Evaluating Police Uses of Force

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Introduction

What does a police officer in the United States look like? There is no way for us to foresee, as we write this months or years before you read it, the details of the officer you're imagining right now. They may be tall or short, male or female, white or black, uniformed or in plainclothes; there are an infinite number of variations. Yet we can confidently predict that the officer you're picturing is armed.[1] At a minimum, they have a handgun, but they may be wearing a duty belt or tactical vest outfitted with pepper spray, a baton, or a TASER; they may be carrying a shotgun, a rifle, or a transparent shield and a riot baton. You may even have pictured an officer using force, mentally replaying one of the many videos of police shootings or other uses of force that have been prominently featured in the news.

The fact—and we are confident enough in our predictions to call it a fact—that you pictured an armed officer demonstrates what academics and officers themselves have long recognized: the use of physical force is inherent in and inseparable from modern policing.[2] How could it be otherwise? Society invests officers with the legal authority to invade privacy and to restrict freedom, to deprive people of their basic liberties. Predictably, people do not always respond well to being deprived of those basic liberties. But police authority is backed by the threat of state-sanctioned violence; if an individual resists an officer's attempts to exercise their authority, the officer may well use physical force to fulfill their duties.

Police violence has proven to be a challenging and divisive issue in the United States, although the use of force, especially the use of deadly force, is relatively rare. Indeed, the vast majority of police–citizen encounters are insipid interactions that do not involve problematic coercion or result in complaints. According to the best available data—which admittedly is not as robust as we would prefer—only a small percentage (1.8 percent) of the more than fifty million police–civilian contacts every year involve a threat or actual use of force. Even in the context of interactions that involve the types of inherently coercive police action that are most likely to elicit civilian resistance, such as arrests, violence is the exception, not the rule. Studies have estimated that out of some thirteen million arrests, only about 4 percent involve the use of more force than necessary to handcuff a compliant subject.[3] And on those occasions

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when officers do use force, the vast majority of incidents involve low-level violence with little potential for injury: grabbing, shoving, and the like.

Why, then, should society care about the use of force? There are at least two different answers to that question: one philosophical, the other pragmatic. Philosophically, the use of government violence against civilians runs counter to our most basic democratic notions of individual freedom, liberty, security, and autonomy. Our system of democratic republicanism is premised on the belief that a non-tyrannical government can rule only with the consent of the governed. A sophisticated civilization must balance individuals' interest in liberty and privacy against society's interest in order and security, but if our democratic ideals are to mean anything that balancing must be carefully managed. The tension between the need for governmental infringement on freedoms and the need for protection from governmental abuse is particularly acute in the context of policing. Police agencies and officers are the paradigmatic public servants, the self-professed Thin Blue Line that stands between ordered society and criminal anarchy. Each use of force against civilians presents, at a microcosmic scale, a scenario that implicates longstanding fears of tyranny and government overreach. On a purely philosophical level, then, understanding and properly evaluating police uses of force against civilians is critical to properly maintaining the dynamic tension between security and liberty.

Pragmatically, there are several reasons to take police uses of force seriously. First, such incidents result in the injury or death of thousands of community members every year. Although the proportion of police–civilian interactions that involve violence are quite modest, the small percentage masks large absolute numbers. Even if force is used in only 1 percent of police–civilian encounters, the fact that there are, on average, more than sixty million such encounters every year would mean that there are at least 600,000 uses of force every year. That's more than one every minute in every hour of every day of the year. Most of the time, officers are not using force to defend themselves: over the last ten years, there have been, on average, about 56,000 incidents every year in which an officer was assaulted (just over a quarter of those assaults resulted in some type of injury to the officer). That leaves at least 544,000 occasions each year in which officers used force for reasons other than self-defense. That breaks down to almost 1,500 every day, which is still more than one per minute. Those numbers are at the low end of the spectrum based on data from the Bureau of Justice Statistics; if more than 1 percent of police–civilian encounters involve the use of force or if there are more than sixty million encounters in a given year, the absolute numbers may be significantly larger. The potential number of use-of-force incidents, then, make this an issue of public importance.

