

# THE ENDOGENOUS FOURTH AMENDMENT: AN EMPIRICAL ASSESSMENT OF HOW POLICE UNDERSTANDINGS OF EXCESSIVE FORCE BECOME CONSTITUTIONAL LAW

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*If the Fourth Amendment is designed to protect citizens from law enforcement abusing its powers, why are so many unarmed Americans killed? Traditional understandings of the Fourth Amendment suggest that it has an exogenous effect on police use of force, i.e., that the Fourth Amendment provides the ground rules for how and when law enforcement can use force that police departments turn into use-of-force policies that ostensibly limit police violence. In this Article, we question whether this exogenous understanding of the Fourth Amendment in relation to excessive force claims is accurate by engaging in an empirical assessment of the use-of-force policies in the seventy-five largest American cities. We find that rather than translating Fourth Amendment standards into specific rules for police and clear protections for citizens in a “top down” fashion, use-of-force policies largely regurgitate the Fourth Amendment’s ambiguities concerning what is “reasonable” while inserting additional equivocations that reflect the interests of law enforcement. This empirical evidence, along with a doctrinal examination of how use-of-force policies are used when presented to federal courts, gives rise to a new understanding of the Fourth Amendment, where self-serving police understandings of excessive force are embedded in use-of-force policies and shape the meaning of reasonable force. These policies are often relied upon, referenced, or deferred to by federal courts as a lawful implementation of an ambiguous Fourth Amendment. Thus, rather than the Fourth Amendment*

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having an exogenous effect on use-of-force policies and police behavior, this Article argues that federal courts often embrace an endogenous, or “bottom-up” meaning of excessive force where the policy preferences of police departments are rearticulated as constitutional law. This finding from our empirical work provides a new way to understand why use-of-force policies and the Fourth Amendment have been ineffective in combating excessive force by the police. Moreover, this endogenous understanding of Fourth Amendment excessive force jurisprudence opens up new avenues for legal reform.

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## INTRODUCTION

Recent high-profile killings of unarmed Black people by the police and resulting social movements have brought renewed attention to the constitutional limits on police use of force during arrests or investigatory stops—an area governed by the Fourth Amendment. Since the 1980s, the Supreme Court has

engaged in a series of decisions—notably *Tennessee v. Garner*<sup>1</sup> and *Graham v. Connor*<sup>2</sup>—that, on their face, appear to provide greater protection for the public by limiting police discretion. *Garner* holds that police may not use deadly force to apprehend fleeing suspects, while the Court in *Graham* refines the constitutional boundaries of police use of force by stating that such actions must be reasonable. In this context, the Court and legal scholars have largely framed the Fourth Amendment as a legal shield against police abuse and mistreatment or as a repository of legal rights that protect citizens from undue State power while being *exogenous* to on-the-ground police/community interactions. Although commentators have raised concerns over whether these constitutional provisions offer enough tactical guidance to constrain police power, the overall sentiment concerning the Fourth Amendment as a set of external governing rules that restrain police action is largely accepted in legal doctrine and traditional scholarly literature.

It would be expected that this aspect of the Fourth Amendment and its interpretative turn toward “reasonableness” since *Graham*<sup>3</sup> would provide community members basic, if not meaningful, protections against police violence—or, at the very least, hold police officers and departments accountable after the fact when there is clear evidence of abuse. Many police departments have aligned their policies with this judicial understanding of the constitutional limitations placed on the police and have developed other tactical measures thought to be commensurate with the Court’s holdings.<sup>4</sup>

Yet, police violence remains a constant, if not growing, problem in many communities.<sup>5</sup> Despite recent media atten-

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<sup>1</sup> 471 U.S. 1 (1985).

<sup>2</sup> 490 U.S. 386 (1989).

<sup>3</sup> *Id.* at 395 (“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.”).

<sup>4</sup> See, e.g., BAKERSFIELD POLICE DEPT., BAKERSFIELD PD POLICY MANUAL 60 (2017) (“[E]very member of this department is expected to use these guidelines to make [use-of-force] decisions in a professional, impartial and reasonable manner.”).

<sup>5</sup> See, e.g., Carl Bialik, *Why Are So Many Black Americans Killed By Police?*, FIVETHIRTYEIGHT (July 21, 2016, 1:24 PM), <https://fivethirtyeight.com/features/why-are-so-many-black-americans-killed-by-police/> [https://perma.cc/4AMD-HL7B]; Kimbriell Kelly et al., *Fatal Shootings by Police Remain Relatively Unchanged After Two Years*, WASH. POST (Dec. 30, 2016), [https://www.washingtonpost.com/investigations/fatal-shootings-by-police-remain-relatively-unchanged-after-two-years/2016/12/30/fc807596-c3ca-11e6-9578-0054287507db\\_story.html](https://www.washingtonpost.com/investigations/fatal-shootings-by-police-remain-relatively-unchanged-after-two-years/2016/12/30/fc807596-c3ca-11e6-9578-0054287507db_story.html) [https://perma.cc/DG3W-MG5M]; John Sullivan et al., *Number of Fa-*

tion and protest, the situation remains bleak: data suggests that police are killing people at roughly the same rate as they did before Michael Brown's shooting in Ferguson, Missouri, sparked national protests.<sup>6</sup> As officers continue to be acquitted of charges or not charged at all—even when questionable police killings and other acts of aggression are documented on video—communities are still finding little accountability in the legal system.<sup>7</sup>

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*tal Shootings by Police is Nearly Identical to Last Year*, WASH. POST (July 1, 2017), [https://www.washingtonpost.com/investigations/number-of-fatal-shootings-by-police-is-nearly-identical-to-last-year/2017/07/01/98726cc6-5b5f-11e7-9fc6-c7ef4bc58d13\\_story.html?utm\\_term=.34888baef7c6](https://www.washingtonpost.com/investigations/number-of-fatal-shootings-by-police-is-nearly-identical-to-last-year/2017/07/01/98726cc6-5b5f-11e7-9fc6-c7ef4bc58d13_story.html?utm_term=.34888baef7c6) [<https://perma.cc/D76Q-VN3X>] (“Since Brown’s killing in Ferguson, other fatal shootings by police, many captured on video, have fueled protests and calls for reform. Some police chiefs have taken steps in their departments to reduce the number of fatal encounters, yet the overall numbers remain unchanged.”); see also CENTER FOR POLICING EQUITY, THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE 4 (2016), [https://policingequity.org/images/pdfs-doc/CPE\\_SoJ\\_Race-Arrests-UoF\\_2016-07-08-1130.pdf](https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf) [<https://perma.cc/AW8B-QLV6>] (“Even though this is a conservative estimate of bias, the analyses of 12 law enforcement departments from geographically and demographically diverse locations revealed that racial disparities in police use of force persist even when controlling for racial distribution of local arrest rates.”). See generally FRANKLIN E. ZIMRING, WHEN POLICE KILL (2017) (discussing police violence and the need for protocols governing lethal police force). It must also be added that police violence has always been a problem for communities of color. See, e.g., Nancy Krieger et al., *Trends in US Deaths Due to Legal Intervention Among Black and White Men, Age 15–34 Years, by County Income Level: 1960–2010*, 3 HARVARD PUB. HEALTH REV., Jan. 2015, at 2, <http://harvardpublichealthreview.org/190/> [<https://perma.cc/8SY2-LCEE>] (“[T]he excess black vs. white mortality rate among men age 15–34 due to legal intervention is . . . longstanding . . .”).

<sup>6</sup> Carl Bialik, *The Police Are Killing People as Often as They Were Before Ferguson*, FIVETHIRTYEIGHT (July 7, 2016, 7:02 PM), <https://fivethirtyeight.com/features/the-police-are-killing-people-as-often-as-they-were-before-ferguson/> [<https://perma.cc/YWS2-4KTQ>]; *Police Shootings 2018 Database*, WASH. POST (2018), [https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm\\_term=.ee2e914413ba](https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.ee2e914413ba) [<https://perma.cc/7LES-BS4X>]; *Police Shootings 2017 Database*, WASH. POST (2017), <https://www.washingtonpost.com/graphics/national/police-shootings-2017/?noredirect=ON> [<https://perma.cc/7NR7-37TG>]; see also Rob Arthur et al., *Shot by Cops and Forgotten: Police Shoot Far More People Than Anyone Realized, A Vice News Investigation Reveals*, VICE (Dec. 11, 2017), <https://news.vice.com/story/shot-by-cops> [<https://perma.cc/PZ7Q-8JLL>] (“An exclusive analysis of data from the 50 largest local police departments in the United States shows that police shoot Americans more than twice as often as previously known. Police shootings aren’t just undercounted—police in these departments shoot black people at a higher rate and shoot unarmed people far more often than any data has shown.”).

<sup>7</sup> See, e.g., Faith Karimi et al., *Tulsa Officer Acquitted in Fatal Shooting of Terence Crutcher*, CNN (May 18, 2017, 3:39 AM), <http://www.cnn.com/2017/05/17/us/tulsa-police-shooting-trial/index.html> [<https://perma.cc/38QS-RJC6>] (describing a case in which an officer was acquitted of shooting an unarmed man despite video evidence showing the man “with his arms in the air before being shot”); Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shoot->

This draws attention to a tension that deserves further theoretical, doctrinal, and empirical exploration: how is it that Fourth Amendment jurisprudence on police use of force can be thought of by the Court and many legal scholars as *restricting* police and yet, as an empirical matter, communities (especially those of color) are experiencing continued if not increasing instances of police violence? Put differently, how can it be that ostensibly protective if not progressive constitutional standards and judicial interpretations aimed at greater fairness, transparency, and restraint are so profoundly ineffective?

A common response to these questions is that police violence is a product of individualized racism, i.e., the racism—whether implicit or explicit—of individual officers<sup>8</sup> that undermines the protective nature of Fourth Amendment doctrine. According to this “bad apples” framing, the solution is simple: more and better training aimed at reducing implicit bias and removing officers who demonstrate explicit racism. In this way, the institutions that support and enable these officers remain without scrutiny—especially federal courts in their decisions on whether certain uses of force violate the constitution. The racism of individual officers is, of course, important, and improving officer training to maximize respect for community members and minimize force in resolving conflict is essential to ethical and effective policing. But it is also important to be attentive to the roles played by policy in these dynamics.

A fruitful place to begin this work is to understand how the Fourth Amendment shapes local, official ground rules for

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ing-trial-philando-castile.html [https://perma.cc/9D43-ZVTG] (describing a case in which an officer was acquitted despite video of the victim’s girlfriend “live-streaming the aftermath of [the] police shooting of her boyfriend, Philando Castile, and narrating the searing, bloody scene that was unfolding around her”); see also AMNESTY INTERNATIONAL, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 3 (2015), [https://www.amnestyusa.org/wp-content/uploads/2015/06/aious\\_deadlyforcereportjune2015-1.pdf](https://www.amnestyusa.org/wp-content/uploads/2015/06/aious_deadlyforcereportjune2015-1.pdf) [https://perma.cc/R2JU-S4UT] (“What is urgently needed is a nationwide review and reform of existing laws, policies, training and practices on police use of lethal force, as well as a thorough review and reform of oversight and accountability mechanisms. As this demonstrates, one of the steps that needs to be taken is for state laws to be thoroughly reformed or, in some cases, replaced with new laws to ensure that police are not permitted to use lethal force except where it is necessary to protect against an imminent threat of death or serious injury.”).

<sup>8</sup> See, e.g., Ryan J. Reilly, *Jeff Sessions Blames Bad Apples for Police Abuse. He Should Read These DOJ Reports.*, HUFFINGTON POST (Jan. 11, 2017, 10:50 PM), [https://www.huffingtonpost.com/entry/police-jeff-sessions-civil-rights-police\\_us\\_58767eb3e4b092a6cae4ac97](https://www.huffingtonpost.com/entry/police-jeff-sessions-civil-rights-police_us_58767eb3e4b092a6cae4ac97) [https://perma.cc/JT6U-H6G6] (describing testimony by former Attorney General Jeff Sessions implying that individual officers, rather than police departments as a whole, were responsible for unlawful police conduct).

when, how, and in what manner police can use force against civilians. Recent discussions concerning police violence have focused on a number of potential reforms, from body cameras to civilian review boards to implicit bias testing. Yet, surprisingly, the basic rules and regulations that govern police engagements have been largely neglected as a site for scholarly attention. These administrative regulations concerning civilian-police encounters—known as “use of force policies”—dictate, delimit, and incentivize police behavior. They are written policies of how police must act in scenarios where force against citizens is used as part of their law enforcement duties.

Use-of-force policies serve at least two core overlapping functions: (1) they are the guidelines and instructions police departments use to train and direct officers on when, where, and how much force to use; and (2) they are also often used to decide whether an officer’s conduct is punishable by the department after an incident. Thus, these policies are embedded in both the production of the violent event as well as how that event is read and legitimated in administrative and legal contexts after it happens. Taken together, use-of-force policies perform the important function of both instructing officers in force usage and providing a standard by which alleged deviations may be measured. As a result, such policies are an important place for scholarly inquiry to understand how Fourth Amendment jurisprudence is translated into local rules and the role these policies might play to produce lasting and meaningful reform in a context of persistent police violence.<sup>9</sup>

Despite this critical role, there is currently little systematic knowledge of the content in police use-of-force policies. To further our understanding of these policies, this Article engages in an empirical analysis of use-of-force policies from the seventy-five largest cities<sup>10</sup> in the United States.<sup>11</sup> Scholars across many disciplines have conducted empirical work on use-of-force policies, largely focusing on aggregate incidents,

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<sup>9</sup> See Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167, 173 (1969) (“Structural violence is silent, it does not show—it is essentially static, it is the tranquil waters. In a static society, personal violence will be registered, whereas structural violence may be seen as about as natural as the air around us.” (emphasis omitted)).

<sup>10</sup> Of the top seventy-five largest cities, the use-of-force policy from Memphis, TN (the twenty-fifth) is not available. We therefore excluded Memphis from our analysis and included the seventy-sixth largest city, Fort Wayne, Indiana.

<sup>11</sup> *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More*, U.S. CENSUS BUREAU (2016), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [https://perma.cc/D5L2-KJG3].

individual case studies, or models for intervention in a manner that is largely detached from Fourth Amendment considerations.<sup>12</sup> The use-of-force study in this Article differs from other scholarly work in that the unit of analysis is the policies themselves. By conducting a rich content analysis of these seventy-five use-of-force policies, this study collects, codes, and evaluates local police understandings of Fourth Amendment restrictions regarding excessive use of force.

Our study highlights three important findings. First, use of force policies rely upon the vagueness and ambiguity of Fourth Amendment case law. By this, we mean that virtually every use-of-force policy contains the language of “reasonableness” reiterated throughout court decisions since *Graham v. Connor* in 1989 without much discussion of what this construct means as an on-the-ground, tactical matter. Absent further textual instruction on what “reasonable” means in particular circumstances, the judicial interpretation of this Fourth Amendment protection remains unarticulated, devolving into a legal gray area. Second, as a result of this ambiguity, use-of-force policies largely refrain from affirmative policymaking, which gives police officers wide latitude to use the force they deem appropriate in any given situation. Rather than restraining police behavior, this latitude can function as creating *before the fact* justifications for police force. Third, these use-of-force policies do not include sufficient protections for civilian health and safety.

These empirical findings not only provide useful insights into the inner workings of use-of-force policies, they also suggest a novel theoretical understanding of the Fourth Amendment’s relation to these policies. The Fourth Amendment, as with much of statutory and constitutional law, is thought of as an exogenous mechanism that governs police engagements. Because the Fourth Amendment is conceived as a repository of rights for citizens against the police, surrounding debates

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<sup>12</sup> See, e.g., Geoffrey P. Alpert & John M. MacDonald, *Police Use of Force: An Analysis of Organizational Characteristics*, 18 JUST. Q. 393, 393 (2001); Geoffrey P. Alpert & Michael R. Smith, *Police Use-of-Force Data: Where We Are and Where We Should Be Going*, 2 POLICE Q. 57, 57 (1999); Robert J. Friedrich, *Police Use of Force: Individuals, Situations, and Organizations*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 82, 82 (1980); Michael D. White, *Controlling Police Decisions to Use Deadly Force: Reexamining the Importance of Administrative Policy*, 47 CRIME & DELINQ. 131, 131 (2001); David Jacobs & Robert M. O’Brien, *The Determinants of Deadly Force: A Structural Analysis of Police Violence*, 103 AM. J. SOC. 837, 837 (1998); Roland G. Fryer, Jr., *An Empirical Analysis of Racial Difference in Police Use of Force 1* (Nat’l Bureau of Econ. Research, Working Paper No. 22399, 2018), <http://www.nber.org/papers/w22399> [<https://perma.cc/QR5Q-2YCD>].

largely frame it as an external legal mechanism that provides rules that constrain state power through judicial review. The empirical analysis of use-of-force policies provided in this Article, however, suggests that the judiciary's understanding of the Fourth Amendment and constitutionality of police force may be *endogenous* rather than *exogenous*. Instead of an independent judiciary determining the meaning of the Fourth Amendment and impressing it upon local police departments, local departments create meaning and symbolic adherence to ambiguous constitutional norms by developing use-of-force policies that reflect their own institutional and administrative preferences. In turn, federal courts defer to these policies as a reasonable iteration of police force.

