrictive than applicable law, since under federal Constitutional law this creation of a more restrictive policy is irrelevant to

municipal liability as determined by *Smith v. Freland* (1992). Use-of-force policies should be brief, concise, and follow state and federal laws. They should not make the force continuum a part of the policy, and information on weapons, force investigation procedures, and training should be placed in policies separate from the use of force policy.

Policies must be clear to avoid misunderstanding. Grammar and vocabulary should be used that ensures all those who read the policy can understand it. It is also important to organize thoughts so they are, “expressing logic in a process that is easy to read from sentence to sentence and paragraph to paragraph” (Kinnaird, 2001, p. 78). Some authors recommend that use-of-force policies not use the words “shall” and “must.” They feel that in the real world of police work, situations are too fluid, too dynamic to limit officers in such a manner” They suggest that language discouraging specific acts, such as “generally prohibited,” should be substituted instead. (Williams, 1999d, p. 45-46). However, administrators must ensure that when certain behavior is required or prohibited it is clearly stated as such; and the words “shall” or “shall not” may be used to convey a clear message to the officers when appropriate.

Administrators should begin the policy with a section stating the purpose for the written directive. A statement of the agency’s policy on use of force should follow this section. The next section should include definitions of terms that are used to qualify the policy, such as deadly force, non-deadly force, physical force, reasonable belief, and serious physical injury. The final section should outline the procedures and rules to be used in carrying out the policy. Several model policies on use of force are available (Human Rights Watch, 1998; International Association of Chiefs of Police, 1999;

Michigan Municipal League, 2000; Siddle, 1985), and a sample policy was developed using the information gathered in this paper (*Appendix D*). Administrators can use these models as guidelines to assist them in their process of policy development and review.

According to Davis (1974/1978), “the police are among our most important policy making administrative agencies. . . . One may wonder whether any other agencies – federal, state, or local – make so much policy that so directly and vitally affects so many people” (p. 123). In developing effective policies, the police will demonstrate their capacity to realistically assume the responsibility of formally engaging in administrative rulemaking (Schubert, 1981).

Policies can provide officers with valuable guidance in the performance of their duties and can also help to reduce liability. However, poorly written policies or policies that are not enforced can significantly increase liability for the officer and the municipality. Officers must be able to claim an objective “good faith” belief that the force used did not violate the Fourth Amendment. If administrators ensure that their officers know the criteria of *Graham v. Connor* (1989) and *Tennessee v. Garner* (1985), they will be in the best position to defend against an excessive force claim in the federal context and a gross negligence or assault and battery claim in the state context. The courts have been clear in their interpretation of the Constitution, as applied through the Fourth and Fourteenth Amendments, as it relates to police use of force. As this research has shown, administrators *can* develop a defensible policy that will help to guide the decision making process of officers involved in use-of-force situations.

Force Continuum History

As the literature and court decisions have shown a continuum of force exists where officers are authorized to use the force that is reasonably necessary to control the resistance they are encountering. Siddle (1989, 1992) conducted research on the origins of force continuums and found:

The first reference to the moral implications of using force can be dated to around 500-550 A.D., with the life of a Buddhist monk known as Dharma. Dharma was said to be the son of King Sugandha of India, who traveled to the Shaolin Temple in the Honan province of China around 520 A.D. He is credited with . . . [bringing] the Zen (historically referred to as the C'han philosophies) to the Shaolin Temple (Lewis, 1985). It is in the Zen philosophy where ethical rules were first applied to the use of martial arts.

Several hundred years later, the Zen philosophies made their way to Japan. Zen became popular with the Japanese Samurai, and became fundamental to the code of Bushido in Japan. The date and author of the Code of Bushido is unknown, but we do know the code of Bushido was established in the Takugawa Period of 1600 to 1867. The Code of Bushido was the strict code of the warrior. The code was founded on the moral principles of loyalty, duty, honor, and ethical conduct in battle. The Code of Bushido is also attributed to establishing a Samurai's responsibility of defending the public when unjustifiably attacked. More importantly, the Code of Bushido became the standard by which the Samurai were judged.

Today's Code of Conduct has become the use of force continuum. Use of force continuums are used to evaluate an officer's conduct when he uses force to establish control of a resisting subject. . . . Research indicates that the United States Army's Military Police implemented the first guidelines on levels of control. Military Police Baton Manuals dating back to the early 1960s, are the first to identify an escalation of force for the impact weapon striking targets. (Major muscle mass, minor muscle mass, joints and bones close to the surface, and the head neck and throat when the officer's life is in jeopardy.) Subsequently, it appears that the U.S. Military Police in part responsible for at least establishing the standards of escalating force. (1989, pp. 3/47-3/48)

Today's force continuums also use this one plus one theory of control, which advocates responding to resistance with proportional force one level higher than the level of resistance encountered.

Michigan Force Continuum

The Michigan Law Enforcement Officers Training Council (LEORTC) (1997) developed the Michigan Law Enforcement Officer-Subject Control Continuum (MLEO-SCC) as a guide to using force in confrontation or arrest situations (*Appendix E*). The LEORTC also developed a resource guide to assist officers and use of force instructors in understanding the MLEO-SCC as well as training objectives covering use of force. A review of the continuum and resource guide found that they provide an excellent tool that complies with the court decisions examined previously in this paper. The following information was developed from the resource guide, and readers should have the MLEO-SCC available to refer to as they cover this section. [The LEORTC has been renamed the Commission on Law Enforcement Standards (MCOLES)]

A thorough understanding of the continuum will assist officers in applying the law and departmental policy in use-of-force situations, properly documenting the use of force, and presenting testimony in legal proceedings. By taking the appropriate response to a subject's resistive or aggressive action, officers can reduce the potential for injury to the officer or the subject, lessen the number of excessive force complaints, and reduce their civil liability.

The continuum is designed to show in its shape, color, and graphics that it is the subject's action or resistance and the totality of circumstances that determine the officer's response. The unique shape illustrates several concepts in the use of force. The wider portion of the continuum depicts the least amount of resistance and the least amount of governmental intrusion to control resistance. Most officer-subject contacts occur at this level. The greatest amount of governmental intrusion occurs at the narrow

end and includes deadly force. As a subject's action escalates, injury potential increases, and the choices an officer has for an effective response decreases. The color shading depicts levels of awareness and the potential for danger and injury. As the color changes to a darker shade, subject resistance or aggressive action increases, injury potential increases, choice of effective officer control methods decreases, and the need for immediate, reasonable, and effective response increases.

