READINGS ON POLICE USE OF DEADLY FORCE

Edited by
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PoliceFoundation

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FOREWORD

The distinguishing characteristic of policing is the authority to use force. With this authority, of course, comes the responsibility never to misuse force. This responsibility translates into an imperative on the part of police management to control police discretion so that officers employ only that degree of force necessary to do their job fairly and humanely.

The use of force at its most extreme is the use of deadly force which, with rare exception, can be described as a decision of a police officer to point a service revolver at another human being and fire it. This is the most momentous decision a human being can make—to take another life. Limiting such decisions to those instances when the use of force is absolutely necessary is one of the most important goals for the police agency. This is so, not only to reduce death and injury, but also to diminish the often woeful impact that police woundings and killings have on citizens' perception of the fairness and decency of police agencies.

In strictly supervising the authority to use deadly force, police chiefs and their fellow administrators need all the reliable information they can obtain so that their decisions are based on a solid foundation. To help police administrators with the task of formulating and enforcing deadly force policies, the Police Foundation has published this anthology of what we believe to be the best available current research on the subject.

Although this volume will be of use to researchers, legislators, lawyers, and judges who must deal with deadly force, it is meant primarily for police chiefs and other local municipal officials charged with controlling crime and maintaining order. Our goal is for this volume to be a principal reference tool for police

chiefs, mayors, managers, and council members as they go about the job of preparing and implementing police department rules and regulations on how and when deadly force is to be used.

Patrick V. Murphy
President
Police Foundation

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Each of the readings in this book originally appeared in another publication. Thus, acknowledgement is owed both the authors of the readings included in this volume, and the publications which consented to their consolidation in one volume.

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James J. Fyfe

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INTRODUCTION

In 1972, I was a New York City police sergeant on leave to pursue graduate studies in criminal justice. Anxious to complete my degree requirements with a dissertation that would be useful to police administrators, I wrote a proposal for an empirical study of the relationship of police corruption to the characteristics of police organizations and individual officers. Since the data required for such a study consisted largely of records possessed by my employer, I forwarded the proposal to a departmental "research liaison committee," with which I subsequently met to discuss the research.

The committee's reaction to the proposed study was lukewarm at best. After several hours of wrangling, the committee granted me access to the necessary data, letting me know in no uncertain terms that I had its permission, but not its blessing, to conduct the proposed corruption study. Corruption, committee members argued, was a highly politicized phenomenon which could not be studied in a meaningful way by academics whose tools were limited to the computer and the statistical techniques of social science. I disagreed with their assessment of the limits of social science research, and with their assessment of me as an academic: I was a police sergeant who had gone to graduate school right out of eight years in a patrol car.

I was also a realist, and I got their message. The message was that corruption was a controversial topic that had just been

given a highly visible public airing in the Knapp Commission hearings and in the revelations of Frank Serpico and Robert Leuci. The department would allow me to conduct my research, but it really wished that attention would be focused on other less volatile subjects while they attempted to address the corruption problems that were still in the process of being identified.

I put my corruption study on hold for a while, and returned to patrol duty in June of 1973. Shortly thereafter, I attended a firearms training program, and learned from instructors that they had collected a data base on shootings by the department's officers. I looked at the data, found that they included all reports of shootings by police and serious assaults upon officers, and felt that I had found my dissertation topic. Deadly force was important, I was not aware of any significant literature on it, and, best of all, it was neither controversial nor politicized. It promised that I could do my research in an academically appropriate, tension-free environment.

I knew that some individual police shootings had raised questions, and I knew that some of the riots of the 1960s—New York's, for example—had followed police shootings, but I also knew that, with very rare exceptions, officers used their guns only reluctantly and with the greatest respect for human life. I had never shot anybody, but I knew officers who had, and I knew how greatly they were affected by having had to kill or wound someone.

I began a review of the literature on deadly force, and found that very little had been published on this topic. There existed some law review articles and comments, some police training material, a few small-scale empirical studies, and some policy recommendations that had been written on the heels of the urban disorders of the previous decade. Even though newspapers regularly reported accounts of police shootings, the scholarly literature included no large-scale empirical studies of police use of deadly force.

Over the next five years, I designed the study, obtained permission to do it from both the State University at Albany

and the New York City Police Department, and did it. I got only cooperation from the police department and was able to do my research with no restrictions whatever. Any tensions created by controversial shootings which occurred during the course of my research never affected my access to data, and never resulted in limitations of any kind. When my work was done, I felt quite good about my findings. The data I analyzed included some shootings of questionable necessity but, in the main, I found that my colleagues exercised their life or death powers in a controlled and humane way.