To make this argument, we extend Lauren Edelman's<sup>13</sup> "legal endogeneity theory" to the Fourth Amendment and use-of-force policy context. Edelman developed this sociological account to explain how the Civil Rights Act of 1964, despite its progressive aspirations, did not produce its intended effects on discrimination in hiring and other workplace dynamics.<sup>14</sup> Legal endogeneity permits a more nuanced theorization of Fourth Amendment excessive force jurisprudence. Fourth Amendment scholars have discussed federal courts' tendency to defer to police expertise. These largely historical and doctrinal accounts examine how police officers' status as professionals has been used to offer testimonial or experiential knowledge that can assist the court.<sup>15</sup> Yet, this scholarship has not empirically explored the sociological dynamics leading courts to not simply defer to expert testimony or police practices, but to allow the *policy preferences* of police departments—as organiza-

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<sup>13</sup> LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 12 (2016).

<sup>14</sup> See generally *id.* at 3–20 (examining change in workplace inequality or the basis of race and gender in the decades after the Civil Rights Act of 1969 became law).

<sup>15</sup> See, e.g., Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1997 (2017) (exploring the history of courts seeking police expert testimony in criminal matters); Aziz Huq, *Fourth Amendment Gloss*, 113 NW. U. L. REV. 701, 703 (2019) (drawing upon the idea of 'historical gloss' in the separation of powers context to highlight how longstanding, on-the-ground police practices in search and seizure contexts informs judicial decision making). For broader discussions of judicial deference in criminal procedure, see generally Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 785 (2014) (exploring federal courts' tendency to defer to pretrial evidence collected by investigators despite questions of accuracy or accountability); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1195 (2012) (discussing problems that arise when courts defer to the judgements of criminality provided by law enforcement).



tions—to shape federal courts’ interpretation of what constitutes excessive force as a constitutional matter. The deference discussed in relation to legal endogeneity is quite different from the “deference” discussed by some Fourth Amendment analysts. The sociological literature is interested in the dynamics leading organizational actors to interpret polysemous rules meant to regulate them, develop internal administrative policies—here, on use of force—that reflect their interests and perspectives, and have these policies deferred to by federal courts as *the* appropriate interpretation of constitutional meaning. This is less a matter of federal courts soliciting individual expert testimony from police officers or assessing existing police practices and more an instance of federal courts abdicating their interpretive role and allowing the administrative policies of police departments to define the meaning of excessive force under the Fourth Amendment.

Rather than conceptualizing excessive force as a deviation from externally imposed (i.e., “top-down”) constitutional rules that shape departmental policies on use of force, legal endogeneity theory characterizes the *structural and doctrinal pathways* through which the administrative preferences of police departments can *become constitutional law* in a “bottom-up” fashion. This dynamic has been underappreciated, yet it provides a novel explanation for how brutal examples of excessive force by police persist largely without consequence at the very moment that seemingly progressive laws and policies on police restraint are on the books. Exposing the endogenous nature of how police preferences concerning excessive force can shape the Fourth Amendment (rather than the Fourth Amendment driving police behavior) also offers new points of intervention for developing meaningful reform.<sup>16</sup>

This Article consists of five parts. Part I reviews the literature concerning Supreme Court decisions and existing scholarship on police excessive force and use-of-force policies. This section provides a brief overview of the Fourth Amendment case law regulating force usage and reviews different scholarly perspectives on this jurisprudence. In Part II, we present findings from our content analysis of use-of-force policies from the

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<sup>16</sup> See Osagie K. Obasogie & Zachary Newman, *Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment*, 105 VA. L. REV. 425, 927 (2019) (arguing that understanding the endogenous relationship between the Fourth Amendment and use-of-force policies creates opportunities for communities to participate in the development of local use-of-force policies to shape federal courts’ understanding of excessive force in a manner that prioritizes civilian health and safety).

seventy-five largest cities and demonstrate how these policies rely on ambiguous case law. We introduce legal endogeneity theory in Part III, originally developed in a statutory context by Lauren Edelman, and explain how it can be adapted in a constitutional space. We then engage in a doctrinal examination of federal court decisions that connects our empirical findings to legal endogeneity theory to describe the iterative processes through which the ambiguous case law outlined in Part I interacts with the use of force policies discussed in Part II to enable a system of normalized excessive force by the police. The Article concludes with a discussion of how legal endogeneity theory can allow for reconceptualizing our understanding of the relationship between the Fourth Amendment, use-of-force policies, and police behavior in a manner that might create new doctrinal opportunities for police reform and reduce the violence and adverse health impacts suffered by communities where police excessive force is common.

## I

### USE OF FORCE: DOCTRINE, CASE LAW, AND SCHOLARSHIP

The law regarding police use of force gives significant discretion to police officers and provides few mechanisms for oversight.<sup>17</sup> By channeling all claims regarding police use of excessive force during arrests or investigatory stops through Fourth Amendment analyses, the legal system individualizes remedies for those subjected to police violence and disconnects this issue from its structural causes.<sup>18</sup> In this context, police departments have legal support to produce policies that contain abstract statements regarding force usage without substantive protections for citizens—all while giving individual officers wide latitude to use deadly and non-deadly force.<sup>19</sup> In

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<sup>17</sup> John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155, 161 (2016) (Supreme Court case law has resulted in “a highly deferential standard by which to determine whether use of force is justified; the decision to use deadly force is left almost entirely up to the individual officer”).

<sup>18</sup> Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 Nw. U. L. Rev. 1465, 1469 (2018) (discussing how the *Graham* decision changed excessive force jurisprudence by forcing all claims into a Fourth Amendment analysis).

<sup>19</sup> See Gross, *supra* note 17, at 155–56 (“While the Supreme Court has made it clear that the Fourth Amendment applies to questions about the use of deadly force, the Court has never given any specific guidance to law enforcement on when the use of deadly force is justified—and the standard of review the Court has promulgated is highly deferential to the judgment of police officers.”).

this section, we briefly examine the case law giving rise to this situation as well as how it has been discussed in legal scholarship.

### A. Case Law

While use of force policies are a central part of understanding the causes of police violence, it is also important to appreciate how these policies are supported by legal precedent that creates the conditions for departments to develop these documents.<sup>20</sup> There are a few key Supreme Court cases that examine the constitutional parameters of police use of force, with *Tennessee v. Garner*<sup>21</sup> and *Graham v. Connor*<sup>22</sup> being the most prominent. But these cases are notoriously thin in substance; little direction is given to officers or to police departments on what the law requires of them.<sup>23</sup> Moreover, police violence in general is not a subject that arises often for the Supreme Court,<sup>24</sup> and therefore there are only a handful of authoritative decisions that speak to a social and legal issue that has gained recent visibility.<sup>25</sup>

In 1985, the Supreme Court decided *Tennessee v. Garner*.<sup>26</sup> Edward Garner, a 15-year-old African American boy, was shot in the back of the head as he ran in the aftermath of committing a burglary, even though the officer who shot him

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<sup>20</sup> See Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1123 (2008).

<sup>21</sup> 471 U.S. 1 (1985).

<sup>22</sup> 490 U.S. 386 (1989).

<sup>23</sup> See Tim Longo, *Defining Instrumentalities of Deadly Force*, 27 TOURO L. REV. 261, 267 (2011) (“The rule of law that comes out of *Garner* is limited to deadly force, and only in the context of the fleeing felon. *Graham*, on the other hand, pertains to all uses of force.” (footnote omitted)); see also Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 278–88 (2017) (examining the empirical evidence of use-of-force policies adopted by various agencies and how the language in *Graham* affected the formulation of those policies).

<sup>24</sup> William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1043 (1995) (“[C]ases like *Garner* are telling precisely because they are so rare. For every reported decision discussing the law of deadly force, dozens discuss the rules that govern automobile searches. And amazingly, there is virtually no case law governing the use of nondeadly force.” (footnote omitted)); Gross, *supra* note 17, at 157 (the Supreme Court “seldom addresses the issue of police officer use of force; when the issue is addressed, legal justifications for the use of force, and the limitations on when the use of force is appropriate are not analyzed or discussed in any great detail”).

<sup>25</sup> Longo, *supra* note 23, at 262 (“[T]he Supreme Court of the United States has decided only three cases to help determine the scope and extent of appropriate force: *Tennessee v. Garner*, *Graham v. Connor*, and *Scott v. Harris*.” (footnotes omitted)).

<sup>26</sup> 471 U.S. 1 (1985).

saw that he did not have a gun in his hand.<sup>27</sup> The Court characterized the main issue of the case in fairly narrow terms by deciding on “the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon.”<sup>28</sup> The Court concluded that deadly force cannot be used unless it is “necessary” to prevent escape and the officer believes that the citizen “poses a significant threat of death or serious physical injury to the officer or others.”<sup>29</sup> Garner’s actions did not merit the officer using fatal force to stop him, leading the Court to establish a clear rule that an officer cannot use fatal force to stop unarmed fleeing suspects who pose no threat.

While *Garner* created an affirmative limit on excessive force, subsequent decisions failed to clarify this line of analysis.<sup>30</sup> In 1989, the Court decided *Graham v. Connor*.<sup>31</sup> A police officer stopped Dethorne Graham, an African American man who was experiencing hypoglycemia, after he quickly (and, to the officer’s eyes, suspiciously) entered and left a convenience store seeking orange juice to offset his diabetic condition.<sup>32</sup> Additional police officers were called to the scene. They erroneously believed that Graham was intoxicated and arrested him. In the ensuing interaction, Graham passed out, was tightly handcuffed, and roughly thrown in a police car. He sustained “a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder.”<sup>33</sup> Graham brought suit under 42 U.S.C. § 1983 to recover damages for injuries caused by the arresting officers’ excessive force in violation of the Fourteenth Amendment.<sup>34</sup> The Court characterized their decision as describing “what constitutional standard governs a free citizen’s claim

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<sup>27</sup> *Id.* at 3–4, 4 n.2.

<sup>28</sup> *Id.* at 3; see also Chase Madar, *Why It’s Impossible to Indict a Cop*, NATION (Nov. 25, 2014), <https://www.thenation.com/article/why-its-impossible-indict-cop/> [<https://perma.cc/5XKN-2KVZ>] (arguing that the lack of police accountability for lethal violence is tied to the Supreme Court’s holding in *Garner*).

<sup>29</sup> *Garner*, 471 U.S. at 3.

<sup>30</sup> See Geoffrey P. Alpert & William C. Smith, *How Reasonable is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 483 (1994) (“Prior to 1989, most federal circuits followed the Fourteenth Amendment substantive due process ‘shocking to the conscience’ standard enunciated by the Second Circuit in *Johnson v. Glick*. Under *Johnson*, the subjective mental state of the offending officer was relevant as a factor to help determine if an actionable injury had occurred.” (footnote omitted)).

<sup>31</sup> 490 U.S. 386 (1989).

<sup>32</sup> *Id.* at 388–89.

<sup>33</sup> *Id.* at 390.

<sup>34</sup> *Id.* at 389.

that law enforcement officials used excessive force.”<sup>35</sup> The Court decided that instead of a Fourteenth Amendment substantive due process standard, an “objective reasonableness” approach under the Fourth Amendment applies to allegations of excessive force during an arrest or investigatory stop.<sup>36</sup> Citing *Garner*,<sup>37</sup> the *Graham* Court clarified that this Fourth Amendment analysis should focus on the particular facts and circumstances of the case, including the severity of the crime, the immediacy of the threat posed by the citizen, and whether the citizen resisted arrest or tried to escape.<sup>38</sup> Moreover, law enforcement’s actions are to be judged “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>39</sup>

*Graham* entrenched the objective reasonableness standard into legal determinations of police excessive force.<sup>40</sup> While *Garner* arguably had the potential to support plaintiffs by drawing clear lines on what police can and cannot do, *Graham* cabined this potential<sup>41</sup> within the limitations of the Fourth Amendment by emphasizing “reasonableness”—a standard that defers to police interpretations at the scene.<sup>42</sup> Instead of enabling

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<sup>35</sup> *Id.* at 388.

<sup>36</sup> *Id.* Fourteenth Amendment claims continue to be available to plaintiffs who are harmed by law enforcement through police interactions other than intentionally applied force to seize or stop a suspect. See *County of Sacramento v. Lewis*, 523 U.S. 833, 843–44 (1998).

<sup>37</sup> See *Graham*, 490 U.S. at 396.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POLY 53, 80 (2016) (“In following *Garner*, *Graham* did not overrule or subrogate the former case, or minimize *Garner*’s prohibition on lethal force against non-dangerous fleeing suspects. *Graham* set an ‘objective reasonableness’ standard for evaluating excessive force claims against police generally.”).

<sup>41</sup> See Garrett & Stoughton, *supra* note 23, at 216 (calling *Garner* “a high-water mark of [the police violence] body of case law”).

<sup>42</sup> See Jonathan M. Smith, *Closing the Gap Between What Is Lawful and What Is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L. 315, 323 (2016) (“*Terry* [*v. Ohio*], *Garner*, *Graham*, and other Supreme Court decisions regarding the Fourth Amendment in the 1960s, ‘70s, and ‘80s placed substantial weight on balancing police powers against the intrusion on the individual’s Fourth Amendment interests. . . . In the cases decided in more recent terms of the Court, very little consideration is given to the interests of the individual. As a result, there have been no significant cases in the last decade in which the Supreme Court has held that the individual’s rights trumped the governmental interest.” (footnotes omitted)); Gregory Howard Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice*, 10 HARV. BLACKLETTER J. 79, 95 (1993) (“[T]he basic problem with *Graham* is the fantasy of the Fourth Amendment ‘reasonableness’ test and the so-called balancing analysis. ‘Reasonableness’ is never truly defined, and unfortu-

individuals harmed by the use of force to mobilize substantive due process, *Graham* makes it more difficult for plaintiffs to successfully bring suits against the police.<sup>43</sup>

The Court further strengthened the reasonableness standard in 2007 with its decision in *Scott v. Harris*<sup>44</sup> “[a]fter nearly twenty years of silence on the issue.”<sup>45</sup> *Scott* dealt with a high-speed chase where Harris’s injuries were a result of Officer Scott’s use of the “Precision Intervention Technique” (PIT). PIT involves an officer using his patrol car to push the rear bumper of a suspect’s vehicle.<sup>46</sup> The Court rejected Harris’s argument that there was a clear “easy-to-apply legal test in the Fourth Amendment context”<sup>47</sup> coming out of *Garner*. Instead, the Court noted that the Fourth Amendment requires a court to “still slosh [its] way through the fact-bound morass of ‘reasonableness.’”<sup>48</sup> The Court held that Scott’s use of force did not violate the Fourth Amendment because it was reasonable under the circumstances to believe Harris presented a serious risk to others.<sup>49</sup>

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nately the balance rarely weighs in favor of the citizen. While the Supreme Court makes it clear that the Fourth Amendment balancing analysis cannot be applied with mechanical precision, the result almost always results in a balancing in favor of the government, as decisions since *Graham* have shown.” (footnotes omitted)); see also Obasogie & Newman, *supra* note 18, at 1497 (discussing how “futile” the Fourth Amendment is for understanding the complexities and nuances of racialized police violence, a structural violence); Zach Newman, Note, “Hands Up, Don’t Shoot”: Policing, Fatal Force, and Equal Protection in the Age of Colorblindness, 43 HASTINGS CONST. L.Q. 117, 145–48 (2015) (discussing the problems of using constitutional rights to address police violence).