Situations do occur where the escalation or de-escalation of subject resistance is sudden, and consequently the officer's response may occur anywhere along the continuum that represents an objectively reasonable response to the perceived threat posed by the subject. An extremely important concept is the totality of circumstances. This refers to the facts and circumstances confronting an officer at the time force is used (a partial list is included on the back of the continuum). It is impossible to list all the factors that officers may be faced with during an incident, but it is important for officers to recognize and document those facts and circumstances that affected their response.

Another key concept that is illustrated is the escalation and de-escalation of resistance or aggression by a subject. As a subject escalates his or her actions, officers must respond with an objectively reasonable amount of force that will control the subject. Control is established when the subject's actions are neutralized and there is no longer an immediate threat to the officer or others. As a subject de-escalates their actions, the officer must reduce the amount of force used proportionally, and be alert and ready to respond to an attempt by the subject to escalate resistance or assault the officer or others.

Subject escalation of resistance may increase slowly or may increase suddenly from passive resistance to active aggression or even deadly force assault. Subject action

and officer response are dynamic and escalation and de-escalation of resistance may fluctuate throughout an incident. It is important to understand that officers do not need to escalate response controls in a step-by-step progression. A sudden attack by an armed subject would require an immediate response by the officer. Verbal commands, joint locks, chemical agents, and impact weapons, may be totally inappropriate under the circumstances. The officer may respond with deadly force without using any of the control techniques at the lower end of the continuum.

In any officer-subject contact there is the potential for injury to the officer and/or subject. As the subject's resistance or aggression increase the potential for injury to the officer increases. When the officer escalates control methods to gain control of the subject the potential for injury to the subject increases. Individual officers may respond differently to a subject's resistance or actions. Officers are not required to choose the least intrusive control method, only a reasonable one.

The law places a tremendous responsibility on law enforcement officers by granting them the authority to use force up to and including deadly force. The general public supports the officer's use of force to control or arrest a resisting subject. The public expects officers to protect themselves and others, and respond with force that is reasonably necessary to control the situation. They trust officers to be competent in the performance of their duties, treat people fairly, and not abuse the power of the position.

The Michigan Law Enforcement Officer-Subject Control Continuum can be used by an officer to prepare for a confrontation or arrest situation where methods of subject control are required. It is a guide that will assist the officer in the decision making process for the application of objectively reasonable force to control a subject.

Training Issues

“Since the beginning of strategic warfare, a special group of individuals has been tasked with training warriors to survive in combat. . . . Throughout the centuries, survival training has changed very little” (Siddle, 1995, p. 11). Siddle believed the time had come for the next evolution of training, where it is brought to the level of science. Recognizing there is a connection between survival stress, escalating heart rates and officer performance in violent encounters, Siddle applied the knowledge gained from research into educational psychology, neurobiology, motor learning sciences, and from thousands of hours in the classroom training criminal justice officers to developing an understanding of the psychology and science of training (p. 7).

Training is at the heart of the effort to control the use of force by police. The research showed training is needed that will enable officers to be better prepared to handle the police-citizen confrontation and avoid violence if possible. The research also showed that this training should be based on a force continuum. Bard and Shellow (1976) claimed, “administrators possess three basic tools for implementing policy on the street level: the first is selective recruitment; the second is reward and discipline for specific behavior, and the third is supervision and training” (p. 31). “Of the three tools an administrator can use, training and supervision are perhaps both the most neglected and the most potentially effective” for getting officers to conform to the policies of the department (p. 33).

It is important that administrators focus their efforts on the training of officers. If the policy on use of force is only a written directive that never gets used on the street by the officers as a guideline for handling the police-citizen encounter it is of no value. The

courts have been clear that it is the policy which is actually being followed by the officers on the street that will be considered the policy in effect for liability purposes. As administrators, the duty and responsibility to conduct training in the proper use of force has been clearly mandated. This training must be conducted incorporating the guidelines established by the *Graham v. Connor* (1989) and *Tennessee v. Garner* (1985) decisions. In addition, the many other cases that have been decided showing where departments were liable for failing to train their officers in realistic job related environments must also be reviewed to learn what use-of-force training is required and how this training should be conducted (e.g., *Popow v. City of Margate*, 1979).

Training is important and necessary, and it must be continuous. Fyfe (1996) found two major reasons for training to be on going:

First, some of the most critical police violence prevention and reduction skills are needed so rarely that they are likely to atrophy into uselessness unless officers receive refresher training. . . . Thus, as in medicine and other emergency professions, constant in-service training is necessary to keep officers' most critical, but rarely employed, skills at a useful level.

The second reason to require constant refresher training in violence prevention skills reflects a perversity of police work: most often, it does not matter whether officers' actions conform with their tactical training. Police officers who receive careful recruit training in the tactics of vehicle stops, for example, graduate to duty where they discover that virtually every traffic violator they stop is nothing more than an otherwise law-abiding citizen. . . . Similarly, officers who respond to reports of burglaries typically find that the tactics they were taught are moot, because the vast majority turn out to be false alarms. Under these circumstances, it is very easy for officers to regard their training for both car stops and responses to burglaries as something akin to preparing to avoid lightning strikes. . . . periodic training reminds them that there are real dangers out there. (pp. 176-177)

Fyfe also advocated training that was realistic, tailored to the officer's and community's needs and experiences, did not make matters worse by creating a sense of paranoia

among the officers, and prepared officers to implement force policies under crisis situations (169-178).

Key standards for training were provided in the *Canton v. Harris* (1989) case. The ultimate goal of use-of-force training is to ensure that officers are prepared to safely and effectively perform their duties and responsibilities. Realism in training provides for preparation in an environment that is similar to the actual environments and situations where this force will be used. By following the *Canton* guidelines, administrators can ensure that their agency is not found to have acted with deliberate indifference to the rights of citizens. The need to train officers to the constitutional limits on the use of force is so obvious that failure to do so *will* be characterized as deliberate indifference to constitutional rights. Therefore, it is absolutely necessary that administrators develop a policy on use-of-force, and then provide training in the proper implementation of the procedures in the policy.