The use of force also plays an important role in shaping public attitudes toward government generally and policing more specifically. Police violence is among the most controversial uses of governmental authority. Community trust and confidence in the police is undermined by the perception that officers are using force unnecessarily, too frequently, or in problematically disparate ways. Over time, negative perceptions of the police can reduce civilian cooperation, making law enforcement and order maintenance significantly more difficult. Public distrust can also create dangerous situations for officers and community members. The use of force not only undermines public trust over time, it can also serve as a flashpoint, a spark that ignites long-simmering community hostility. Use-of-force incidents can have lasting reverberations, from the televised abuses of the Civil Rights Era to the beating of Rodney King in 1991, and from the shooting of Amadou Diallo in 1999 to the shooting of Walter Scott in 2015. Throughout the country, police uses of force have instigated violence or civil unrest.[4] Of the ten most violent and destructive riots in United States history, fully half were prompted by what were perceived as incidents of excessive force or police abuse.[5]

The central role that use-of-force incidents play in shaping public perceptions of policing is all the more critical in light of the limited information that most community members have about policing and the use of force. Traditional and social media shape public perceptions, but that coverage can lead to misperceptions about the frequency and substance of use-of-force incidents. Citizens often learn about police behavior from entertainment media—television, movies, video games, and so on—but such portrayals are rarely accurate. Even when news media provides more accurate reports of how force is used, the public can be left with an incomplete or inaccurate understanding about the use of force. During oral argument in a Supreme Court case involving officers who shot at a fleeing vehicle, for example, the late Justice Antonin Scalia asserted that officers shoot at moving vehicles "all the time"; this highly questionable statement was predicated not on data from academic studies or specific police agencies, but rather on "movies about bank robberies."[6]

In the aggregate, reporting on police uses of force naturally focuses on what are viewed as the most newsworthy events: particularly officer-involved shootings, brutal violence, or egregious misconduct. Because of a cognitive bias known as the "availability heuristic"—which causes us to make judgments about the frequency of an event based in large part on our awareness of other similar, recent, and significant events—such reporting can contribute to the false impression that such events are far more frequent than they actually are. A recent, high-profile incident of police violence in the news, then,

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can lead people to conclude that similar incidents of police violence are quite common even when that may not be the case.

Public misunderstandings about the use of force can also affect the way individual incidents are perceived. News reports, especially preliminary reports, are of limited value: inevitably, there is a significant amount of information the reporters—and, by extension, the public—simply do not have at the time. Many viewers, however, will come to a firm conclusion based on partial information, unconsciously relying on a host of cognitive biases to fill in the gaps. Worse, many viewers will have a high degree of confidence in their conclusions. As a result, a use-of-force incident may be judged by thousands of people who develop strong opinions based on weak and incomplete evidence.[7] And even when there is good information about a particular incident, most people simply do not apply any rigorous analytical framework to evaluate the use of force. That matters because police violence is just that: violence. Even when we are quite comfortable with the abstract proposition that officers use force, the actual use of force can be aggressive, brutal, and ugly. When force is, or appears to be, excessive or unnecessary, it can create the perception that a government official charged with ensuring public safety turned on a member of the public they are sworn to protect.

These philosophical and pragmatic rationales make it incredibly important for officers to use force appropriately and for officers and agencies to be held accountable when they do not. This book poses and responds to a question that is central to police accountability: how does society evaluate the propriety of an officer's use of force? That is, how do we tell whether any given use of force appropriately balanced the subject's interest in freedom against the social interests in order and law enforcement? We identify four different answers to that question, four evaluative standards that can be—and are—used in different contexts. Chapter 1 provides a detailed roadmap of constitutional standards, where the propriety of police force is regulated by the Fourth Amendment's prohibition of unreasonable seizures. Chapter 2 supplies an overview of state law, which sets out criminal and civil standards. Chapter 3 explores the administrative standards that individual police agencies create through policy, procedure, and training. Chapter 4 discusses what we term the "community expectations standard," an important, if informal, way to evaluate police uses of force through the lens of public expectations. In each chapter, we engage in a detailed discussion of one relevant standard, identifying the contexts in which that standard applies, describing the precise behaviors that each standard regulates, and exploring how each evaluative standard is used to assess the propriety of any given use of force.

In the final two chapters, we provide key information about the choices police make in use-of-force situations; understanding these choices is essential for applying any of the evaluative standards. In chapter 5, we discuss police tactics: the decisions that officers make and the actions they take as they approach and interact with civilians, both of which can contribute to whether and how force is used. In chapter 6, we explore the various ways officers use force, describing the role various techniques, tools, and weapons can play in use-of-force situations, and highlighting the continued development of tools and technologies that may shape when and how officers use force.

These discussions about the evaluative standards, and the additional information that is necessary to apply those standards effectively, are situated within a broader conversation about governmental accountability, the role that police play in modern society, and how officers should go about fulfilling their duties. We acknowledge the value of, but do not here explicitly engage in, those more extensive themes. This book does not claim to resolve, or even to address, all of the problems in policing; indeed, our focus on the evaluative frameworks that can be applied to use-of-force incidents is quite limited. This book explores how *individual* use-of-force incidents are evaluated, but we do not here examine how the use of force is or could be evaluated in the aggregate. That is to say, we explore different answers to the question, "How can society assess a particular shooting?" but not to the broader question, "How can society assess police shootings in the United States taken as a whole?"