<sup>43</sup> See Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), [https://mobile.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html?\\_r=0](https://mobile.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html?_r=0) [<https://perma.cc/6JTS-D2X2>] (“[T]he court has made it very difficult, and often impossible, to hold police officers and the governments that employ them accountable for civil rights violations. This undermines the ability to deter illegal police behavior and leaves victims without compensation. When the police kill or injure innocent people, the victims rarely have recourse.”); Garrett & Stoughton, *supra* note 23, at 217 (“Only the most egregious uses of force can result in police liability, and even then, not easily.”).

<sup>44</sup> 550 U.S. 372 (2007).

<sup>45</sup> Harmon, *supra* note 20, at 1119; see also Garrett & Stoughton, *supra* note 23, at 217 (“The turn away from *Garner* was cemented by the Court’s 2007 decision in *Scott v. Harris*, which reinforced the approach in *Graham* by holding that there are no clearly impermissible uses of deadly force . . . . Instead, officers may use force, including deadly force, so long as it is objectively reasonable to do so in the circumstances of each case.” (footnote omitted)).

<sup>46</sup> *Scott*, 550 U.S. at 374–75.

<sup>47</sup> *Id.* at 383.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 384, 386.

## B. Scholarship on Police Use of Force

With these cases, the Supreme Court established its modern approach to police use of force, which made it much harder for police to be held accountable.<sup>50</sup> While there are important articles and commentaries on federal courts' use-of-force jurisprudence, much more scholarly work is needed. In this section, we review key writings on police violence and the Fourth Amendment as a way to assess the current literature.

Rachel Harmon argues that the "Supreme Court's Fourth Amendment doctrine regulating the use of force by police officers is deeply impoverished."<sup>51</sup> To Harmon, *Scott* only further exacerbated the problems in use-of-force jurisprudence so that the "law [is now] more incomplete and indeterminate than ever."<sup>52</sup> Harmon argues that "the Supreme Court's few opinions fail to answer basic questions of why, when, and how much force officers can use, while at the same time permitting, if not encouraging, the use of irrelevant and prejudicial considerations in evaluating whether an officer acted reasonably."<sup>53</sup> This results in a situation where there is no "principled basis" for deciding when the use of force is reasonable under the Fourth Amendment and, as a result, leads to many instances of unconstitutional use of force going "uncompensated and undeterred."<sup>54</sup>

Brandon Garrett and Seth Stoughton write that people would be wrong to assume that "the U.S. Constitution protects citizens against completely unjustified uses of deadly force" or that there are "clear constitutional rules."<sup>55</sup> From their perspective, the doctrine is "notoriously opaque and fact dependent, providing little meaningful guidance to police officers and rarely resulting in compensation to persons injured by police officers."<sup>56</sup> In turn, they argue that police departments rely on these standards in producing department policies, causing a ripple effect from the Supreme Court down to individual police officers.<sup>57</sup> They contend that not only is Fourth Amendment excessive force case law problematic from a force-prevention standpoint, it is also tactically flawed, in terms of police being

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<sup>50</sup> See Garrett & Stoughton, *supra* note 23, at 217.

<sup>51</sup> Harmon, *supra* note 20, at 1119.

<sup>52</sup> *Id.* at 1120.

<sup>53</sup> *Id.* at 1123.

<sup>54</sup> *Id.*

<sup>55</sup> Garrett & Stoughton, *supra* note 23, at 211.

<sup>56</sup> *Id.* at 218.

<sup>57</sup> *Id.* at 217–18.

effective in using force when it is appropriate.<sup>58</sup> Hence, Garrett and Stoughton argue that this case law leads to both bad use-of-force policies and a failure of courts and police departments to use best practices.<sup>59</sup>

In *When Police Kill*, Franklin Zimring parallels Garrett and Stoughton in noting that changing the protocols that govern lethal force is essential to decreasing police violence.<sup>60</sup> To Zimring, “the purposeful redrafting of protocols for the circumstances and procedures that must be followed in deadly force encounters” is where activist and scholarly attention should focus.<sup>61</sup> In this redrafting process, there are two essential areas to shift: (1) clear restrictions on when lethal force can be used and (2) clear mandates for when a shooting should stop once begun.<sup>62</sup> For Zimring, the most impactful reform will involve creating “less destructive rules of engagement.”<sup>63</sup>

John Gross argues that the case law fails to provide much guidance on what counts as reasonable and justified force.<sup>64</sup> To Gross, “the Court has failed to provide law enforcement with any meaningful guidance on when the use of deadly force is appropriate.”<sup>65</sup> He argues that use-of-force analysis should be revised in order to give “meaningful guidance,” and require that officers “see a gun before they decide to use deadly force.”<sup>66</sup> Contrary to popular perception, Gross argues that citizens are killed by police officers at disproportionately higher rates than officers are killed in the line of duty.<sup>67</sup> This further supports the argument that the Supreme Court has provided a set of opinions that cause officers to rely upon deadly force in a manner that is incongruent with documented risks to officers.

Nancy Marcus argues that the Constitution puts firm restrictions on use of force under *Garner*, and that this means officers should abide by the rule not to use deadly force against those who do not pose an imminent threat.<sup>68</sup> She contends that the necessary restrictions already exist and that they just

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<sup>58</sup> *Id.* (“[T]oday’s Fourth Amendment case law is not only poorly suited for police training, but actually counterproductive, confounding efforts to draft clear use-of-force policies.”).

<sup>59</sup> *See id.* at 300.

<sup>60</sup> *See* ZIMRING, *supra* note 5, at 220.

<sup>61</sup> *Id.* at 224.

<sup>62</sup> *See id.* at 227.

<sup>63</sup> *See id.* at 219.

<sup>64</sup> *See* Gross, *supra* note 17 at 155–56.

<sup>65</sup> *Id.* at 156.

<sup>66</sup> *Id.* at 180–81.

<sup>67</sup> *See id.* at 156.

<sup>68</sup> *See* Marcus, *supra* note 40, at 57.



need to be followed by police.<sup>69</sup> From this vantage point, if these constitutional restraints were followed, we would not have—or would have fewer—unnecessary killings by police.<sup>70</sup> Consequently, she concludes that “future [use-of-force] reform efforts must include—at a bare minimum—an emphasis of *Garner’s* prohibition of deadly police force against unarmed, non-dangerous fleeing persons.”<sup>71</sup>

A common theme from this stream of scholarly writing on the Fourth Amendment is the perception that it can, does, or should operate as an external or exogenous check on police behavior. From the Court’s perspective, *Garner* and *Graham* provide rules developed from outside of police departments that positively or normatively limit how police engage with communities when using force. Traditional scholarly perspectives align with this sentiment. Even those critical of the Supreme Court jurisprudence and police behavior implicitly argue that the path to justice is paved by the Court strengthening or being more explicit about the constitutional boundaries of these external checks in order to provide better and clearer guidance for police officers. But, as we argue in this Article, new avenues to reform may open up by rethinking our understanding of the relationship between constitutional law, judicial decisions, and police use of force.

It is crucial to note that there is an important literature on police violence that pushes back against this traditional formulation concerning the Fourth Amendment’s ostensibly protective nature in police use-of-force contexts. Scholars arguing against the mainstream perspective emphasize the role of race and racism in how police excessive force plays out on the ground as well as the jurisprudential indifference to using legal mechanisms to constrain such behavior. Much of the writing on race and the Fourth Amendment speaks to the issue of racial profiling and police stops. For example, Tracey Maclin’s *Race and the Fourth Amendment* bemoans the Court’s ruling in *Whren v. United States*<sup>72</sup> that pretextual seizures via traffic

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<sup>69</sup> *Id.* (“Had the officers involved in the series of killings detailed in this article respected the constitutionally mandated restraints on the use of deadly police force, some of the victims of those police killings might still be alive. Instead, the circumstances of many of these killings indicate that at least some police are no longer aware of, or heeding, the constitutional limitations upon their use of force against civilians.”).

<sup>70</sup> *See id.*

<sup>71</sup> *Id.* at 105.

<sup>72</sup> 517 U.S. 806 (1996).

stops are outside the scope of the Fourth Amendment.<sup>73</sup> The empirical significance of such stops in relation to the surveillance of communities of color has also been demonstrated by scholars such as Jeffrey Fagan<sup>74</sup> and Tracey Meares,<sup>75</sup> who highlight the deeply racialized nature of use-of-force jurisprudence and related issues.

Other scholars have pushed back against traditional use-of-force jurisprudence by making direct links between stop-and-frisk practices and police excessive force. For example, Devon Carbado argues that “blue-on-black violence” can be understood as comprising of six features—from hyper-surveillance of Black communities to the doctrine of qualified immunity—that allow police excessive force to persist in these communities.<sup>76</sup> Carbado embraces this framing of “blue-on-black violence” as both a “rhetorical device” and to resist individualist framings of police violence so as to highlight its struc-

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<sup>73</sup> Maclin notes:

The Court’s conclusion that the Fourth Amendment has nothing to say about pretextual stops of black motorists is not surprising. The reasonableness analysis of recent Fourth Amendment cases emphasizes objective standards. The Court disfavors criteria and standards that require judges to ascertain the motivations and expectations of police officers and citizens enmeshed in confrontations that rarely have neutral observers. Moreover, the *Whren* Court’s unwillingness to consider the impact that pretextual traffic stops have on black and Hispanic motorists is consistent with the modern Court’s trend of ignoring evidence of racial impact as a factor in the reasonableness analysis mandated by the Fourth Amendment.

Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 338 (1998) (footnotes omitted).

<sup>74</sup> See generally Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L.J. 539, 611–14 (2016) (examining racial disparities in police surveillance through the Boston Police Department and arguing that Black individuals are more likely than their White counterparts to be surveilled and stopped by police). For other articles by Prof. Fagan on this topic, see also Ben Grunwald & Jeffrey Fagan, *The End of Intuition Based High Crime Areas*, 107 CALIF. L. REV. 395, 395 (2019); John MacDonald & Jeffrey Fagan, *Using Shifts in Deployment and Operations to Test for Racial Bias in Police Stops* (Jan. 4, 2019) (unpublished manuscript), available at <https://www.aeaweb.org/conference/2019/preliminary/paper/anGDTfz6> [<https://perma.cc/P5DQ-SJR2>]; Jeffrey Fagan et al., *No Runs, Few Hits, and Many Errors: Street Stops, Bias, and Proactive Policing* (unpublished manuscript) (on file with author).

<sup>75</sup> See generally Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANN. REV. L. & SOC. SCI. 335, 336 (2014) (discussing the history of the legal doctrine of stop and frisk, the effectiveness of this doctrine on any purported crime reduction, and the procedural justice issues related to stop and frisk).

<sup>76</sup> Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L. J. 1479, 1483–84 (2016).

tural nature.<sup>77</sup> In *From Stop and Frisk to Shoot and Kill*, Carbado delineates possible causes of police violence by focusing on doctrinal pathways—specifically, the stop-and-frisk jurisprudence stemming from *Terry v. Ohio* and how that incentivizes police contact with Blacks that all too predictably leads to abuse and violence.<sup>78</sup> Carbado’s article is important in that it attempts to push beyond the debate concerning the cause of police violence that often oscillates between structural determinants and racial inequality on one hand and rogue police officers on the other to show how law creates the conditions for excessive force. He describes this approach as “put[ting] the law back on the table”<sup>79</sup>—an effort that continues in this Article through an examination of use of force policies and the Fourth Amendment.

Some authors extend this oppositional account of the causes and consequences of police violence. Paul Butler’s *Chokehold: Policing Black Men* takes an intersectional approach to understand how excessive force is constitutive of the social control that the police exert on Black people through the criminal justice process. Butler notes that “the problem is the criminal process itself. Cops routinely hurt and humiliate black people because that is what they are paid to do. Virtually every objective investigation of a U.S. law enforcement agency finds that the police, *as policy*, treat African Americans with contempt.”<sup>80</sup> Dynamics such as these have led some authors to call into question the mainstream narrative surrounding the Fourth Amendment, with scholars like I. Bennett Capers declaring that “[t]he story of the development of our criminal procedure jurisprudence is largely a story about race.”<sup>81</sup>

Perspectives that complicate the mainstream account of the relationship between police violence and the Fourth Amendment do so without explicitly rejecting the exogenous

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<sup>77</sup> *Id.* at 1482; see also Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1215–16 (2017) (emphasizing the importance of studying excessive and deadly force as part of a larger system, rather than as isolated events, and asserting that police use force against Black men more than any other demographic as well as that the state sanctions and legitimizes this force).

<sup>78</sup> Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio’s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1510–12 (2017).

<sup>79</sup> *Id.* at 1510.

<sup>80</sup> PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 2 (2017).

<sup>81</sup> I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 1 (2011); see also Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48 (2000) (discussing the link between modern criminal procedure and Black defendants in the Jim Crow South).

predicate that frames both the jurisprudential and scholarly narratives. Thus, this conversation could benefit from an extended examination of the reciprocal relationship between use of force policies developed by police departments, the constitutional rules thought to govern them, and the role of federal courts in turning police perspectives on force usage into law. To begin such an analysis, the next section explores a series of key empirical questions: How do local police departments understand this constitutional discussion in terms of the limits placed on their ability to use force on civilians? What policies are in place to train and hold officers accountable? Outside of a handful of reviews,<sup>82</sup> there has not been a systematic social scientific analysis of use-of-force policies used by local police officers to understand the restrictions placed on law enforcement in light of Fourth Amendment guarantees and the protections offered to civilians.

## II

### EMPIRICAL ANALYSIS OF USE-OF-FORCE POLICIES

As previously noted, there has been little scholarly research on use-of-force policies, and even less attention paid to what rules and procedures are contained within them. Previous work has largely skimmed the surface of these policies without looking closely at their text in a manner that allows for an aggregate understanding of the rules that shape police officers' behavior when they use force on civilians. In this Part, we discuss the results of a content analysis of use of force policies from the seventy-five largest cities. This analysis builds on an earlier iteration of this project, where we coded and analyzed the policies for the twenty largest cities.<sup>83</sup> That project focused specifically on use-of-force policies' public health implications to the extent that ineffective protections for

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<sup>82</sup> See, e.g., Garrett & Stoughton, *supra* note 23; *Police Use of Force Project*, CAMPAIGN ZERO, <http://useofforceproject.org/#project> [<https://perma.cc/YMN6-4UKM>] (last visited May 6, 2019); SAMUEL SINYANGWE, EXAMINING THE ROLE OF USE OF FORCE POLICIES IN ENDING POLICE VIOLENCE 1 (2016), available at <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/57e17531725e25ec2e648650/1474393399581/Use+of+Force+Study.pdf> [<https://perma.cc/4W76-4AMU>]; CAMPAIGN ZERO, POLICE USE OF FORCE POLICY ANALYSIS 1 (2016), available at <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/57e1b5cc2994ca4ac1d97700/1474409936835/Police+Use+of+Force+Report.pdf> [<https://perma.cc/JXA9-2JTX>].

<sup>83</sup> See generally Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, 43 AM. J. L. & MED. 279, 280 (2017) (discussing how police use of force impacts public health and providing an empirical assessment of use of force policies).

citizens leads to poor health outcomes for communities. In this Article, we provide an approach that is not only broader than our previous effort but is also “deeper” than other examinations of use-of-force policies. This combination of breadth and depth allows for new and richer insights into use-of-force policies and their relationship to Fourth Amendment concerns regarding excessive force by the police.

## A. Methods

The data used in our analysis came from the Campaign Zero archive of use-of-force policies.<sup>84</sup> We analyzed the policies for the seventy-five largest available cities<sup>85</sup> to develop both a textured and holistic assessment of their content. We formulated eighteen codes as part of an effort to capture the main dimensions of use of force policies, from the most conventional elements (e.g., whether the policy mentions reasonableness as in *Graham* and other Supreme Court case law) to more cutting-edge elements contained in forward-looking policies (e.g., emphasizing de-escalation and/or providing a robust use-of-force

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<sup>84</sup> The website for Campaign Zero hosts the use-of-force policies from several cities in the United States. See DeRay Mckesson et al, *Use of Force Policy Database*, CAMPAIGN ZERO, <http://useofforceproject.org/database/> [<https://perma.cc/TY4B-3585>] (last visited May 6, 2019). Our analysis is based on a subset of this available data. Campaign Zero’s analysis tried to identify which use-of-force policies were useful in reducing excessive force by the police and then determined how frequently they were present in existing departmental rules. The empirical work performed in this Article differs in that it attempts to provide an overview of use-of-force policies in general to provide a sense of the type of rules and policies they contain—especially as these policies develop in conversation with the Supreme Court’s post-*Graham* jurisprudence on reasonableness.