The Michigan Law Enforcement Officer-Subject Control Continuum discussed in the previous chapter provides a guideline upon which training in use of force can be conducted. The continuum complies with all of the standards established by the courts regarding proper use of force, and is a tool that officers can apply during training and on the street. This force continuum can best be used when incorporated into a training program on subject control that includes all of the issues brought out in this research. The training objectives attached to this paper (*Appendix F*) meet this need, and are an effective tool for conducting reliable, effective, legally sound ethical training.

The administrator who takes the responsibility for developing a sound training program is fulfilling their obligation to protecting the democratic principles of society,

while protecting the officer and the municipality from needless liability. Most importantly, they are providing the tools to assist officers in carrying out their duties in the most effective manner possible that will help to reduce police-citizen violence. The result will be better protection for both the officers and the citizens they encounter. By adopting the Michigan Law Enforcement Officer-Subject Control Continuum and using the Training Objectives as the core of the use-of-force training program, administrators will help to fulfill the requirements established by the courts and society for ethical police service in a democratic society.

Literature is available to the administrator in the form of professional journals that are found in most police departments. These articles address the realities of training including budget constraints, lack of municipal support for training, lack of qualified instructors, officer capabilities, adult learning methods, lesson plan development, and training program management. This information, *that is so easily obtained and so readily available to administrators*, is an often-overlooked tool that can assist in this training process. The articles that should be reviewed have been listed below. Administrators must then continue to stay updated as new information and resources become available.

Baratta (1998, 1999); Boyd (1998); Breedlove (1996); Caddell (1997); Connor (1998, 1999); Engells (1997, 1998); Grossman (1996, 1998); Grossman & Siddle (2000a, 2000b); Honig (1998); Hontz (1996, 1997); Ijames (2001); Keeney (2001); Lathrop (2000); Martinelli (1997); Mills (2000); Mueck (1999); Niehaus (1997, 2000); Nowicki (2000, 2001); Parent (1998); Parham (1998); Pollock (1998); Rayburn (2000); Rheingans (1997); Roberts (1998); Sample (1997); Sharp (2000); Sifling-Aardema (2000); Smotzer (1997a, 1997b); Solar (1998); Solomon (1996a, 1996b); Tate (1999); Warren & Rose (1999); Weinblatt (1999); Williams (1999a, 1999b, 1999c).

As this research has shown, administrators *can* develop defensible training that will better prepare officers to handle use-of-force situations.

Current Practice in a Michigan County

As the research has shown, policy and training in police use of force is vitally important to controlling the actions of the police in a democratic society. The improperly handled police-citizen encounter can erupt into violence and lead to negative perceptions of the police, and may result in officer or citizen injury. It is important for police administrators to provide the necessary guidance to their officers in the area of police use of force so that the performance of police officers involved in use-of-force situations will be proper, ethical, and in compliance with the constitutional and legal mandates of our democratic society.

Recognizing the importance of providing this guidance, the Michigan Commission on Law Enforcement Standards (formally Michigan Law Enforcement Officers Training Council) supplies police administrators with a Law Enforcement Officer-Subject Control Continuum and subject control training objectives, to assist them in managing their officer's use of force. As discussed in a previous chapter, the Michigan guidelines meet all the requirements identified in the literature and court decisions.

In an effort to determine if police agencies currently have a use-of-force policy in place and have adopted the State of Michigan guidelines that were developed in 1997, the author contacted the municipal police agencies in one urban Michigan county and asked them about these issues. The answers to these questions provided insight into the status of police use-of-force policy and training in one Michigan county, and identified areas where improvement may be needed. This is especially important if officers from one department are involved in use-of-force situations with officers from another department and the use-of-force policies and levels of training are not the same.

Genesee is Michigan's fifth largest county with a population of 436, 141 (2000 Census), and Flint, Michigan's fourth largest city, is the county seat. There are 11 cities, 17 townships, and 3 village governments in Genesee County. Police services are provided to these municipalities by 10 city police departments, 11 township police departments, 1 village police department, the Genesee County Sheriff's Department, and the Michigan State Police.

Between June and September 2001, the author contacted each of these municipal agencies and asked them three questions regarding policy, training, and adoption of the State of Michigan's Law Enforcement Officer-Subject Control Continuum. This inquiry did not address non-municipal police agencies that provide police services to airports, colleges and universities, or private communities. The municipal police departments contacted in this inquiry are all centrally dispatched by the Genesee County Regional 911 dispatch center, and officers from multiple departments often work together and assist each other on calls for service involving conflict related situations as provided under mutual aid agreements. The results of this inquiry are shown below.

Question One

Does your department currently have a use-of-force policy in place?

RESPONSE	NUMBER	PERCENT
YES	23	96
NO	1	4
TOTAL	24	100

Question Two

Does your department currently conduct annual use-of-force training?

RESPONSE	NUMBER	PERCENT
YES	8	33
NO	16	67
TOTAL	24	100

Question Three

Has your department adopted the State of Michigan Law Enforcement Officer-Subject Control Continuum as a guide to using force?

RESPONSE	NUMBER	PERCENT
YES	8	33
NO	16	67
TOTAL	24	100

How many of the departments that do conduct annual use-of-force training have adopted the State of Michigan Law Enforcement Officer-Subject Control Continuum as a guide to using force?

RESPONSE	NUMBER	PERCENT
HAVE	7	88
HAVE NOT	1	12
TOTAL	8	100

The results of this inquiry show that most (96%) municipal police departments in Genesee County, Michigan have recognized the importance of having a use-of-force policy in place. The results also show that a majority (67%) of departments have not recognized the importance of conducting use-of-force training and adopting the use-of-force guidelines as produced by Michigan's Commission on Law Enforcement Standards. The results did show that of the departments that do conduct annual use-of-force training, most (88%) departments have adopted the State of Michigan guidelines.