We are cognizant that our focus on individual incidents excludes controversial and important aspects of police uses of force, including, for example, the racial dynamics of the criminal justice system generally, of policing, and of the use of force specifically. There is good reason to think that the use of force is not evenly distributed along racial lines. In a survey administered by the Bureau of Justice Statistics, 1.3 percent of white respondents reported being subjected to a use of force, compared to 3.3 percent of black respondents, which suggests that there exists, at a minimum, a racially disproportionate perception that officers have used force. While force was perceived as "necessary" by roughly the same percentage of blacks (32 percent) and whites (32.4 percent), the perception that force was "excessive" was reported more often by blacks (59.9 percent) than whites (42.7 percent). Further, data gathered by the FBI and various media outlets suggests that this is not just a matter of perception, at least in the context of officer-involved homicides: 13.4 percent of the US population, but more than 30 percent of individuals killed by police, are black.

These observations are deeply troubling, implicating longstanding concerns about racial equality—or, more accurately, the lack thereof—in the

United States and the manner in which policing as an institution has perpetuated inequity, both historically and today. They give rise to a series of challenging sociological quandaries. There is, of course, the very real possibility that individual officers act out of racial animus on at least some occasions. The picture is almost certainly more complicated than that, though. It is almost certainly the case that if officers are more likely to interact with black individuals, then, all other things being equal, we would expect them to use force at a higher rate against that population group. That, however, does nothing to explain *why* officers are more likely to interact with black individuals. The answer is likely systemic, reflecting the correlation between urban poverty and crime and a long, distressing history of race-conscious, and often overtly race-motivated, choices relating to education policy, housing policy, and economic policy, not to mention criminal justice policy. The looming role that race has played, and continues to play, in shaping how we define a "threat" or "threatening behavior" undoubtedly affects police uses of force. This is true at the wholesale level, where the identification of certain substances, but not others, as "illicit drugs" or the distinction between drugs and "hard" drugs is rife with racial overtones; consider the Federal Sentencing Guidelines' 100:1 disparity—later reduced to an 18:1 disparity—between crack cocaine and powder cocaine, in which possession of one gram of crack (a drug associated primarily with black users and dealers) was punished at the same severity as one hundred grams of powder cocaine (a drug associated primarily with white users and dealers). Or consider the difference in the law enforcement-oriented response to the crack cocaine epidemic of the 1980s and early 1990s, when the drug was largely confined to poor, inner city (read: predominantly black) communities and the public health–oriented response to the modern heroin epidemic, which has spread into middle- and upper-class suburban (read: predominantly white) communities.

It is impossible to entirely disaggregate the social dynamics of race and class from policing and the use of force, and we do not attempt to do so. We do, however, consciously avoid tackling head-on such complex and complicated issues: that discussion is very much needed, but it is simply outside the scope of what we set out to do in this book.

To reiterate, our focus in this book is narrow: we seek to explore how individual police uses of force are evaluated. Nevertheless, this book is both necessary and a significant contribution to public and academic debates about police violence. Police uses of force are the single most visceral and divisive aspect of contemporary policing. Police kill almost three people a day,[8] and people have responded with protests, civil unrest, and horrifying ambushes that have resulted in the murder of police officers in Texas, Pennsylvania,

Louisiana, and elsewhere. And yet, the public conversation about police uses of force has focused almost exclusively on whether individual officers who used excessive force in individual incidents should be criminally punished, without much, if any, broader discussion about how to determine whether the force used was excessive.

This is even more remarkable in light of the observation that the use of force by police has been studied for more than fifty years. There was only limited academic interest in the subject until the 1960s, when scholars like James Fyfe began conducting research and building a budding literature. Even then, the use of force was not the subject of sustained academic attention until 1980. That year, interest was energized by the publication of volume 452 of *The Annals of the American Academy of Political and Social Science*; that volume was a special edition that brought to the attention of a broad academic community the nature and scope of existing academic work on use-of-force issues.[9] Since then, there have been marked improvements in the academic literature.[10] Today, the use of force by police is an accepted topic for researchers and practitioners alike. Indeed, a volume of the *Annals* to be published in 2020 will be dedicated to research on fatal police shootings. These important research questions continue to develop, and interested scholars and practitioners investigate them and report their findings,[11] but scant attention has been paid to the analytical topics we address in this book: the various evaluative standards for use-of-force incidents and the tactics and tools of police violence.

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