<sup>85</sup> 1. New York City; 2. Los Angeles; 3. Chicago; 4. Houston; 5. Phoenix; 6. Philadelphia; 7. San Antonio; 8. San Diego; 9. Dallas; 10. San Jose; 11. Austin; 12. Jacksonville; 13. San Francisco; 14. Columbus; 15. Indianapolis; 16. Fort Worth; 17. Charlotte; 18. Seattle; 19. Denver; 20. El Paso; 21. Washington, D.C.; 22. Boston; 23. Detroit; 24. Nashville; 25. *Memphis (not included because use-of-force policy not available. Replaced by #76 Fort Wayne, IN)*; 26. Portland; 27. Oklahoma City; 28. Las Vegas; 29. Louisville; 30. Baltimore; 31. Milwaukee; 32. Albuquerque; 33. Tucson; 34. Fresno; 35. Sacramento; 36. Mesa, AZ; 37. Kansas City; 38. Atlanta; 39. Long Beach; 40. Colorado Springs; 41. Raleigh; 42. Miami; 43. Virginia Beach; 44. Omaha; 45. Oakland; 46. Minneapolis; 47. Tulsa; 48. Arlington, TX; 49. New Orleans; 50. Wichita; 51. Cleveland; 52. Tampa; 53. Bakersfield, CA; 54. Aurora, CO; 55. Honolulu; 56. Anaheim, CA; 57. Santa Ana, CA; 58. Corpus Christi, TX; 59. Riverside, CA; 60. Lexington, KY; 61. St. Louis; 62. Stockton, CA; 63. Pittsburg; 64. St. Paul, MN; 65. Cincinnati; 66. Anchorage; 67. Henderson, NV; 68. Greensboro, NC; 69. Plano, TX; 70. Newark; 71. Lincoln, NE; 72. Toledo, OH; 73. Orlando; 74. Chula Vista, CA; 75. Irvine, CA. *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More*, U.S. CENSUS BUREAU (2016), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [<https://perma.cc/RF83-Z8Y4>].

continuum<sup>86</sup>). The codes used in this study appear below along with an operational definition of each concept:<sup>87</sup>

1. *Reasonableness*: whether the policy mentions the “reasonableness” standard.
2. *Force levels*: whether the policy describes different levels of force.
3. *Resistance levels*: whether the policy describes different levels of resistance.
4. *De-escalation*: whether the policy emphasizes de-escalation.
5. *Force continuum*: whether the policy includes a continuum or matrix describing the relationship between resistance and force.
6. *Reassessment*: whether the policy states that an officer should continuously reassess the situation as it evolves.
7. *Proportionality*: whether the policy states that force should be proportional to resistance.
8. *Exhaustion of alternatives*: whether the policy states that alternatives to deadly force (or to using force at all) should be exhausted before escalating.
9. *Verbal warning or advisement*: whether the policy mentions providing a warning, advising, or communicating with citizens before force is used.
10. *Human life*: whether the policy includes a statement on the value of human life.
11. *Bias or prejudice*: whether the policy includes a statement on being bias-free.
12. *Mental health*: whether the policy discusses mental health or substance abuse.
13. *Prohibition on shooting at moving vehicles*: whether the policy precludes officers from shooting at or from moving vehicles unless necessary to prevent imminent death or serious bodily injury.
14. *Prohibition on shooting at “fleeing felons”*: whether the policy precludes officers from shooting at someone running away or escaping unless necessary to prevent imminent death or serious bodily injury.

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<sup>86</sup> See generally William Terrill et al., *A Management Tool for Evaluating Police Use of Force: An Application of the Force Factor*, 6 POLICE Q. 150, 154 (2003) (“Police departments often present and use a continuum as a guideline that promotes police escalation of force in ‘small increments’ in reference to the level of resistance encountered. Thus, to achieve citizen compliance (with respect to a force continuum), officers are encouraged to use a level of force that is commensurate to the level of citizen resistance encountered.”).

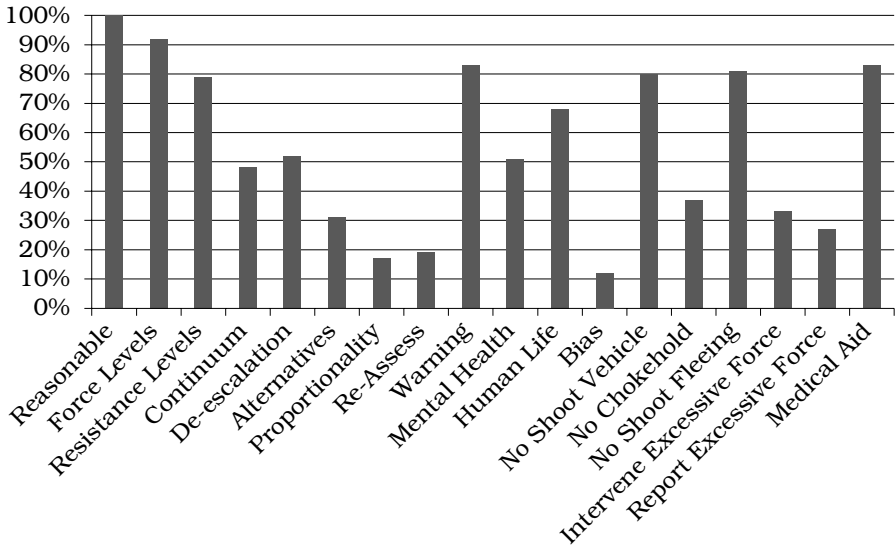
<sup>87</sup> The authors coded the policies. Because the data is yes/no and not interpretive (i.e., marking the presence or absence of each term/concept), no additional coders were used.

- 15. *Prohibition on dangerous chokeholds*: whether the policy precludes officers from using dangerous chokeholds unless deadly force is authorized.
- 16. *Reporting excessive force*: whether the policy states that officers must report other officers for using clearly excessive force.
- 17. *Intervening against excessive force*: whether the policy states officers must intervene to stop other officers from using clearly excessive force.
- 18. *Medical aid*: whether the policy states that officers should summon medical assistance or provide first aid.

B. Findings

Each policy we examined contains a reference to the reasonableness standard from *Graham v. Connor*. Nevertheless, what is striking about the seventy-five use-of-force policies is their internal variation. The distribution described in Figure 1 underscores this claim. Beyond these overall patterns, the policies also largely evince an absence of affirmative policymaking that might limit officer behavior and lack focus on substantive strategies or tactics that emphasize civilian health and safety.

FIGURE 1: CODING RESULTS



1. *Reliance on Reasonableness Standard*

One-hundred percent (100%) of the policies reviewed contained some mention of reasonableness. This came in a few different forms, from outright citing the standard from *Graham* to vaguely referring to it in a broad sense. For example, the

Denver use-of-force policy requires that “an officer shall use only that degree of force necessary and reasonable under the circumstances” and, further, that the “reasonableness of a particular use-of-force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>88</sup> Milwaukee summarizes the case law in a similar manner:

Objective reasonableness is judged from the perspective of a reasonable police member facing similar circumstances and is based on the totality of the facts known to the police member at the time the force was applied, along with the member’s prior training and experience, without regard to the underlying intent or motivation of the police member.<sup>89</sup>

Portland directly cites the case law: “Under *Graham v. Connor* and subsequent cases, the federal courts have established that government use of force must comply with the ‘reasonableness’ requirement of the Fourth Amendment.”<sup>90</sup> Las Vegas similarly cites to *Graham* in their definition of “force transitions” while also describing escalation and de-escalation: “The movement, escalation/de-escalation, from the application of one force type to another in conjunction with the ‘objectively reasonable’ standard from [*Graham v. Connor*].”<sup>91</sup>

While it is unsurprising that use-of-force policies discuss the guiding legal doctrine set by the Supreme Court, references to “reasonableness” do not provide officers with pragmatic, detailed, or sophisticated guidance in using force. Police reproduce ambiguous judicial interpretations of the Fourth Amendment in their local policies, which limits the development of rules that might restrict force usage. This arrangement provides greater leeway to police regarding the type and severity of force that can be used against civilians.

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<sup>88</sup> DENVER POLICE DEP’T, OPERATIONS MANUAL: USE OF FORCE POLICY 1 (2015), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569ad5c20e4c1148e6b1089e/1452987846106/Denver+Use+of+Force+Policy.pdf> [<https://perma.cc/GS2K-YUFD>].

<sup>89</sup> MILWAUKEE POLICE DEP’T, STANDARD OPERATING PROCEDURE: USE OF FORCE 2 (2015), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569abf43c21b86e3d56a32fe/1452982086699/Milwaukee+Use+of+Force+Policy.pdf> [<https://perma.cc/XHZ9-DKQ6>].

<sup>90</sup> CITY OF PORTLAND POLICE BUREAU, *1010.00 Use of Force*, <https://www.portlandoregon.gov/police/article/647779> [<https://perma.cc/LBX8-ZB87>] (last visited May 6, 2019).

<sup>91</sup> LAS VEGAS METROPOLITAN POLICE DEP’T, USE OF FORCE POLICY 1150 (2015), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569ad92b57eb8d0f11460ead/1452988719385/Las+Vegas+Use+of+Force+Policy.pdf> [<https://perma.cc/U29M-NAA9>].



In addition, it is also useful to look at the frequency of two other related codes: force levels and resistance levels. Force levels appeared in ninety-two percent (92%) of the policies surveyed; resistance levels in seventy-nine percent (79%). We coded for any discussion of force levels within a policy as well as any mention of the levels of resistance an officer can face. These are basic elements of a use-of-force policy in that they describe officers' ability to use multiple levels of force and that there are different kinds of resistance that police may face.

A description of force levels could appear as it does in the Cleveland policy, which states that “[d]eadly [f]orce is any action likely to cause death or serious physical injury” and “may involve firearms, but also includes any force or instrument of force . . . capable of causing death or serious injury.”<sup>92</sup> The policy distinguishes this from “Less Lethal Force” which is “any use of force other than that which is considered deadly force,” and the policy includes pepper spray, Tasers, and batons as examples.<sup>93</sup> This is a straightforward description of deadly versus less lethal force, and is fairly commonsense. Yet, this elementary articulation does not provide much assistance to officers.

In terms of resistance levels, a policy may or may not discuss the types of resistance a person may exhibit. For example, the Denver Police Department’s use-of-force policy describes several dispositions, ranging from “Psychological Intimidation—non-verbal cues in attitude, appearance, demeanor or posture that indicates [sic] an unwillingness to cooperate or a threat”—to “Active Aggression,” which is understood as “[a] threat or overt act of an assault, coupled with the present ability to carry out the threat or assault, which reasonably indicates that an assault or injury to any person is imminent.”<sup>94</sup> Sometimes the discussion of citizen resistance is built into the use-of-force continuum, which is what the Washington, D.C. use-of-force policy does. This policy describes the force continuum as “a training model/philosophy that supports the progressive and reasonable escalation and de-escalation of member-applied force in proportional response to the

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<sup>92</sup> CLEVELAND DIVISION OF POLICE, GENERAL POLICE ORDER ON USE OF FORCE 2 (2002) (emphasis omitted), <https://static1.squarespace.com/static/56996151cbced68b170389f456996151cbced68b170389f4/t/569ad416df40f3a31fc7d5f2/1452987425051/Cleveland+use+of+force+policy.pdf> [<https://perma.cc/W6HG-UXVP>].

<sup>93</sup> *Id.* (emphasis omitted).

<sup>94</sup> DENVER POLICE DEP’T, *supra* note 88, at 4.

actions and *level of resistance* offered by a subject.”<sup>95</sup> In these examples, we see policies that provide simple definitions of increasing and decreasing levels of civilian compliance.

Our empirical findings show that policies (1) always cite to the *Graham* reasonableness standard to gesture toward overarching constitutional compliance and (2) very often include generic references to a differentiation of force and resistance levels. Providing definitions of force and resistance levels are the most elementary “protections” a policy can offer. Yet, as we will see in subsequent sections, restrictions beyond these foundational elements are less likely to be found in these policies.

## 2. *Basic Protections and Substantive Duties*

Some policies do more than merely recite the reasonableness standard and include a few restrictions, while others also incorporate affirmative policies that limit the force used by police officers. Our analyses captured this dynamic with two different sets of codes: (1) policies containing basic protections (i.e., general statements against shooting at vehicles, dangerous chokeholds unless deadly force is authorized, and shooting at “fleeing felons” while requiring warnings before using force) and (2) policies containing substantive and affirmative duties (i.e., specific rules and regulations like de-escalation, proportionality, reassessment, exhaustion of alternatives, and force continua). Taken together with section 1, we can understand use-of-force policies as having three tiers: a foundational level (rearticulating reasonableness) that is found in all policies, a middle level (the basic protections) that is less common, and a higher level (substantive protections for citizens and obligations placed upon officers) that is relatively uncommon.

Regarding the middle-level basic protections, the requirement that officers refrain from shooting at vehicles appeared in eighty percent (80%) of policies, and statements against shooting at “fleeing felons” appeared in eighty-one percent (81%). Rules against dangerous chokeholds appeared in thirty-seven percent (37%), which is low compared to the other three basic protections often put in policies yet is still higher than many of the more substantive discussions of force usage. The requirement that officers provide a warning appeared in eighty-three

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<sup>95</sup> DISTRICT OF COLUMBIA METROPOLITAN POLICE, USE OF FORCE 3 (2002) (emphasis added), <https://static1.squarespace.com/static/56996151cbced68b170389f456996151cbced68b170389f4/t/569bf3c740667a727ee7ef39/1453061069584/DC+Metropolitan+police+use+of+force+policy.pdf> [https://perma.cc/8PYN-BXCY].

(83%) percent of the policies. Hence, three out of four of these basic protections are fairly common. Yet, these middle-tier rules that serve as basic “dos and don’ts” of policing are not as significant in restricting officer behavior as the substantive or affirmative policymaking that we see with other third-tier policies like de-escalation or force continua.

An example of prohibitions on shooting at fleeing vehicles can be found in the Tucson, Arizona, use of force policy, which states: “Officers shall not discharge a weapon . . . [a]t a moving vehicle unless deadly force is being used against the officer or a third party.”<sup>96</sup> Similarly, the Virginia Beach policy against chokeholds notes that “[c]hokeholds or neck restraints are not authorized unless the use of deadly force is appropriate.”<sup>97</sup> Regarding “fleeing felon” rules, the Minneapolis policy states that deadly force is permitted to arrest, capture, or prevent the escape of someone who the officer “knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the use or threatened use of deadly force” or “knows or has reasonable grounds to believe has committed or attempted to commit a felony if the officer reasonably believes that the person will cause death or great bodily harm if the person’s apprehension is delayed.”<sup>98</sup> In terms of verbal warning or advisements, the Oakland, California, policy states: “To the extent possible and without ever compromising safety, members are required to use verbal commands to accomplish the police objective before resorting to physical force.”<sup>99</sup> While

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<sup>96</sup> TUCSON POLICE DEP’T, GENERAL OPERATING PROCEDURES: USE OF FORCE 6 (2016), [https://web.archive.org/web/20170223215245/https://www.tucsonaz.gov/files/police/general-orders/2000USE\\_OF\\_FORCE.pdf](https://web.archive.org/web/20170223215245/https://www.tucsonaz.gov/files/police/general-orders/2000USE_OF_FORCE.pdf) [<https://perma.cc/SP2D-Y2R9>].

<sup>97</sup> VIRGINIA BEACH POLICE DEP’T, GENERAL ORDER: USE OF FORCE 2 (2014), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569bf3aa40667a727ee7ee5b/1453061040288/Virginia+beach+use+of+force+policy.pdf> [<https://perma.cc/P9DE-9HKA>]. Another example is from the Miami Police Department use-of-force policy, where that policy specifically describes different types of chokeholds the police are precluded from using: “Officers are prohibited from utilizing the Lateral Vascular Neck Restraint (LVNR), chokehold, neck hold, and/or any other restraint that restricts free movement of the neck or head.” MIAMI-DADE POLICE DEP’T, DEPARTMENTAL ORDER 6, CHAPTER 21: USE OF FORCE 4, <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/57584d061bbee036509d71ea/1465404695957/Miami+UOF.pdf> [<https://perma.cc/3H66-3MCL>].