The research has shown that training is a necessary component in efforts to control the use of force by police and ensure that officers are prepared to properly handle the police-citizen confrontation. The use of force by police officers tends to be situationally motivated and justified by the facts known to the officer at the time they decide to use force. Determining the amount of force to use to overcome various forms of resistance is a complex task for the police and a critical concern for the public. Training is the tool that administrators can use to ingrain respect for human life and a commitment to using force in a humane fashion. The values and standards of agencies and individual officers are frequently called into question via the lawsuit process because juries evaluate officer credibility. Officers who are cognizant of the values of society and the police profession are more likely to operate from a base of integrity, good faith, and reasonableness, compared to those who are not.

It is the obligation of police administrators to keep their officers informed of updates in the latest police methods and practices. Staying abreast of new literature, studies, procedures, concepts, court decisions, and equipment is central to insuring that training programs are current and relevant to today's law enforcement problems.

Adequate training not only benefits the department and its officers, but the communities they serve as well. Trained officers can better respond to the needs and demands of the citizens, and police-citizen encounters can be handled positively and without the use of force whenever possible.

Administrators must ensure that their officers are prepared for the actual street situations they will encounter. Training will give the officers the confidence in their own abilities so they will not overact in confrontations. Frequently, it is the officer that sets the tone of an encounter with a potentially resistant subject. If the subject realizes that the officer projects confidence and professionalism, implying skills, abilities, and training, the subject may decide a fight with the officer is a losing proposition. It is the administrator's responsibility to ensure that the safety of the officer and the subject are priorities, and providing the training necessary to do this is an obligation that cannot be ignored.

This inquiry into the status of policy and training in one urban county in Michigan shows that many police administrators are disregarding their obligation to provide the training necessary to improve the performance of police officers in use-of-force situations. Though inquiry was made into the status of only one of Michigan's 83 counties, the results may be used to reinforce the importance of policy and training to police administrators in all Michigan counties. The results of this inquiry also indicate that the Michigan Commission on Law Enforcement Standards may need to conduct a more detailed study to learn the reasons that the Michigan subject control continuum and training guidelines have not been adopted by a majority of police departments, and then take steps to increase the amount of agencies that are using these valuable tools.

Conclusion

When the founding fathers created the judicial system with Article Three of the United States Constitution, they laid the foundation for public policy review throughout the country. Furthermore, when the Supreme Court developed the doctrine of judicial review, it built upon this strong foundation that had been laid so well. It is through this well built legal system that the decisions of public policy makers are guided so that the actions of those governmental actors who interact with the citizens of this country are carried out in a proper and controlled manner.

One area that has been involved in this control process is the use of force by police. The actions taken by the police impact each and every one of us, and the decisions made by the officer on the street can have lasting effects on everyone involved. The police play a vital role in our society and they are given broad discretionary power to protect the peace, aid people, render medical care, and investigate unusual or dangerous circumstances. Potential liability may arise in many situations in which police intervene in people's lives. Thus, intervention may lead to claims of false arrest, malicious prosecution, deprivation of liberty and property, and other intentional torts and federal civil rights claims based on intrusive methods. There is a perception among some people in our country that the police institution is a brutal organization that needs to be controlled. According to Human Rights Watch (1998):

Police brutality is one of the most serious, enduring, and divisive human rights violations in the United States. The problem is nationwide, and its nature is institutionalized. For these reasons, The U.S. government – as well as state and city governments, which have an obligation to respect international human rights standards by which the United States is bound – deserve to be held accountable. (p. 1)

It is important to remember when holding the police accountable that officers are often confronted with situations that are tense, uncertain and rapidly evolving, and the decisions they make in those moments can be devastating. It is the proper decision making by policy makers *prior* to these incidents that establishes guidelines to help ensure that the officers making those split second decisions know the proper procedures and have been given the training necessary to carry out their duties correctly.

By holding those in authority accountable for developing the necessary policies and procedures, the goals of carrying out public policy can be achieved for the betterment of the citizens in our democratic society committed to a peaceful existence. Since the police are responsible for safeguarding the democratic process, if their conduct fails to conform to the requirements of the law, they frustrate the achievement of this principal. It is for this reason that we must ensure the police are accountable to the public for their actions and it is the legal system that continues to be used as a tool to watch over and review these actions. According to Delattre and Behan (1991):

Those who govern and those who are governed have to be joined in the common purpose of securing the blessings of liberty, and the law applies equally to both. . . . Every time a police officer interacts with citizens, every time a police leader establishes departmental policy . . . those two basic principles should be kept in mind: citizens themselves share the responsibility for upholding constitutional ideals, and those with public authority are bound to serve the public good. (p. 538)

The capacity to use force is at the core of the police function, and this capacity may be used to ensure peaceful existence in society; provided it is carried out in accordance with the wishes of the people, using ethical and democratic principles. It is the responsibility of administrators to ensure this takes place. They must develop policies on the proper use of force, and then reinforce these policies through effective training

and supervision. It is our role as researchers and members of this democratic society to make the review of police use of force a priority because as Bittner (1970) said, “evaluation of that institution must focus . . . on their distribution of non-negotiably coercive force” (p.46).

How can the performance of police officers involved in use-of-force situations be improved so that it is proper, ethical, and in compliance with the constitutional and legal mandates of our democratic society? As the research has shown, it is by having administrators develop policies that guide the decision-making process of officers involved in use-of-force situations, and then conduct training that reinforces those policies and better prepares officers to handle use-of-force situations in a manner that is tactically, ethically, and legally sound.

Appendix A

Federal Civil Rights Statutes

CRIMINAL - Title 18 of the United States Code Service, Sections 241, 242:

18 U.S.C.S. § 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C.S. § 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year or both; and if bodily injury results from these acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

CIVIL - Title 42 of the United States Code Service, Sections 1983, 1985, 1986:

42 U.S.C.S. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.S. § 1985. Conspiracy to interfere with civil rights.

(1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party; witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an

elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more conspirators.

42 U.S.C. S. § 1986. Action for neglect to protect

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 USC § 1985], are about to be committed, and having power to prevent or aid in preventing the commission of same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefore, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action accrued.