<sup>98</sup> MINNEAPOLIS POLICE DEP’T, 5-300 Use of Force, POLICY & PROCEDURE MANUAL, [http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy\\_5-300\\_5-300](http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_5-300_5-300) [<https://perma.cc/NX2A-AN82>] (last visited May 6, 2019).

<sup>99</sup> OFFICE OF CHIEF OF POLICE, OAKLAND POLICE DEP’T, MEMORANDUM ON REVISED DGO K-3, USE OF FORCE 4 (2014), <http://www2.oaklandnet.com/oakca1/groups/police/documents/webcontent/oak053209.pdf> [<https://perma.cc/9TCT-NYZK>].

these examples highlight the fundamental importance of these protections, they also draw attention to the lack of guidance provided to officers regarding their general use of force. In the most basic sense, these middle-tier policies merely tell officers to refrain from certain unacceptable tactics and to provide a warning.

Some policies contain more substantive protections that *do* inform officers of what affirmative steps to employ. However, this third tier of substantive rules is less common than most of the second-tier basic protections. We coded substantive rules as de-escalation (appearing in 52% of the policies coded), force continua (48%), exhaustion of alternatives (31%), reassessment (19%), and proportionality (17%). These are the specific policies that departments can articulate that go above the bare constitutional minimum of reasonableness and basic protections (“dos and don’ts”) to proactively limit excessive force by police.

New Orleans’ use-of-force policy offers an example of de-escalation: “Force shall be de-escalated immediately as resistance decreases.”<sup>100</sup> This policy contains the specific requirement that officers adjust their force in relation to resistance. Similarly, the Minneapolis policy states that “officers shall use de-escalation tactics to gain voluntary compliance and seek to avoid or minimize use of physical force.”<sup>101</sup> In this description, we also see the motivation behind de-escalation: avoiding or minimizing unnecessary use of force that might harm others. Finally, the Sacramento, California, policy describes specific de-escalation techniques: “De-escalation techniques include, but are not limited to, gathering information about the incident; assessing risks; gathering resources (personnel and equipment); using time, distance, cover; using crisis intervention techniques; and communicating and coordinating a response.”<sup>102</sup> In so doing, this policy gives officers guidance on not only what de-escalation means, but how to practice it.

Fewer than half of the policies surveyed contain force continua (48%) that can guide police use of force so that it is

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<sup>100</sup> NEW ORLEANS POLICE DEPT, PROCEDURE MANUAL 29 (2013), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569adafed82d5e0d876a81b2/1452989185205/NOLA+use+of+force+policy.pdf> [https://perma.cc/ZWY3-TJ73].

<sup>101</sup> MINNEAPOLIS POLICE DEPT, *supra* note 98.

<sup>102</sup> SACRAMENTO POLICE DEPT, GENERAL ORDERS, USE OF FORCE 2 (2017), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/5ab3c908f950b7622d67da86/1521731848545/Sacramento+Police+Use+of+Force+Policy.pdf> [https://perma.cc/8TLZ-NJDT].

proportional to the situation. As an example of what these policies can look like, the Charlotte, North Carolina, policy contains both a visual aid depicting the continuum of force relative to levels of resistance as well as a description of what those guidelines signify.<sup>103</sup> The policy further describes the levels of resistance as going from “Non-Verbal and Verbal Non-Compliance” to “Aggravated Active Aggression” and the levels of control as going from “Professional Presence” to “Lethal Force.”<sup>104</sup> Hence, while the continuum contains other elements, it specifically notes the relationship between force and resistance and spells out the levels rather than simply saying officers should act reasonably. In providing both a visual aid and a discussion, this policy offers guidance in how to use force and how to escalate and de-escalate accordingly based on response.<sup>105</sup>

With regard to policies requiring that an officer exhaust alternatives (31%), the Nashville, Tennessee, use-of-force policy states that police “are permitted to use only that force which is reasonable and necessary under the particular circumstances to protect themselves or others from bodily injury, and only after other reasonable alternatives have been exhausted or it is determined that such alternative action(s) would be ineffective under the circumstances.”<sup>106</sup> This policy has the requirement that officers act reasonably. But then it goes above this to mandate that “reasonable alternatives” should be exhausted. This approach draws attention to the idea that force should be the last option, not the first.

Reassessment (19%) is a rare element of use of force policies. It is required by the San Francisco Police Department, as their policy states: “Using a critical decision-making model, officers shall collect information, assess the threats and risk, consider police powers and the Department’s policies, identify options and determine the best course of action, and review and *re-assess* the situation.”<sup>107</sup> Similarly, the Sacramento Police Department’s policy requires officers to “continuously reas-

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<sup>103</sup> See CHARLOTTE-MECKLENBURG POLICE DEP’T, INTERACTIVE DIRECTIVES GUIDE § 600-020 (2011), <https://www.documentcloud.org/documents/2661081-Charlotte-Police-Department-Directives-2015.html> [<https://perma.cc/R7Q9-3524>].

<sup>104</sup> *Id.*

<sup>105</sup> See *id.*

<sup>106</sup> NASHVILLE POLICE DEP’T, DEPARTMENT MANUAL 700 (2018), <https://www.nashville.gov/Portals/0/SiteContent/Police/docs/Strategic%20Development/MNPDManual.pdf> [<https://perma.cc/PR7H-Q2RG>].

<sup>107</sup> SAN FRANCISCO POLICE DEP’T, GENERAL ORDER: USE OF FORCE 5 (2016) (emphasis added), <https://sanfranciscopolice.org/sites/default/files/Documents/Police Documents/DepartmentGeneralOrders/DGO%205.01%20Use%20of%20Force%20%28Rev.%2012-21-16%29.pdf> [<https://perma.cc/8QPN-FT8J>].

sess the perceived threat to select the reasonable use of force response.”<sup>108</sup> As such, the concept of reassessment prompts officers to continuously evaluate threat levels and make sure their assessment aligns with the constantly changing situation.

Finally, proportionality appears in less than one-fifth of the policies. This concept is illustrated by the San Antonio, Texas, policy which states that officers may use force “on an ascending scale of the officer’s presence, verbal communications, open/empty hands control, physical force, intermediate weapon and deadly force, according to and *proportional* with the circumstances of the situation.”<sup>109</sup> Proportionality, while a simple concept, ensures that officers use force that is commensurate with the resistance they are facing.

This content analysis demonstrates that substantive, affirmative policy choices are relatively rare in use-of-force policies, especially when compared to the blanket statements on reasonableness and basic protections. Most policies foster symbolic compliance with *Graham’s* statement on reasonableness instead of providing specific rules and processes for officers to engage when deciding whether to use force. Since affirmative policies are not common, we are largely left with use-of-force policies that reiterate what police think the law is in order to comply without limiting force usage on the ground or increasing the possibility of accountability when force becomes excessive.

### 3. *Minimal Focus on Civilian Health and Safety*

While the previous section of our findings discussed the policies that can affirmatively structure an encounter, the policies discussed in this final section are more philosophical, provide special protections for vulnerable groups (e.g., people suffering mental health crises), or speak to police response after force is used (e.g., providing immediate medical attention). Our findings suggest that use-of-force policies that are thought to protect the public may actually expand police latitude and indicate minimal attention to civilian health and safety. The set of codes used to capture this dynamic include: statements on the sanctity of human life (68%); statements

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<sup>108</sup> SACRAMENTO POLICE DEPT, *supra* note 102.

<sup>109</sup> SAN ANTONIO POLICE DEPT, GENERAL MANUAL: PROCEDURE 501—USE OF FORCE 1 (2014) (emphasis added), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569be875dc5cb4298582fc94/1453058170849/San+Antonio+Use+of+Force+Policy.pdf> [<https://perma.cc/23Q3-S3FL>].

against bias or prejudice (12%); discussion of how mental health intersects with use of force (perhaps offering strategies for de-escalating in that particular context) (51%); and reporting and/or intervening against another officer when he or she uses excessive force (reporting: 27%, intervening: 33%). The only requirement in this category that is fairly common in the data is the requirement that officers summon or perform immediate medical aid after force is used (83%).

These additional protections signal different values expressed by the departments. Statements that the department respects human life or is opposed to bias and prejudice signals a philosophical alignment with those ideals. For instance, the Washington, D.C. use-of-force policy states: “The policy of the Metropolitan Police Department is to value and preserve human life when using lawful authority to use force” and therefore “officers . . . shall use the minimum amount of force that the objectively reasonable officer would use.”<sup>110</sup> Similarly thin language is used in reference to bias and prejudice. For example, Bakersfield, California, combines this language with the discussion of human life: “The Department recognizes and respects the value of all human life and dignity without prejudice to anyone.”<sup>111</sup>

The intersection of mental health with police violence is a critical issue. These codes capture elements of policies where the department articulates standards regarding mental health assessments of community members as part of a use-of-force scenario. For example, the New Orleans policy states that, in evaluating whether to use force and which level of force is reasonable, one factor is the person’s “mental state or capacity” as well as the “effects of drugs or alcohol.”<sup>112</sup> Roughly half (51%) of the policies discuss this issue. These rules target a specific group for additional protections, or at least recognizes that certain groups are more vulnerable to police use of force. Acknowledging this in a policy—and going above and beyond a bland recitation of reasonableness or basic protections—is important.

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<sup>110</sup> DISTRICT OF COLUMBIA METROPOLITAN POLICE, *supra* note 95.

<sup>111</sup> BAKERSFIELD POLICE DEP’T, BAKERSFIELD PD POLICY MANUAL: USE OF FORCE 60 (2017), <https://www.muckrock.com/foi/bakersfield-3105/use-of-force-policy-bakersfield-police-department-53955/#file-190121> [<https://perma.cc/GC5A-XYHC>]. The New Orleans use-of-force policy puts it identically: “The Department recognizes and respects the value of all human life and dignity without prejudice to anyone.” NEW ORLEANS POLICE DEP’T, *supra* note 100, at 93.

<sup>112</sup> NEW ORLEANS POLICE DEP’T, *supra* note 100, at 94.

Third, requiring a report or intervention when observing excessive force is a mandate that instructs officers to be attentive to what their colleagues are doing, meaning that they should not inhibit investigations or protect each other when violations occur. This requirement is not prominent in the data (reporting: 27%, intervening: 33%). As an example, the Las Vegas Police Department requires both intervening and reporting, articulating it as a “Duty to Intervene”: “Any [commissioned] officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, safely intercede to prevent the use of such excessive force. Officers shall promptly report these observations to a supervisor.”<sup>113</sup> The requirement that officers report and/or intervene against other officers using excessive force is important because it demonstrates that the department encourages officers supervising one another to support civilian health and safety rather than allowing officers to shield each other from liability.

Finally, ensuring those subjected to force receive immediate medical attention seems like it should be in every policy, as it is a fairly basic idea that, post-force, a person should be treated for their injuries in order to increase their chances to survive. For instance, the New Orleans Police Department use-of-force policy mandates: “Medical assistance shall be obtained for any person who exhibits signs of physical distress, who has sustained visible injury, expresses a complaint of injury or continuing pain, or who was rendered unconscious.”<sup>114</sup> While the need for this might seem obvious, nearly one in five policies do *not* contain this type of provision.

These data demonstrate that policies often fail to include substantive protections that go beyond the constitutional floor and basic norms of policing while largely reproducing the ambiguous Fourth Amendment reasonableness standard without meaningful guidance on what type of force is in or out of bounds. This speaks directly to Fourth Amendment questions concerning excessive force. The data undermines claims that the Fourth Amendment provides external guidance for how police officers should conduct their affairs. Moreover, this empirical investigation shows that the very use-of-force policies that are thought to be responsive to exogenous Constitutional standards are often as vague as the standards themselves, giving police officers wide discretion.

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<sup>113</sup> LAS VEGAS METROPOLITAN POLICE DEP'T, *supra* note 91, at 1156.

<sup>114</sup> NEW ORLEANS POLICE DEP'T, *supra* note 100, at 96.



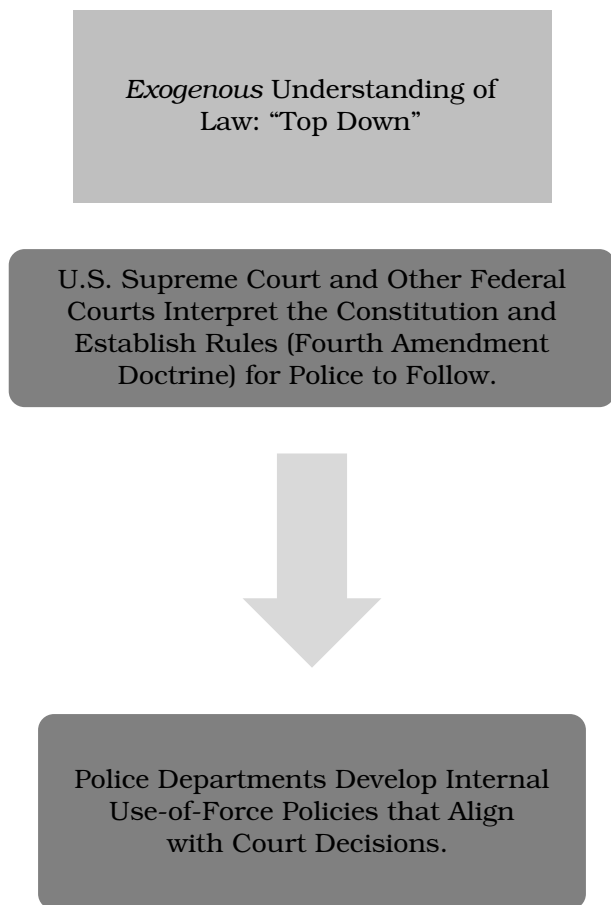
These findings also give rise to questions about how to theoretically describe the character of local use-of-force policies in relation to constitutional mandates. Drawing upon Lauren Edelman's legal endogeneity theory, the next Part discusses how the policy preferences of law enforcement as expressed through use-of-force policies allows regulated actors—the police—to define what counts as excessive force, which is often deferred to by federal courts to become the meaning of law itself. Putting the empirical findings from Part II in conversation with legal endogeneity theory allows for a deeper understanding of excessive force that goes beyond traditional frameworks that view federal courts as exogenously producing legal meanings that police comply with.

### III

#### TOWARD AN ENDOGENOUS UNDERSTANDING OF THE FOURTH AMENDMENT AND USE-OF-FORCE POLICIES

Law is traditionally thought of as being exogenous to society. Constitutions and statutes are written. Cases are decided. And, in a top-down fashion, the rules are thought to dictate and determine how the state interacts with citizens or how citizens interact with one another. Figure 2 visually represents the exogenous perspective on use-of-force policies and Fourth Amendment excessive force inquiries.

FIGURE 2: EXOGENOUS UNDERSTANDING OF USE-OF-FORCE POLICIES



In her book, *Working Law: Courts, Corporations, and Symbolic Civil Rights*, Professor Lauren Edelman puts forth a novel approach that she calls “legal endogeneity theory” to describe scenarios in which law becomes constructed through the “social fields” that the law intends to regulate.<sup>115</sup> This happens through organizational policies developed by the regulated group itself such that they end up functioning like the regulator. Organizations translate laws—initially developed to constrain them—into everyday compliance practices that signal conformity. This compliance, however, is symbolic and only followed to the extent that it does not disrupt the status quo.<sup>116</sup>

<sup>115</sup> EDELMAN, *supra* note 13, at 22, 26.

<sup>116</sup> *See id.* at 3.

The process of legal endogeneity can be described in three parts.<sup>117</sup> The theory (1) “posits that organizations respond to ambiguous law by creating a variety of policies and programs designed to symbolize attention to law”; (2) organizations “equate the mere presence of these structures with legal compliance”; and (3) legal and organizational actors fail to “scrutinize their effectiveness” once the structures are in place.<sup>118</sup> Hence, there is the ambiguous law itself; the organization abiding by it and enacting symbolic policies to perform compliance; and then legal actors—from attorneys to judges—defer to the symbolic measures created by organizations and treat them as if they are in material compliance with an external law that was never clearly defined.<sup>119</sup>

In practical terms, legal endogeneity operates as a recursive process through which the status quo can be maintained, and the regulated group gives life to the practices that become the legal standards that ultimately regulates it.<sup>120</sup> By combining critical theory,<sup>121</sup> legal analysis, and empirical research,<sup>122</sup>

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<sup>117</sup> See *id.* at 27 (2016) (Edelman separates legal endogeneity into six stages, but we have consolidated it into three broad parts. The six stages that Edelman uses are: “(1) ambiguous law, (2) professional framing of the legal environment, (3) diffusion of symbolic structures, (4) managerialization of law, (5) mobilization of symbolic structures, and (6) legal deference to symbolic compliance.”).

<sup>118</sup> *Id.* at 12.

<sup>119</sup> See *id.*

<sup>120</sup> *Id.* at 12, 15 (“When organizations hold the key to the meaning of law, they also harness its power, weakening the potential of social reform laws to achieve ideals.”).

<sup>121</sup> Legal endogeneity theory offers an approach aimed at demystifying the alleged post-racial, colorblind, and post-civil rights moment we exist in by undermining these dominant narratives to reveal how discrimination and oppression continue to function. See *id.* at 5–11 (discussing the persistence of race and gender inequalities after fifty years of civil legislation). This enables us to understand the behind-the-scenes process that starts with the role of the Court and often ends with the unnecessary death and injury to citizens. While these systems can be obfuscated, legal endogeneity theory helps us reveal their inner workings in terms of how administrative policies on police use of force can shape the meaning of constitutional law. See *id.* at 12 (“Legal endogeneity theory suggests that the meaning of law evolves through the articulation and resolution of problems not in the halls of Congress but rather in the halls of work organizations.”). This is, by definition, an endeavor in critical theory, i.e., uncovering the unsaid, normative, and hegemonic myths that sustain status quo relationships and hierarchies. Critical theoretical approaches allow for the uncovering of these iterative dimensions of law to reveal how systems continue to produce oppression and disparate impacts.

<sup>122</sup> Edelman relies on empirical data to make her arguments regarding employment law and civil rights. Mobilizing empirical data allows her to demonstrate the objective consequences of sociolegal policy choices—both those of the courts and those of organizations. Our goal is to similarly engage with both critical theory and an empirical methodology, blending legal analyses with social science tools. See generally, OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH*

legal endogeneity uncovers sociolegal processes that can overstate the impact of formal civil rights legislation. It reveals how organizational actors who are thought to be regulated through these social reform laws remain in a position of power and dominance. This, in turn, is how civil rights remain symbolic, and how inequality persists despite overt legal proscriptions.

Edelman develops legal endogeneity theory to critically engage with the persistence of inequality despite decades of legislative and statutory protections designed to prevent employment discrimination.<sup>123</sup> She focuses her critique on Title VII of the 1964 Civil Rights Act<sup>124</sup> and the laws that have come after its enactment that mandate equal employment opportunity.<sup>125</sup> She applies this theory to what she calls “work organizations” in order to explain the “limited success” that civil rights laws in the employment law context have had on materially changing employment equity.<sup>126</sup> Legal endogeneity theory describes the “interplay between work organizations and their legal environments.”<sup>127</sup>

While Edelman’s work focuses on employment law and statutory law, we contend that this framework can be adapted to the constitutional law context. Traditionally perceived as the apex of exogenous law, the U.S. Constitution can be extremely vague, ambiguous, and broad. It requires interpretation and implementation. Legal endogeneity theory has important implications in the domain of constitutional law because it contends, at the very least, that organizations regulated by seemingly detached textual mandates from the US Constitution can ultimately shape their meaning.

Legal endogeneity theory has particular relevance for thinking through the Fourth Amendment in relation to the Supreme Court’s excessive force jurisprudence, police violence, and racially disparate use of force.<sup>128</sup> Instead of taking an

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THE EYES OF THE BLIND 1 (2014) (discussing the methodological benefits of blending critical theory with social science methods). In this Article, we engage in a qualitative content analysis, with the intent of uncovering the elements of these use-of-force policies, and then analytically engage this data with legal endogeneity theory. We employ this methodology by both thinking through the endogenous qualities of excessive force jurisprudence and also by using empirical methods to understand overarching frameworks.

<sup>123</sup> See EDELMAN, *supra* note 13, at 3.

<sup>124</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2018).

<sup>125</sup> See EDELMAN, *supra* note 13, at 5.

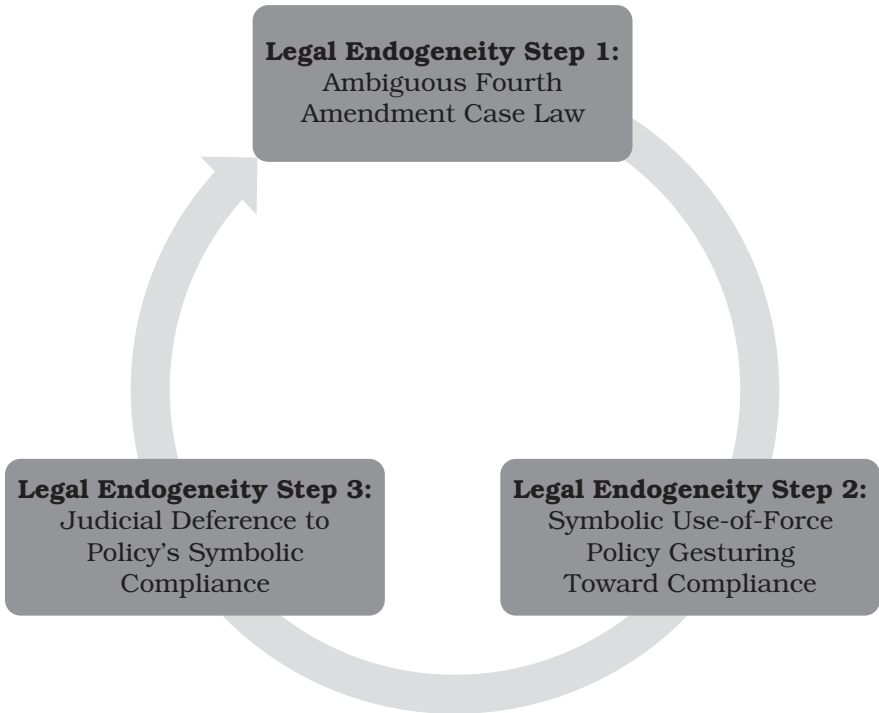
<sup>126</sup> *Id.* at 12.

<sup>127</sup> *Id.*

<sup>128</sup> See *id.* at 235 (Edelman discusses the fact that the theory “has implications for a number of literatures in the social sciences and law”).

exogenous approach in which we might solely critique federal courts and specific doctrinal choices, we intend to understand the reciprocal relationship between ambiguous Constitutional text and judicial interpretations as well as the mechanisms through which police departments' policy preferences regarding the meaning of excessive force can become understood as law.

FIGURE 3: LEGAL ENDOGENEITY, THE FOURTH AMENDMENT, AND USE-OF-FORCE POLICIES



In applying Edelman's theory to the Fourth Amendment, we argue that the Constitution is not immune from sociolegal processes that can shape how law materializes. Even with the federal court system and the interpretation and application of Constitutional principles, organizations—in this instance, the police departments that create use-of-force policies—can play a role in bringing the law into real life and, in turn, lead courts to incorporate policy preferences as valid iterations of constitutionality.

Our empirical findings in Part III suggests that the broad, ambiguous mandates of the Fourth Amendment as interpreted by the Court—ostensibly designed to protect civilians from ille-

gitimate uses of force by police—leaves police departments with significant discretion to decide what the Fourth Amendment means and, within this, what “objectively reasonable” force looks like. These findings show that use-of-force policies rely upon ambiguous language in Supreme Court case law and largely fail to include meaningful descriptions of what specific actions, behaviors, and duties constitute being reasonable. As these data suggest, use-of-force policies often regurgitate the vague mandates of *Graham*<sup>129</sup> without providing much more, reflecting the Court’s failure to provide meaningful exogenous guidance. Moreover, the resulting discretion for police departments to self-regulate and decide what reasonable means on the ground can serve as endogenous determinants that federal courts often point to in characterizing what the Fourth Amendment requires. In the following section, we draw upon our empirical data and examples from federal court cases regarding police excessive force to highlight how legal endogeneity can manifest itself in this Constitutional space.

#### A. Ambiguity and the Fourth Amendment

The three-step process of legal endogeneity theory begins with the notion that the rules that legislative bodies and courts produce to regulate organizations can be “broad and ambiguous.”<sup>130</sup> This ambiguity gives organizations the space to figure out what compliance looks like in the social and legal environment that they occupy.<sup>131</sup> From this perspective, the meaning of compliance is not determined when the law is made—in an exogenous way—but once the law gets into the hands of those regulated by it.<sup>132</sup>

As noted in Part I, the Fourth Amendment itself is ambiguous, merely affording “the people” the right to “be secure in their persons, houses, papers, and effects,” which means being free from “unreasonable searches and seizures,”<sup>133</sup> whereby excessive force has come to be included in the latter. But when do such engagements become unreasonable? The Fourth Amendment and judicial decisions concerning excessive force leaves the meaning of this key doctrinal term largely undefined. The Amendment does not specify what unreasonable actually means, nor has the Supreme Court elaborated. In addition, the

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<sup>129</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>130</sup> EDELMAN, *supra* note 13, at 29.

<sup>131</sup> *See id.*

<sup>132</sup> *See id.*

<sup>133</sup> U.S. CONST. amend. IV.

notion that the Fourth Amendment is thought of as the only constitutional vehicle to address excessive force is in itself the product of doctrinal choice. With *Graham*, the Supreme Court firmly held that excessive force stemming from an arrest or investigatory stop is to be understood as a Fourth Amendment problem.<sup>134</sup> In doing so, the Court signaled that the only way to think about police excessive force—violence that is often racialized in a manner thought to give rise to Fourteenth Amendment considerations—is through an ambiguous Fourth Amendment.

Second, *Graham* as case law exacerbates the textual ambiguity of the Fourth Amendment by adding another level of imprecision. As discussed in Part I, excessive force case law is “notoriously opaque.”<sup>135</sup> The Supreme Court rarely illuminates its difficulties, leaving police with little to follow in developing their internal policies that purport to adhere to the law.<sup>136</sup> Because *Graham* held that incidents of force must be analyzed using a “reasonableness” inquiry,<sup>137</sup> *Graham* doubles down by adding another layer of jurisprudential haze. What we see in this language is an *avoidance* of making substantive recommendations to police departments, which keeps the doctrine obscure.

These imprecisions are unable to provide clear guidance to police officers and can serve as cover for even the most egregious uses of force. Ambiguity creates the conditions for the cascade of symbolism and inaction that ultimately becomes endogenously created law. This lack of clarity permits the second step of legal endogeneity theory to occur, where ambiguous law is translated into symbolic policy.

## B. Use-of-Force Policies as Symbolic Structures

In the second step of legal endogeneity, ambiguous laws lead organizational actors to gesture toward compliance by developing symbolic policies that still maintain “managerial pre-

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<sup>134</sup> See *Graham*, 490 U.S. at 394; Obasogie & Newman, *supra* note 18, at 1477–78.

<sup>135</sup> See *supra* text accompanying note 56.

<sup>136</sup> Garrett & Stoughton, *supra* note 23, at 218.

<sup>137</sup> *Graham*, 490 U.S. at 395. This inquiry involves looking at the relationship between the intrusion to the individual versus the governmental interests, paying “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,” and “whether [the suspect] is actively resisting arrest or attempting to evade arrest.” *Id.* at 396.

rogatives” and practices.<sup>138</sup> Organizations adapt to changing legal terrain, but effectively preserve their interests.<sup>139</sup> They do so by assuming “a variety of compliance positions that loosely mimic public law enforcement.”<sup>140</sup> Edelman calls this “managerialization”: the process by which ambiguous legal requirements are translated from substantive legal ideals into practical, potentially symbolic policy choices that signal compliance internally and to outside legal actors while also conforming to managerial prerogatives.<sup>141</sup> These policies evince attention to the law while remaining primarily symbolic in terms of material results.<sup>142</sup>

The ambiguities across constitutional text and judicial rulings allow police departments to develop and mobilize symbolic structures—namely, use-of-force policies—that allow officers to respond to claims of excessive force by pointing to documented standards concerning what is considered reasonable and compliant behavior.<sup>143</sup> These use-of-force policies are critical; ambiguous Fourth Amendment standards become realized in a form that is highly favorable to police through the symbolic gestures of self-regulation.<sup>144</sup> This is where substantive legal ideals are manipulated and law is reconceptualized to benefit the regulated group. Thus, law becomes endogenously created—that is, given substance through managerial preferences expressed as administrative policies that federal courts ultimately cede to.<sup>145</sup> As these forms of organizational compliance gain legitimacy, symbolic compliance becomes normalized as what compliance ought to look like in the real world.

As Edelman describes in the statutory context, the symbolism of these policies exists along a spectrum.<sup>146</sup> Symbolic structures can range from being “merely symbolic,” “both symbolic and substantive, or may fall somewhere in between merely symbolic and substantive.”<sup>147</sup> Using this framework, our findings show that some use-of-force policies are merely symbolic, containing a reference to reasonableness and not

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138 EDELMAN, *supra* note 13, at 31.

139 *See id.*

140 *Id.* at 24–25.

141 *See* EDELMAN, *supra* note 13, at 25.

142 *See id.*

143 *See Graham*, 490 U.S. at 396 (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”).

144 EDELMAN, *supra* note 13, at 25.

145 *Id.*

146 *Id.* at 32.

147 *Id.*



much else. For example, the Stockton, California, Police Department policy describes reasonableness and force levels, verbal warnings, and medical aid.<sup>148</sup> Thus, the Stockton policy fails to contain any descriptive or incentivizing language that affirmatively tells officers to do anything other than to act reasonably during an encounter, apart from giving verbal warnings and summoning or providing medical aid. While it includes a few protections, it fails to describe de-escalation, proportionality, or any other more substantive means to protect citizens.

Other policies are still mostly symbolic, but they are also substantive because they contain protections like de-escalation. For example, the San Francisco Police Department use-of-force policy contains all eighteen of our codes, which means it included the broad, symbolic references to case law (which is to be expected, as the basis of compliance); the basic, generic protections (e.g., no shooting at vehicles); and also all of the materially substantive protections (e.g., a force continuum, de-escalation, and proportionality).<sup>149</sup> In this way, San Francisco's policy represents an approach that engages the discourse of reasonableness while going beyond this constitutional floor to provide meaningful protections to citizens. Officers are instructed and incentivized to engage in affirmative conduct designed to reduce force, de-escalate, and ultimately minimize harm.

Finally, some policies fall in between these two on the symbolic versus substantive spectrum. While being primarily symbolic, these policies might have some meaningful protections, or at least one of the basic protections discussed above (e.g., no shooting at vehicles). For example, the Cleveland Police Department use-of-force policy includes the generic language of reasonableness, but it also includes a discussion of de-escalation, proportionality, all three basic protections, and requirements on intervention and reporting when officers use excessive force.<sup>150</sup> Thus, while engaging in the symbolism of reasonableness, this kind of policy does include some substantive policies that could deter excessive force by police.

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<sup>148</sup> See STOCKTON POLICE DEP'T, GENERAL ORDER Q-1: USE OF FORCE 1 (2015), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569bf30b76d99c4f3919012d/1453060879155/Stockton+Use+of+Force+Policy.pdf> [https://perma.cc/7D87-NLEB].

<sup>149</sup> See SAN FRANCISCO POLICE DEP'T, *supra* note 107.

<sup>150</sup> See CLEVELAND DIVISION OF POLICE, *supra* note 92.

While there is a range, our empirical findings demonstrate that use-of-force policies show a managerial preference within police departments. Since the regulated—here, the police—are permitted to develop their own rules and restrictions, we can see clear managerial preferences embedded throughout use-of-force policies that protect organizational interests through the appearance of legal compliance. When police create their own rules and regulations and largely decline to include substantive protections, they are able to protect their organizational interests when an incident of force might raise questions. Legal endogeneity transforms use-of-force policies into devices that can insulate the police from liability instead of protecting citizens from constitutionally-violative excessive force. The next subpart discusses the final step regarding the endogenous nature of this process, whereby managerial preferences not only shape use-of-force policies but are treated by federal courts as articulations of legal compliance that shape the courts' own understanding of what the Fourth Amendment requires.