42 U.S.C.S. § 14141. Cause of action.

(a) Unlawful conduct. It shall be unlawful for any governmental authority, or agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(c) Civil action by Attorney General. Whenever the attorney General has reasonable cause to believe that a violation of subsection (a) of this section has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

Appendix B

Government Liability Act

Governmental Liability for Negligence, Act 170 of 1964

An ACT to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, officers, employees, and volunteers thereof, and members of certain boards, councils, and task forces when engaged in the exercise or discharge of a governmental function, for injuries to property and persons; to define and limit this liability; to define and limit the liability of the state when engaged in a proprietary function; to authorize the purchase of liability insurance to protect against loss arising out of this liability; to provide for defending certain claims made against public officers and paying damages sought or awarded against them; to provide for the legal defense of public officers and employees; to provide for reimbursement of public officers and employees for certain legal expenses; and to repeal certain acts and parts of acts.

MCL 691.1401 *et seq.* (Act 170 of 1964 Codified)

691.1405 Government owned vehicles; liability for negligent operation.

Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner.

691.1407 Immunity from tort liability; intentional torts; immunity of judge, legislator, official.

(2) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.

(3) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. . . .

(5) A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

Appendix C

Discretionary and Ministerial Acts

Ross v. Consumers Power Company (1984)

The “discretionary/ministerial” test has a long common-law history and grants immunity to individuals only to the extent necessary to guarantee unfettered decision-making. (p. 634)

“Discretionary” acts have been defined as those which require personal deliberation, decision, and judgment. This definition encompasses more than quasi-judicial or policy-making authority, which typically is granted only to members of administrative tribunals, prosecutors, and higher level executives. . . . For clarity, we would add the word “decisional” so the operative term would be “discretionary-decisional” acts. (p. 634)

“Ministerial” acts have been defined as those which constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice. We believe that this decision is not sufficiently broad. An individual who decides whether to engage in a particular activity and how best to carry it out engages in discretionary activity. However, the actual execution of this decision by the same individual is a ministerial act, which must be performed in a non-tortious manner. In a nutshell, the distinction between “discretionary” and “ministerial” acts is that the former involves significant decision-making, while the latter involves the execution of a decision and might entail some minor decision-making. Here too, for clarity, we would add the word “operational” so the operative term would be “ministerial-operational” acts. (pp. 634-635)

The ultimate goal is to afford the officer, employee, or agent enough freedom to decide the best method of carrying out his or her duties, while insuring that the goal is realized in a conscientious manner. (p. 635)

Under the rules set forth today, it is obvious that the immunity extended to individuals is far less than that afforded governmental agencies. We believe that this was the result intended by the Legislature. The threat of personal liability for engaging in *ultra vires* activities [activities which are unauthorized and outside the scope of employment] or tortiously executing one’s duties may be the most effective way of deterring improper conduct. We note, however, that a governmental agency is statutorily authorized to defend or indemnify its officers, employees, and agents in its discretion under certain circumstances. (p. 635)

Police officers, especially when faced with a potentially dangerous situation, must be given a wide degree of discretion in determining what type of action will best ensure the safety of the individuals involved and the general public, the cessation of unlawful conduct and the apprehension of wrongdoers. The determination of what type of action to take, *e.g.*, make an immediate arrest, pursue a suspect, issue a warning, await backup assistance, etc., is a discretionary-decisional act entitled to immunity. Once that decision has been made, however, the execution thereof must be performed in a proper manner, *e.g.*, the arrest must be made without excessive force. (pp. 659-660)

Appendix D

Sample Policy for Use of Force

SAMPLE POLICY FOR USE OF FORCE

I. PURPOSE

The purpose of this directive is to establish policy and procedures to be used as guidelines when determining the appropriate and acceptable use of force, while at the same time ensuring a high degree of officer safety.

II. DEFINITIONS

- A. *Deadly Force* is any force likely to cause death or serious physical injury.
- B. *Non-deadly Force* is any force other than that which is considered deadly force.
- C. *Physical Force* is any type of officer response to a subject's action where the officer uses compliance, physical, or intermediate controls.
- D. *Reasonable Belief* means the facts or circumstances the officer knows, or should know, are such as to cause an ordinary and prudent person to act or think in a similar way.
- E. *Serious Physical Injury* is a bodily injury that creates a substantial risk of death; causes serious, permanent disfigurement; or results in long-term loss or impairment of the functioning of any bodily member or organ.

III. POLICY

This department recognizes and respects the value and special integrity of each human life. In vesting police officers with the lawful authority to use force to protect the public welfare, a careful balancing of all human interests is required. Therefore, it is the policy of this department that officers use only that force which is reasonable and necessary to effectively bring an incident under control, while protecting the lives of the officer and others.

IV. PROCEDURES

A. USE OF FORCE

1. Officers should assess the situation to determine the level of control that would be appropriate. When possible, officers should attempt to gain control by means of verbal directives of commands.
2. If verbal directives or commands are ineffective, or not feasible given the circumstances of the situation, the officer may find it necessary to escalate to control methods that involve the use of physical force.
3. Officers are authorized to use department approved control techniques and equipment to:
 - a. Protect the officer or others from injury or death.
 - b. Prevent others from injuring themselves.
 - c. Stop potentially dangerous and unlawful behavior.
 - d. Effect a lawful arrest when the subject offers resistance.

B. USE OF DEADLY FORCE

1. Officers may only use deadly force to protect the officer or others from what is reasonably believed to be an imminent threat of death or serious physical injury.
2. Restrictions on firearms use:
 - a. Where feasible, officers shall identify themselves and state their intent to shoot prior to using deadly force.
 - b. Officers shall not fire warning shots.
 - c. Officers shall not fire at or from a moving vehicle unless it is a last resort situation.
3. Last resort situations.

- a. In those situations where immediate and drastic measures must be taken in order to prevent death or serious physical injury, officers may use weapons and/or techniques not covered by this policy; however, the officer's actions must remain objectively reasonable in light of the facts and circumstances confronting the officer.
 - (1) These situations may involve the use of motor vehicles, various objects used as impact weapons, and any other technique or object available to the officer.

C. MEDICAL ATTENTION

- 1. Whenever any force is used, medical attention will be provided if:
 - a. The subject requests medical attention.
 - b. The subject complains of injury or continued pain.
 - c. Any officer observes or suspects injury to the subject.
 - d. The subject does not substantially recover from the effects of an Aerosol Subject Restraint (ASR) within the reasonable and expected period of time.

D. REPORTING THE USE OF FORCE

- 1. A supervisor will be notified immediately whenever:
 - a. Deadly force is used.
 - b. Medical attention is required.
- 2. As soon as reasonably possible, officers shall complete an Incident Report and the Law Enforcement Officer-Subject Control Report whenever:
 - a. Any physical or deadly force is used.
 - b. Medical attention is provided.
 - c. A firearm is discharged for other than training or recreational purposes.

3. Officers shall submit completed reports to the appropriate supervisor for review.

V. COMPLIANCE

- A. Violations of this policy may result in disciplinary action.
- B. Officers assigned to or assisting other law enforcement agencies will follow the procedures established in this policy.

VI. APPLICATION

This directive outlines departmental policy and procedures, and is not intended to enlarge the employee's or employer's liability in any way. It shall not be construed as the creation of a higher legal standard of safety or care in an evidentiary sense with respect to third party claims insofar as the employee's or employer's legal duty as imposed by law.

Appendix E

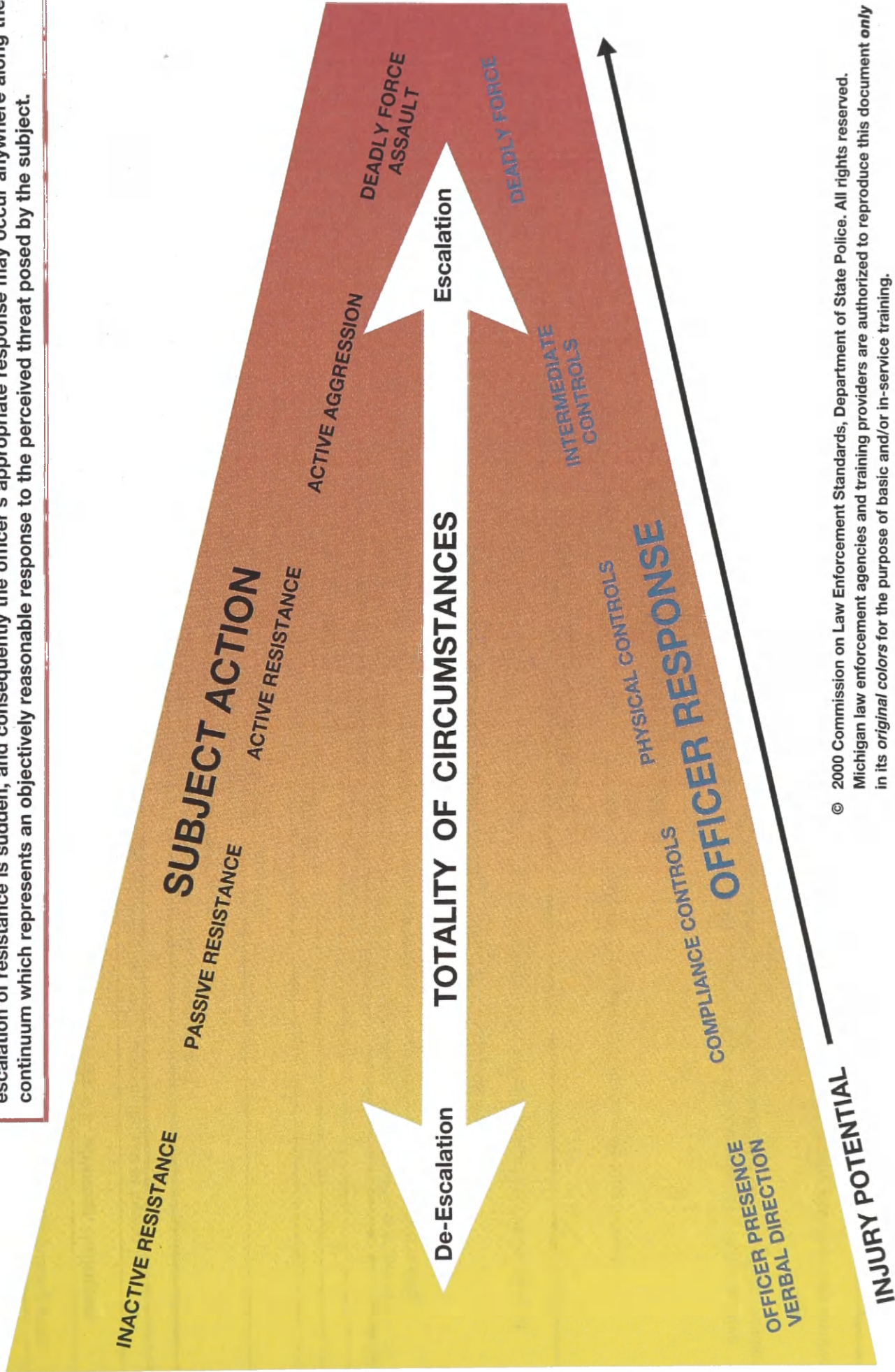
Michigan Law Enforcement Officer-Subject Control Continuum



MICHIGAN LAW ENFORCEMENT OFFICER-SUBJECT CONTROL CONTINUUM

A Training Guide for Escalation and De-Escalation of Subject Control

CAUTION: It is not possible for these Training Guidelines to cover all of the possible situations that occur within the law enforcement officer's job. Therefore, this continuum is offered only as a general training guide to using force in confrontation or arrest situations. The officer must understand that situations occur where the escalation and/or de-escalation of resistance is sudden, and consequently the officer's appropriate response may occur anywhere along the continuum which represents an objectively reasonable response to the perceived threat posed by the subject.



The Michigan Law Enforcement Officer-Subject Control Continuum is published by the Michigan Commission on Law Enforcement Standards and is offered as a general training guide to controlling subjects in confrontation or arrest situations. It is imperative that law enforcement officers be properly trained in the interpretation and application of this guide, and be annually updated on legal issues, technological changes, departmental policy, and skills needed to apply subject control techniques authorized by the law enforcement agency.