C. Deference: How Judicial Processes Integrate  
“Managerial Perspectives” into Use-of-Force  
Policies

The final step in legal endogeneity theory is that the legal system defers to organizations' symbolic compliance. In essence, symbolic compliance as a managerial interpretation and application of legality *becomes law* when courts and other legal actors allow these policies to shape the meaning of legal concepts. As Edelman puts it: “When organizational constructions of compliance enter the judicial realm, law becomes endogenous or influenced by the social fields that it seeks to regulate.”<sup>151</sup> The courts charged with finding violations of the law “tend unwittingly to endorse symbolic structures without evaluating their effectiveness.”<sup>152</sup>

In the excessive force context, the legal system legitimizes the constitutional interpretations of law enforcement as expressed through their administrative policies concerning use of force. Federal courts can internalize these efforts at compliance and rearticulate them as an appropriate iteration of constitutional law. This creates a dynamic in which symbolic structures are not seen as “a *means to achieve civil rights* but rather as *the achievement of civil rights*.”<sup>153</sup> Police departments

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<sup>151</sup> EDELMAN, *supra* note 13, at 170.

<sup>152</sup> *Id.* at 39.

<sup>153</sup> *Id.* at 217.

and their advocates can point to use-of-force policies and contend that the officer followed the protocols outlined in the policy; that the protocol is based on Supreme Court case law; and, therefore, they are in compliance and no rights violation occurred. When police refer to internal standards or say that an officer followed protocol and therefore should not be held liable for excessive force, the organization engages in the “countermobilization of symbolic structures” to gesture toward compliance.<sup>154</sup>

Edelman argues that adherence to symbolic structures occurs along a spectrum, through “a process of *reference*, *relevance*, and *deference*, which represent the progressive stages of legal endogeneity.”<sup>155</sup> In practice, this looks like judges: (1) incorporating or referring to organizational structures in their opinions; (2) deciding organizational structures are relevant in discerning whether a violation happened; and (3) deferring to the “mere presence of symbolic structures.”<sup>156</sup> Hence, reference (entry into the “judicial lexicon”) is the first stage of endogeneity; relevance is the intermediate stage; and deference is the most extreme form of endogeneity.<sup>157</sup>

In this way, internal policies play an important role in constructing the judicial imagination of what compliance and violation look like in real time.<sup>158</sup> We apply legal endogeneity theory to contend that the judicial system completes the feedback loop by often ceding to use-of-force policies that validate primarily symbolic rules that offer few protections for citizens. These policies signal formal compliance with constitutional protections and can be mobilized within this reference/relevance/deference spectrum.<sup>159</sup> A closer look at the different ways this can occur appears below.

### 1. *First Stage: Reference, Incorporation, and Entry into Judicial Lexicon*

At the lowest level of legal endogeneity, a judge refers to and incorporates the policy into the opinion. While not neces-

<sup>154</sup> *Id.* at 37.

<sup>155</sup> *Id.* at 39–40.

<sup>156</sup> *Id.* at 40.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 168 (“Law becomes endogenous when official legal bodies like courts, legislatures, and administrative agencies defer to organizations’ symbolic compliance structures, thus condoning managerialized conceptions of law and compliance.”).

<sup>159</sup> Edelman explains that “[w]hen judges defer to symbolic structures without evaluating their efficacy in achieving the goals of civil rights law, they usually do so inadvertently.” *Id.* at 219.

sarily a highly relevant or an otherwise determinative factor, a judge might include or mention a policy and therefore allow it to enter the “judicial lexicon.”<sup>160</sup> This is the most basic way that a use-of-force policy is included in judicial discussions of excessive force.<sup>161</sup> “Reference” means that the policy is pointed to as something worth being discussed, such as in one excessive force case involving a K-9 where the Kern County Sheriff Department’s policy is described in the undisputed facts section of the case. The court notes that “Kern County does not have a custom of condoning the use of excessive force” and that the department “has policies that govern the appropriate use of police dogs.”<sup>162</sup>

In another example from Alabama, the administrator of the estate of a man shot to death by police brought suit against the City of Birmingham alleging that the deceased had his Fourth Amendment rights violated, among others.<sup>163</sup> In the opinion, the court discusses how the officer “received training at the Police Academy on dealing with a person with a mental illness and on the City’s Use-of-Force Policy,” which “establishes and regulates the amount of force a Birmingham police officer is allowed to use in various situations.”<sup>164</sup> While the judge did not necessarily defer to the policy, he nonetheless refers to it as being an important fact in deciding the excessive force claim.

Lastly, as a third example, a California plaintiff brought an excessive force claim.<sup>165</sup> In the section of the opinion reciting

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<sup>160</sup> *Id.* at 40.

<sup>161</sup> See, e.g., *Bettis v. Bean*, No. 5:14-cv-113, 2015 WL 5725625, at \*6 (D. Vt. Sept. 29, 2015) (in the undisputed facts section of this case, which resulted in the court granting summary judgment for the defendants, the court refers to the department’s policy, writing that “[t]he Montpelier Police Department’s Use of Force Policy provides that ‘[w]hen the use of force is objectively reasonable the degree of force employed should generally be in direct relationship to the amount of resistance employed by the person or the immediate threat the person poses to the officer or others.’ . . . Under the Use of Force Policy, an officer ‘must weigh the circumstances of each case and employ only that amount of force which is objectively reasonable to control the situation or persons.’” (citation omitted)); see also *Crowley v. Rosie*, No. 2:13-cv-442-JHR, 2015 WL 5778603, at \*5 (D. Me. Sept. 30, 2015) (quoting the Farmington Police Department’s use-of-force policy).

<sup>162</sup> *Brown v. County of Kern*, No. 1:06-cv-00121-OWW-TAG, 2008 WL 544565, at \*1 (E.D. Cal. Feb. 26, 2008).

<sup>163</sup> *McElroy v. City of Birmingham*, 903 F. Supp. 2d 1228, 1232 (N.D. Ala. 2012).

<sup>164</sup> *Id.*

<sup>165</sup> *Gilbert v. Baldwin*, No. 1:05-cv-1627-OWW-NEW (TAG), 2007 WL 3203021, at \*1 (E.D. Cal. Oct. 29, 2007). For a similar example, see also *Jackson v. Town of Waldoboro*, 751 F. Supp. 2d 263, 267–68, 273 (D. Me. 2010) (noting that “[a]ll Town police officers also receive training in the Police Department’s Policies and Standard Operating Procedures, including the Use of Force Policy”

the “Defendants’ Statements of Undisputed Facts,” the court includes that “the shooting was within Department policy and consistent with current training standards for use of force by peace officers in California” and the officer “followed appropriate state law, department policies, and training as it relates to the use of deadly force.”<sup>166</sup> The court held that “[n]o reasonable officer would have responded differently” and that the officer did not violate plaintiff’s “right to be free from excessive force.”<sup>167</sup> The court then refers to the use-of-force policy in ultimately finding that there was no excessive force.<sup>168</sup> Noting compliance with the policy signals that the court—at the very least—found this to be an important fact in the case.

These examples demonstrate what it can look like when a judge incorporates and refers to a force policy, allowing it to enter the decision-making process to suggest constitutional compliance. While the judges do not fully capitulate to the policies in these examples, the policy is included as a reference point that is part of the discussion.

## 2. *Second Stage: Relevance in Discerning Violation*

Second, judges might explicitly say that the force policy is *relevant* in evaluating an instance of force usage.<sup>169</sup> In one case, the court discusses the relevance of the use-of-force policy (introduced by the police through testimony) for the factfinder to decide on the issue of excessive force.<sup>170</sup> The court characterizes the issue as “whether Officer Kerr’s adherence to [the city’s] use of force policy is relevant to his decision to use pepper spray on [plaintiff].”<sup>171</sup> The court states that “an objectively reasonable officer would consider his training,” and whether he followed the policy “relevant evidence that the finder of fact should consider in deciding whether Officer Kerr

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and ultimately finding that the officer did not violate the constitutional rights of the plaintiff).

<sup>166</sup> *Baldwin*, 2007 WL 3203021, at \*7.

<sup>167</sup> *Id.* at \*13.

<sup>168</sup> *See id.* at \*14.

<sup>169</sup> *See, e.g., Russell v. Wright*, 916 F. Supp. 2d 629, 644 (W.D. Va. 2013) (“ACSO’s use of force policy authorizes taser use against subjects who are resisting arrest, and targeting Russell’s chest was in accordance with the training Wright received on how to use the device. Additionally, Russell was given numerous chances to comply with the officer’s commands before any force was employed. As a result, Wright’s conduct simply cannot be said to lack the ‘slight diligence’ required to defeat a claim of gross negligence.”).

<sup>170</sup> *Bowyer v. Houck*, No. 5:05-cv-00628, 2006 WL 6854908, at \*2 (S.D.W. Va. Nov. 14, 2006).

<sup>171</sup> *Id.*

was objectively reasonable” in his use of force.<sup>172</sup> Hence, we see the court concluding that a policy proffered by the defendants is relevant in an excessive force claim.

In another excessive force case from Tennessee, the court includes a long section in the opinion that contains numerous references to the force policy.<sup>173</sup> The court describes how the defense’s expert (a “law enforcement consultant”) “concluded that the [police department’s] use of force policy and use of force continuum complied with Fourth Amendment standards.”<sup>174</sup> The court found that the “officers acted in accordance with the [police department’s] use of force policy,”<sup>175</sup> and ultimately the court held that the officers did not use excessive force.<sup>176</sup> In this case, we see the court not only mentioning a policy, but finding it relevant and worth discussing at length. We also see the court concluding that because a policy appears to comply with Fourth Amendment standards, and because an officer followed the policy, that the officer therefore complied with the Fourth Amendment.

In a third example of relevance, an Ohio plaintiff was tased and subsequently brought a § 1983 suit.<sup>177</sup> The court discusses the fact that the town had “investigated this incident and determined that [the officer] had complied with its Use of Force Policy.”<sup>178</sup> The court stated that the policy “instructs officers on ‘constitutional adherence’ in the use of force,” to “use reasonable force,” and “provides the definition of reasonable force specifically relying on the United States Supreme Court case *Graham v. Connor*.” Finally, the court wrote that there is an “instructional Taser class” and that the officer not only “completed the required training,” but “was also certified as a Taser instructor.”<sup>179</sup> In this decision, the court (1) gives credence to the internal investigation; (2) evokes constitutional adherence to *Graham* as if the case reflects a substantive constraint; and (3) includes the fact that the officer was a “certified” instructor. Thus, the court discusses the policy as a

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<sup>172</sup> *Id.*

<sup>173</sup> *Watson v. Dyersburg City Police Dep’t*, No. 08-2718-SHM-tmp, 2013 WL 5306683, at \*16 (W.D. Tenn. Sept. 20, 2013).

<sup>174</sup> *Id.* at \*30.

<sup>175</sup> *Id.* at \*35.

<sup>176</sup> *Id.* at \*38.

<sup>177</sup> *Peabody v. Perry Tp.*, No. 2:10-cv-1078, 2013 WL 1327026, at \*2 (S.D. Ohio, Mar. 29, 2013).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

relevant element in deciding the constitutionality of the force used.

There are also instances where a court might invoke the internal adjudicatory process of the police department and discuss the use-of-force policy in depth. In a case from Maine involving the use of a Taser, the court states: “Ultimately, both the Force Review Board and the internal affairs investigation concluded that the use of the Taser was justified and in keeping with departmental policy to overcome Parker’s resistance to being taken into lawful custody following his arrest for operating under the influence” and that the officer was acting within “his department’s use-of-force policy and applicable law.”<sup>180</sup> The court concluded that summary judgment was appropriate for most of the officers.<sup>181</sup>

A district court in Phoenix deciding an excessive force claim made a similar statement, using the following language: “The City of Phoenix investigated and determined that [the officer’s] actions were in compliance with the Phoenix Police Department’s use of force policy.”<sup>182</sup> In another excessive force case from California, after outlining the relevant portions of the force policy, the court states that the actions of the officer were “consistent and in compliance with Inyo County Sheriff’s Department training and policy” as well as “with the California Commission on Peace Officer Standards and Training use of force policy in California.”<sup>183</sup>

With these examples, the courts integrate use-of-force policies as relevant elements of a decision on excessive force, or even describing the internal or municipal adjudicatory process in relation to the policy. By allowing them to be incorporated in this way, the courts permit use-of-force policies to—directly or indirectly—evoke a sense of compliance through relevance. In finding these policies relevant, the court allows organizational structures (the policies) to be utilized by courts adjudicating constitutional violations.

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<sup>180</sup> Parker v. City of South Portland, No. 06-129-P-S, 2007 WL 1468658, at \*13 (D. Me. May 18, 2007).

<sup>181</sup> *Id.* at \*29; *see also* Scott v. Deleon, No. 2:15-cv-02193, 2016 WL 9685994, at \*1 (W.D. Ark., 2016) (“A use of force review was conducted and Defendant Kevin Lindsey, who was at that time Chief of Police, determined that Deleon’s use of force in the sally port complied with Fort Smith Police Department policy.”).

<sup>182</sup> Remato v. City of Phoenix, No. cv 09-2027-PHX-FJM, 2011 WL 3648268, at \*2 (D. Ariz. Aug. 19, 2011).

<sup>183</sup> Gilbert v. Baldwin, No. cv-F-05-1627 OWW/GSA, 2007 WL 4126084, at \*5 (E.D. Cal. Nov. 20, 2007).

### 3. *Third Stage: Deference to the Presence of a Policy*

On the far end of this spectrum, the court might fully defer to a use-of-force policy in evaluating a claim of excessive force.<sup>184</sup> In one case from Texas, the plaintiff brought suit after an officer struck him in the knee in a manner that caused significant injury, including a ruptured femoral artery.<sup>185</sup> The court proceeded to directly and explicitly integrate the force policy into its opinion on the excessive force claim, treating it with substantial deference.

*Under the Fort Worth Police Department's guidelines, a knee strike is considered an intermediate use of force and not deadly use of force or a technique that could cause serious injury. Thus, although [the plaintiff] suffered a severe injury that may have resulted from [the officer's] use of the knee strike, that injury will not color the Court's analysis as to the reasonableness of the use of that technique. To allow such an influence would bias the objective review of the officer's use of force with 20/20 hindsight. Under the circumstances of this case, and resisting the temptations of 20/20 hindsight, the Court concludes that the officers [sic] use of force was not excessive.*<sup>186</sup>

By invoking the policy, the court makes it an integral part of the decision-making process beyond mere reference or relevance; it largely constitutes the holding. What is also interesting here is that the court invokes the “20/20 hindsight” element of *Graham*, in combination with the policy, to find that the instance of force was not excessive. The court thereby absolves itself of analytical responsibility beyond the generalized rehashing of *Graham's* vagueness alongside the police department's own interpretation of the *Graham* standard. The court goes on:

*According to the police department's guidelines, this level of force is appropriate “when the officer meets an actively resisting subject who represents a physical threat to the safety of the officer or attempts to use force against the officer or another but does not yet represent a life-endangering threat.” Faced with just such a situation, the officers used the appro-*

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<sup>184</sup> EDELMAN, *supra* note 13, at 173 (“When judges defer to symbolic structures, it means that they have failed to engage in adequate scrutiny of these structures.”).

<sup>185</sup> Peterson v. City of Fort Worth, No. 4:06-CV-332-Y, 2008 WL 440301, at \*2 (N.D. Tex. Feb. 19, 2008).

<sup>186</sup> *Id.* at \*10 (emphasis added) (footnote omitted).



prate level of force to protect their safety and minimize [the plaintiff's] potential threat.<sup>187</sup>

By directly discussing the force policy, the court indicates its centrality and magnitude in its decision. More than just referencing it or discussing its relevance, the policy is integrated into the holding as a critical piece of the court's decision-making process. The force policy is thereby part of the meaning-making application of law.

In a second example from West Virginia, the court holds that the officer's conduct was "objectively reasonable," similarly pointing directly to the force policy in its holding.<sup>188</sup> The court states: "Officer Hennessey acted reasonably under the circumstances to protect both [the plaintiff] and himself, *in accordance with the Morgantown City Police Department's Use of Force policy*" and therefore "did not violate [the plaintiff's] Fourth Amendment right to be free from unreasonable search and seizure."<sup>189</sup> As we see here, the court cites the force policy explicitly as part of its holding that the force was reasonable. The presence of the force policy is effectively equated to compliance with the Fourth Amendment.