SUBJECT ACTIONS

INACTIVE RESISTANCE	Resistance that may include psychological intimidation and/or verbal resistance. (e.g., blank stare, clenching of fist(s), tightening of jaw muscles, etc.)
PASSIVE RESISTANCE	Any type of resistance whereby the subject does not attempt to defeat the officer's attempt to touch and control the subject, but still will not voluntarily comply with verbal and physical attempts of control. (e.g., dead weight, does not react to verbal commands, etc.)
ACTIVE RESISTANCE	Any action by a subject that attempts to prevent an officer from gaining control of the subject. (e.g., pulling/pushing away, blocking, etc.)
ACTIVE AGGRESSION	Physical actions/assaults against the officer or another person with less than deadly force (e.g., advancing, challenging, punching, kicking, grabbing, wrestling, etc.)
DEADLY FORCE ASSAULT	Any force used against an officer or another person that may result in great bodily harm or the loss of human life.
OFFICER RESPONSE*	
OFFICER PRESENCE/VERBAL DIRECTION	Identification of Authority (i.e., uniformed presence, or identification as a police officer) Verbal Direction (e.g., for arrest or to control subject's movements) Use of Restraint Devices (i.e., Compliant Handcuffing)
COMPLIANCE CONTROLS	Soft Empty Hand Techniques (e.g., joint lock, pressure points, etc.) Compliance Control Devices**
PHYSICAL CONTROLS	Hard Empty Hand Techniques (e.g., strikes, take downs, etc.)
INTERMEDIATE CONTROLS	Intermediate Weapons (i.e., impact weapons)
DEADLY FORCE RESPONSE	Any force used by an officer that has a reasonable probability to cause death.

*NOTE: All officer response controls available at the lower end of the continuum are still available to the officer as the subject's action escalates. (e.g., An officer attempting to arrest a subject who is actively resisting him/her may use verbal direction and compliance controls as a control measure even though he/she may be justified in using chemical agents and/or hard empty hand techniques.)

**Compliance Control Devices (e.g., Do-Rite, baton, Kubotan, PR-24, etc., when used as a compliance control device rather than as an impact weapon)

Chemical aerosol sprays have application where the subject's actions constitute Active Resistance or Active Aggression, or when the officer believes lower forms of empty hand controls will be inadequate or unsafe.

TOTALITY OF CIRCUMSTANCES

The question is whether the officer's actions are "**objectively reasonable**" in light of all the facts and circumstances confronting the officer, at the time the force is used.

CIRCUMSTANTIAL CONSIDERATIONS
(List is not all inclusive)

Type of crime committed or attempted, relative size/stature; exigent conditions: number of officers, number of subjects involved, and availability of back-up; reaction time, relative strength; subject(s) access to weapons; subject(s) under the influence of alcohol or drugs; exceptional abilities/skills (e.g., martial arts); injury to, or exhaustion of, the officer; weather or terrain conditions; immediacy of danger; distance from the subject; special knowledge (e.g., subject's prior history of violence, etc.).

Last Resort: Situations may occur where certain, immediate, and drastic measures must be undertaken by an officer to protect human life. Force used in these situations may involve the use of techniques or weapons not specifically authorized by policy (e.g., neck restraint, striking with flash light, etc.).

Appendix F

Michigan Law Enforcement Officer-Subject Control Training Objectives

Michigan Law Enforcement Officer-Subject Control Training Objectives

Module Title: APPLICATION OF SUBJECT CONTROL

Notes to instructor:

These training objectives are to be used in conjunction with the Michigan Law Enforcement Officer-Subject Control Continuum (MLEO-SCC). Trainees will need ready access to the continuum during the training.

Module Objectives:

Upon completion of this module, the officer will be able to:

1. Demonstrate an understanding of the law as it relates to the use of force.

Identifies that in order for an officer to use force there must be a legal basis for the initial contact or intrusion.

Describes that an officer's duty is to uphold the law and is not required to retreat from an arrest or confrontation situation by reason of resistance shown.

Identifies that only that force (Control Methods) necessary to apprehend a suspect may be used (*People v. McCord*, 76 Mich 200 (1889); *Warner v. Hartfelder*, 113 Mich App 747 (1982)).

Describes that force (Control Methods) must be used in an "objectively reasonable" manner in light of the facts and circumstances (Totality of the Circumstances) surrounding the officer, and (*Graham v. Connor*, 109 S.Ct.1865 (1989):

Defines reasonableness as being determined by:

Balancing the nature and quality of the intrusion with the need for governmental action;

The severity of the crime at issue;

Whether the suspect poses an immediate threat to the safety of the officers or others;

Whether the suspect is actively resisting arrest or attempting to evade arrest by flight;

A reasonable officer on the scene, rather than 20/20 hindsight;
and

The fact that police officers are often face to make split second
judgments under circumstances that are tense, uncertain, and
rapidly evolving; and

Identifies that the reasonableness of the use of force is judged at the
moment the force was used.

Describes deadly force as any force used against another person that may result
in great bodily harm or the loss of human life.

Describes non-lethal force as force used by an officer that will not reasonably be
expected, or have the likely potential to cause great bodily harm or the loss of
human life.

Identifies that deadly force may be used under the following conditions:

In self defense;

In defense of another when the officer has reason to believe there is
imminent danger of death or great bodily harm;

To apprehend a fleeing felon where the officer has probable cause to
believe that: (*Tennessee v. Garner*, 105 S.Ct. 1694 (1985), *Washington v.*
Starke, 173 Mich. App.230 (1989))

The suspect has threatened an officer with a weapon; or

The officer has probable cause to believe that the suspect has
committed a crime involving the infliction or threatened infliction
of serious physical harm; and

The use of deadly force is necessary to prevent the suspect's
escape; and

If feasible, some warning has been given.

On other occasions covered by departmental policy (e.g., shoots injured
animals).

Describes departmental policy as also defining the circumstances where force
may be used.

2. Demonstrate an understanding of the Michigan Law Enforcement Officer-Subject Control Continuum (MLEO-SCC).

Defines the terms listed on the Continuum:

Active Aggression – Physical actions/assaults against the officer with less than deadly force (e.g., advancing, challenging, punching, kicking, grabbing, wrestling).

Active Resistance – Any action by a subject that attempts to prevent an officer from gaining control of the subject (e.g., pulling/pushing away, blocking, etc).

Compliance Controls – Soft Empty Hand Techniques (e.g., joint lock, pressure points, etc.).

Control – is established when the subject's unlawful action(s) are neutralized and no longer pose a threat to the officer, the subject, and/or others.

Deadly Force – Any force used against another person that may result in death or serious physical injury.

De-escalation of Force – is the officer's decreased control response to a subject's decreased level of resistance or aggressive action. This does not mean to imply the officer must ease all control. Control must be maintained at an appropriate level.

Escalation of Force – is the officer's increased reasonable and necessary control response to a subject's increased level of resistance or aggressive action when the level of force being used is insufficient to stop or control the resistance or aggressive action.

Force – is the attempt to establish control through physical means, in the presence of resistance.

Inactive Resistance – Resistance that may include psychological intimidation and/or verbal resistance (e.g. blank stare, clenching of fist(s), tightening of jaw muscles, etc.).

Intermediate Controls – Intermediate Weapons (e.g., impact weapons).

Objective Reasonableness – is the officer's action consistent with the actions another officer would take given the same circumstances.

Officer Presence/Verbal Direction – Identification of Authority (e.g., uniform, police identification) Verbal Directions (e.g., for arrest or to control a subject's movements) Use of Restraint Devices (e.g., compliant handcuffing).

Officer Response – Is the officer's lawful action taken to gain control of a subject whose unlawful actions create a dangerous situation for the officer or others, or the subject is attempting to defeat the officer's attempt to gain control.

Passive Resistance – Any type of resistance whereby the subject does not attempt to defeat the officer's attempt to touch and control the subject, but still will not voluntarily comply with verbal and physical attempts of control (e.g., dead weight, does not react to verbal commands, etc.).

Physical Controls – Hard Empty Hand Techniques (e.g., strikes, take downs, etc.).

Subject Action – Actions (verbal or physical) taken by a subject to defeat an officers attempt to gain control of the subject during an arrest or confrontational situation. The subject's action determines the officer's response.

Totality of Circumstances – All of the facts and circumstances confronting the officer, at the time the force is used. These include, but are not limited to:

Type of crime committed or attempted;

Relative size/stature;

Exigent conditions: number of officers, number of subjects involved, and availability of backup;

Relative strength;

Subject's access to weapons;

Subject under the influence of alcohol or drugs;

Subject's exceptional abilities/skills (e.g., martial arts);

Injury to, or exhaustion of the officer;

Weather or terrain conditions;

Immediacy of danger;

Distance from the subject;

Special knowledge (e.g., subject's prior history of violence, etc.);

Reaction time: the officer must consider that action is faster than reaction, thus the officer must pay attention to the above factors when preparing for a course of action;

Reactionary gap: officers should be cognizant of, and utilize a reactionary gap during all police/subject contacts. The reactionary gap is defined as a safety zone between the officer and subject, which affords the officer more time to react to aggression. The minimum distance is six to eight feet, but varies with the type of weapon the subject may possess;

The officer generally has two reactionary options available: penetrate the gap to attempt control, or disengage to create distance.

3. Demonstrate an understanding of the relationship between the use of force and the Michigan Law Enforcement Officer-Subject Control Continuum (MLEO-SCC).

Identifies the MLEO-SCC as a general guideline for controlling subjects in arrest or confrontation situations.

Describes the MLEO-SCC as graphically displaying that the escalation or de-escalation of resistance by a subject can be sudden and:

That resistance and response are dynamic;

The subject's action and the officer's use of force to control it may fluctuate through out the continuum during any encounter;

The officer's appropriate response may occur anywhere along the continuum which represents an objectively reasonable response to the perceived threat (subject's actions);

The subject's actions are the driving force that dictate the officer's response;

That all the facts and circumstances (totality of circumstances) known the officer, will affect the officer's response;

That as the subject's actions become more resistant or aggressive (violent):

The officer's response must be sufficient enough to gain control or prevent injury or death to the officer;

The officer's use of force must be in proportion to the threat perceived by the officer;

The officer's options for control of the subject become limited;

The potential for injury to the officer, subject, and others increases; and

The immediacy of a decisive and appropriate response is critical;

That as the subject's actions cease and/or resistance is reduced:

The officer must still gain and maintain control;

The officer must reduce the amount of response force used proportionally; and

The officer must be alert and ready to respond to any attempt by the subject to escalate resistance or assault the officer or others;

That all officer response controls available at the lower end of the continuum are still available as the subject's action escalates;

That the majority of officer-subject contact is not depicted on the continuum in that:

Most subject arrests are completed through verbal direction (there is no resistance by the subject) and the application of handcuffs; and

Most officer-subject confrontations where an arrest is not made are resolved peacefully;

That the majority of officer-subject contacts, which involve subject resistance, occur at the lower end (lighter shaded area) of the continuum.

4. Demonstrates an understanding of the decision making process required to use the appropriate amount of force in gaining control of a subject.

Assesses the situation by considering the Totality of Circumstances.

Plans for an appropriate response:

Where reaction time may be very limited (split-second):

Through training, and

Mental preparation (situation rehearsals);

Where there is time to analyze and formulate a plan of response.

Takes appropriate action.

5. Write a report that documents the officer's use of force.

Identifies that a well-written report documenting the use of force is the officer's best defense against excessive force claims.

Utilizes the Michigan Law Enforcement Officer-Subject Control as a guide while writing a use of force report to:

Ensure that all of the elements of the use of force are described, and

Consistent and correct terminology is used.

Includes the following information in detail:

The legal basis for the intrusion;

The totality of circumstances

Documents in detail any observable injuries that occurred; and the

Medical treatment required;

Location (e.g., at the scene, hospital, etc.) treatment received;

Attending medical personnel (e.g., paramedic, nurse, doctor, etc.);

Time elapsed between injury and treatment; and

The photographing of the injuries.

Documents damage to equipment (e.g., uniform, watches, glasses, patrol car, property, etc.) that resulted from the subject's actions.

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