A third example of this process can be seen in a wrongful death suit brought by the parents of a Wisconsin man shot and killed by police in front of his house.<sup>190</sup> In this case, the court wrote that pursuant to the "law at the time of the incident, *as well as the policies for both law enforcement agencies*, permitted the use of deadly force under certain circumstances."<sup>191</sup> The Court also noted that since it "agree[d] that other police, confronted with the same situation, would find that the force used by the defendants was reasonable, the defendants [were] shielded from this action under the principles of qualified immunity."<sup>192</sup> The court places the use-of-force policies on the same level as the law to demonstrate their significance in un-

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<sup>187</sup> *Id.* (emphasis added).

<sup>188</sup> *Neiswonger v. Hennessey*, 89 F. Supp. 2d 766, 774 (N.D. W.Va. 2000).

<sup>189</sup> *Id.*; see also *Alicea v. Schweizer*, No. CIV.A. 14-0213, 2015 WL 4770680, at \*1 (E.D. Pa. Aug. 12, 2015) (discussing the training officers received on the police department's "rules and directives, including the use of force policy" in finding that defendants were entitled to judgment as a matter of law); *McElroy v. City of Birmingham*, 903 F. Supp. 2d 1228, 1232 (N.D. Ala. 2012) ("Officer Hutchins received training at the Police Academy on dealing with a person with a mental illness and on the City's Use-of-Force Policy. . . . The City's Use-of-Force Policy establishes and regulates the amount of force a Birmingham police officer is allowed to use in various situations." (citation omitted)).

<sup>190</sup> *Liebenstein v. Crowe*, 826 F. Supp. 1174, 1176 (E.D. Wis. 1992).

<sup>191</sup> *Id.* at 1186 (emphasis added).

<sup>192</sup> *Id.* at 1187.

derstanding the constitutionality of the use of force. In finding the force used within the realm of what is constitutionally permissible (via qualified immunity), the court defers to the policy.

In these cases, federal courts effectively defer to the presence of a policy as signaling compliance with the Fourth Amendment. The presence of the policy thwarts the plaintiffs' claims that the force used against them violated the Fourth Amendment. The courts include use-of-force policies as part of or leading to the holding, indicating that the importance of the policy goes beyond reference or relevance. As such, federal courts give credence to these policies, allowing the embedded managerial preferences to effectively become Fourth Amendment standards with regards to excessive force inquiries.

These examples of reference, relevance, and deference allow us to see how the legal system engages with use-of-force policies in a manner that validates and valorizes the policies as indicative of compliance with constitutional mandates. This is the last stage of endogeneity, i.e., the final step in the process through which the regulated actor defines the terms and conditions of legal compliance. As Edelman notes, "when courts—as well as other legal institutions—rely on myth and ceremony . . . rights themselves become merely symbolic."<sup>193</sup>

This legal analysis along with our data on use-of-force policies suggests that Fourth Amendment considerations of excessive force are not the exogenous process many consider them to be, and that police can exert their own conceptualizations of the law through use-of-force policies that are seen as relevant, used as reference points, or deferred to by federal courts. Law—and the meaning of law—rarely exists outside of real sociolegal structures of interpretation and manifestation. Through these use-of-force policies, there is a process of knowledge production in which symbolic structures advocating police/managerial preferences *become constitutional law* and truncate the rights of those the Fourth Amendment is supposed to protect—the public.

#### CONCLUSION: TOWARD THE DEMOCRATIZATION OF USE-OF-FORCE POLICIES

This Article provides empirical evidence on use-of-force policies that gives rise to a new way of conceptualizing excessive force claims under the Fourth Amendment. Contrary to traditional understandings that frame the Fourth Amendment

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<sup>193</sup> EDELMAN, *supra* note 13, 217.

as an exogenous determinant for how police understand their use-of-force responsibilities, our data and analysis suggest that use-of-force policies often reflect an endogenous process. Ambiguous doctrine and case law allow police departments to define what is reasonable through their own administrative preferences which become a symbolic structure of compliance that federal courts come to refer, rely upon, or defer to in understanding what the Constitution requires. Thus, Fourth Amendment reasonableness is not merely defined by external legal mechanisms like constitutional text or judicial decisions, but also shaped *endogenously* by police departments and their use-of-force policies. The reframing offered by this Article provides a new understanding for how and why the Fourth Amendment has been ineffective in curbing excessive and deadly force by the police or holding them accountable after the fact.

While the empirical study of use-of-force policies opens up new possibilities for thinking about the relationship between police administrative policies and constitutional law, it is not without limitations. Not all Fourth Amendment excessive force cases refer to or incorporate use-of-force policies. This Article is interested in those instances in which they do and how, if at all, courts treat these policies when discussed in their decisions. Moreover, police excessive force claims are decided through diverse means; no one explanation captures every dynamic. Yet, by empirically examining use-of-force policies and how they are used in judicial decisions, we are able to have a sense of the bottom up pressures that can shape courts' understandings of what counts as excessive force.

This Article focuses on performing the preliminary empirical work to identify a dynamic between the Fourth Amendment, excessive force jurisprudence, and police administrative policies that has not been discussed in the literature and understanding how the policy preferences of police departments can become constitutional standards adhered to by federal courts. It is our intent that this Article serves as the beginning of a scholarly conversation on the diverse implications of these findings. We anticipate that future studies can uncover underlying patterns of judicial deference to use-of-force policies across various time periods or make comparative claims about legal endogeneity theory in civil and criminal contexts. Such research can make important contributions to understanding how and why police violence persists in many communities.

Understanding the endogenous relationship between use-of-force policies and federal courts' conceptions of excessive force also creates new possibilities for reform in reducing the instances of police brutality in the communities they serve. In addition to encouraging federal courts to be more specific in how they characterize and define appropriate versus excessive force, our key recommendation is that use-of-force policies must become radically democratic documents that allow diverse constituencies to participate in their creation.

There are approximately 18,000 police agencies in the United States, each of which has the power to define its use-of-force policy.<sup>194</sup> A combination of the Black Lives Matter movement, consent decrees, and an active Department of Justice during the Obama Administration put pressure on police departments to reform their use-of-force policies over the past several years<sup>195</sup>—from Las Vegas<sup>196</sup> to Baton Rouge<sup>197</sup> to Asheville.<sup>198</sup> Other locales voluntarily responded in the face of civilian pressure, such as in St. Paul.<sup>199</sup> Members of the community can offer recommendations and feedback in an advisory committee or a public comment period, and a consent decree may tell a department to specifically do something like focus on de-escalation.<sup>200</sup> In Denver, for instance, after the

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<sup>194</sup> The Editorial Board, *Adopt Uniform Police Use-of-Force Policies*, USA TODAY (July 11, 2017, 10:37 AM), <https://www.usatoday.com/story/opinion/2017/07/10/adopt-uniform-police-use-of-force-policies/425162001/> [https://perma.cc/RK4P-9D3E].

<sup>195</sup> Cecil Bothwell, *Bothwell: Police Reforms Are Already Working*, CITIZEN TIMES (Mar. 16, 2018, 7:18 AM), <https://www.citizen-times.com/story/opinion/2018/03/16/bothwell-police-reforms-already-working/429617002/> [https://perma.cc/V4L2-7TLN]; Cheryl Corley, *New Use-of-Force Guidelines for Chicago Police*, NPR (Oct. 14, 2017, 7:12 PM), <https://www.npr.org/2017/10/14/557832705/new-use-of-force-guidelines-for-chicago-police> [https://perma.cc/LD2Q-AQ88]; Jessica Anderson, *Team Overseeing Consent Decree Sets Deadlines for Baltimore Police*, THE BALTIMORE SUN (Jan. 8, 2018, 5:55 PM), <https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-consent-decree-monitor-plan-20180108-story.html> [https://perma.cc/HC6C-X2WQ].

<sup>196</sup> See *supra* note 194, *Adopt Uniform Police Use-of-Force Policies*.

<sup>197</sup> Andrea Gallo et al., *Here's Why Experts Say New Use-of-Force Policies Put Baton Rouge Ahead of Most Police Agencies*, THE ADVOCATE (Feb. 2, 2017, 9:00 AM), [http://www.theadvocate.com/baton\\_rouge/news/alton\\_sterling/article\\_de5fa502-e8cb-11e6-8fd7-af3ba631b532.html](http://www.theadvocate.com/baton_rouge/news/alton_sterling/article_de5fa502-e8cb-11e6-8fd7-af3ba631b532.html) [https://perma.cc/H2V6-8HER].

<sup>198</sup> See Bothwell, *supra* note 195.

<sup>199</sup> Chao Xiong, *St. Paul Police Release Updated Use-of-Force Policy*, STAR TRIBUNE (Mar. 21, 2018, 9:28 PM), <http://www.startribune.com/st-paul-police-release-updated-use-of-force-policy/477569503/> [https://perma.cc/SE7T-RHSF].

<sup>200</sup> Camila Dmonoske, *Baltimore, DOJ Reach Agreement on Consent Decree for Baltimore*, NPR (Jan. 12, 2017, 10:56 AM), <https://www.npr.org/sections/thetwo-way/2017/01/12/509479934/baltimore-doj-reach-agreement-on-consent-decree-for-baltimore-police> [https://perma.cc/7HSY-BFUC].

police department failed to sufficiently involve the community, an advisory committee of community members participated in updating the rules in 2017.<sup>201</sup>

The San Francisco Police Department approved an updated policy in 2016 after not having done so since 1995.<sup>202</sup> This new policy features all of the substantive protections discussed in Part III.<sup>203</sup> The process of updating the policy happened, at least in part, due to the killing of Mario Woods. It was launched based on a mayoral initiative and involved discussions with numerous stakeholders, including the San Francisco Police Department, the San Francisco Police Officers Association, the Board of Supervisors, the San Francisco Police Commission, and community members.<sup>204</sup> The Police Commission's then-President stated: "The people of San Francisco have demanded that we make meaningful change."<sup>205</sup>

In addition, Chicago—a department with a use-of-force policy with many key protections—similarly faced public and federal pressures to change. In early 2017, the DOJ released a highly critical report of the Chicago Police Department's excessive use of force and continuous violation of citizen's civil rights.<sup>206</sup> The DOJ's investigation started after the death of

<sup>201</sup> Jesse Paul, *New Use-of-Force Policies for Denver Police Officers Will Take Months of Training, Deputy Chief Warns City Council Members*, DENV. POST (Dec. 20, 2017, 2:39 PM), <https://www.denverpost.com/2017/12/20/denver-police-use-of-force-policy-training/> [<https://perma.cc/S8VZ-GR6Q>]; Noelle Phillips, *Denver Police Chief Reverses Course, Plans to Invite Outside Voices to Finalize New Use-of-Force Policy*, DENV. POST (Feb. 27, 2017, 3:43 PM), <https://www.denverpost.com/2017/02/27/robert-white-advisory-panel-use-of-force-policy/> [<https://perma.cc/H92G-BKXH>].

<sup>202</sup> *San Francisco Police Commission Approves New Use of Force Policy*, CBS (Dec. 21, 2016, 11:09 PM), <https://sanfrancisco.cbslocal.com/2016/12/21/shooting-at-moving-vehicles-banned-in-new-sfpd-use-of-force-policy/> [<https://perma.cc/8V9H-D4R6>].

<sup>203</sup> See discussion *supra* Part III.

<sup>204</sup> Jonah Owen Lamb, *SFPD's Use-of-Force Policy Reforms Unanimously Passed by Police Commission*, S.F. EXAMINER (June 22, 2016, 12:00 AM), <http://www.sfoxaminer.com/sfpds-use-of-force-policy-reforms-unanimously-passed-police-commission/> [<https://perma.cc/CJ2J-GMKA>]; Vic Lee, *San Francisco Mayor Releases Initiative to Reform Use-of-Force Policy*, ABC (Jan. 7, 2016), <https://abc7news.com/news/san-francisco-mayor-releases-initiative-to-reform-use-of-force-policy/1150910/> [<https://perma.cc/W5AW-R9ET>]; *San Francisco Police Commission Approves New Use Of Force Policy*, *supra* note 202; *SFPD and City Leaders Continue to Debate Police Reforms, Including Use-of-Force Policy*, FOX (Nov. 16, 2016, 1:37 PM), <http://www.ktvu.com/news/sfpd-and-city-leaders-continue-to-debate-police-reforms-including-use-of-force-policy> [<https://perma.cc/PMQ6-SHPS>].

<sup>205</sup> Lamb, *supra* note 204.

<sup>206</sup> U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTORNEY'S OFFICE N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017), <https://www.justice.gov/opa/file/925846/download> [<https://perma.cc/UPJ2-3U58>];

Laquan McDonald, a Black teenager shot sixteen times by Chicago police as he was walking away.<sup>207</sup> As a result, in May of 2017, the Chicago Police Department announced stricter use-of-force rules that focus on firearm restrictions, de-escalation, and requiring officers to seek medical attention for citizens after using force.<sup>208</sup> According to Chicago Police Superintendent Eddie Johnson, the policy incorporated input from citizens through community meetings, two public comment periods, and focus groups with officers and police supervisors.<sup>209</sup>

Thus, mounting pressure from the public and federal government over the past five years has had the effect of increasing community involvement in the process of producing new administrative rules and regulations. In order to break the cycle of legal endogeneity that allows police departments to develop policies that are favorable to police and less attentive to the wellbeing of community members, cities and municipalities must find ways to ensure that the public is deeply involved in developing community standards to define what is reasonable and how they expect their police departments to use force. Given the remarkably high stakes, this democratization of use-of-force policies must go beyond mere city council meetings and public discussions to find novel ways for community members to have permanent roles in defining and implementing standards that can guide officer decision making and hold police accountable when standards are not met.

In addition to initiating conversations concerning reform, it is also our hope that scholars will view this Article as an invitation to think more sociologically in understanding the social and organizational forces that endogenously create law as opposed to treating law as an entity that exists anterior to social relations. While legal endogeneity has been well received as a theory for understanding dynamics surrounding organiza-

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see also Julie Bosman & Mitch Smith, *Chicago Police Routinely Trampled on Civil Rights, Justice Dept. Says*, N.Y. TIMES (Jan. 13, 2017), <https://www.nytimes.com/2017/01/13/us/chicago-police-justice-department-report.html> [<https://perma.cc/KR66-HRRS>]; Corley, *supra* note 195.

<sup>207</sup> Mitch Smith, *Sweeping Limits on Police Use of Weapons Proposed in Chicago*, N.Y. TIMES (Oct. 7, 2016), <https://www.nytimes.com/2016/10/08/us/chicago-police-guns-force.html> [<https://perma.cc/CG54-58FV>].

<sup>208</sup> Mitch Smith & Timothy Williams, *Chicago Police Adopt New Limits on Use of Force*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/chicago-police-force-shooting.html> [<https://perma.cc/8E33-AHBW>].

<sup>209</sup> Tom Jackman, *Chicago Police Adopt De-Escalation in Sweeping Change to Use-of-Force Policy*, WASH. POST (May 17, 2017), [https://www.washingtonpost.com/news/true-crime/wp/2017/05/17/chicago-police-adopt-de-escalation-in-sweeping-change-to-use-of-force-policy/?utm\\_term=.10e2234cc303](https://www.washingtonpost.com/news/true-crime/wp/2017/05/17/chicago-police-adopt-de-escalation-in-sweeping-change-to-use-of-force-policy/?utm_term=.10e2234cc303) [<https://perma.cc/4MFF-L8M7>].

tional behavior and statutory laws,<sup>210</sup> we invite scholars to apply this same type of sociological thinking to understanding various aspects of public law. Taking this approach might create new ways for considering whether our commitments to the rule of law and a just and fair society are being met.

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<sup>210</sup> Edelman's *Working Law: Courts, Corporations, and Symbolic Civil Rights* has won the American Sociological Association Distinguished Book Award, the Distinguished Book Award for the Sociology of Law Section of the American Sociological Association, the Academy of Management George R. Terry Book Award, and Honorable Mention for the American Political Science Association Law and Courts Sections C. Herman Pritchett Award.