In the course of my research, I became aware that other people were studying police deadly force. I also became aware, however, that researchers who had attempted to study deadly force in other departments had encountered far greater resistance than had my corruption study proposal; studying this subject was not tension-free everywhere, and much work was aborted or delayed by denial of access to police data. Similarly, after completion of my work, I found that many people challenged my remarks about the prudence exercised by police in their use of firearms. As I reviewed data and research from other jurisdictions, I realized that I had made the mistake of assuming that my single-city findings were generally true of police agencies across the country. New York has a reputation as a crime ridden city, and I had found the frequency of police shootings there to be closely associated with levels of crime and violence within the city's different communities. I had assumed, therefore, that New York City police officers were as likely to kill as were police officers in any American jurisdiction. As I have learned since, that is not so.

The small, but growing, body of literature shows that police in some cities are far more likely to kill than are police in other cities. In some cases, relatively high probability that an officer will kill a citizen is associated with high levels of violence and crime. But in other cases, police in comparatively crime-free jurisdictions use their guns with great frequency. In some jurisdictions, almost all those shot by police are armed and threatening, and leave officers no real choice but to shoot or be shot or

stabbed themselves. In other cities, most of those shot by police are unarmed and shot in the back as they flee from crimes against property. In some jurisdictions, police are commended for shooting people in circumstances that would result in dismissal had they involved officers in other police departments.

There are about 17,000 police departments in the United States, and their operating policies and practices vary widely. Some police departments enforce traffic laws vigorously, while others often overlook traffic violations. In some police departments, officers regularly provide merchants with services that would be regarded as compromising and unethical in other jurisdictions. Naively, however, I had assumed that police policies and practices where questions of life or death are concerned would be relatively constant across jurisdictions. I learned that I was wrong, and that police deadly force policies and practices vary as much as policies and practices concerning parking enforcement.

One possible reason for this variance among police departments is that no national reporting system on police use of deadly force exists. True, the National Health Service annually publishes figures on persons killed by the police, but, as Sherman and Langworthy point out in this book's first chapter, there is reason to doubt the accuracy of those figures. Even if accurate, however, the National Health Service's Vital Statistics would be instructive only on questions concerning persons *killed* by police use of deadly force; they include no data on persons shot and wounded or shot at and missed by officers exercising their deadly force powers. Because no agency reports in a systematic manner on use of deadly force among American jurisdictions, there is no way for police in one jurisdiction to assess their use of deadly force in relation to use of deadly force in other similar jurisdictions. By referring to the Uniform Crime Reports, police chiefs can obtain some measure of the relative frequency of crime in their jurisdictions. By referring to the same reports, citizens can obtain information on the relative effectiveness of their police in solving crime. Even though the Uniform Crime Reports annually reports on killings

of police and assaults upon officers, there exists no such reporting system to assess the relative frequency of deadly force among American jurisdictions, or to compare the circumstances in which citizens are killed by police in those jurisdictions. If such a system did exist, it would show that police in some jurisdictions are as much as ten times as likely to kill citizens as are police in other similar jurisdictions.

It is important to collect and disseminate information about deadly force policies and practices among American jurisdictions. Such information would embarrass some police agencies, but that consideration is not an adequate reason to refrain from providing American citizens and officials with information on how often their police officers use deadly force. Neither is it the point of disseminating such information to embarrass police departments in which rates of deadly force are high. The reason that it is important to disseminate such information is to make citizens and police in jurisdictions with high shooting rates aware that police in other jurisdictions cause far less bloodshed while doing the same job and facing the same hazards with equal effectiveness and no greater risk to themselves. Since it is the primary obligation of the police to protect life, such information would encourage citizens and police in jurisdictions with high rates of deadly force to reexamine their policies and practices. The limited information now available on police deadly force has meant that policies and practices among this country's 17,000 police departments often have been developed in a vacuum, and often are based on untested assumptions rather than upon the collective experience of police throughout the country.

Ironically, it is important to provide information on police use of deadly force because it is employed so infrequently and is, thus, often regarded as insignificant and not problematic. True, every violent death is a tragedy and, in comparison to deaths by execution, deaths at the hands of the police occur with great frequency. Since 1967, we have executed four convicted murderers in this country; estimates of the numbers of people shot and killed by police in the same period vary between 4,000 and 8,000. There is, of course, no reliable way to

estimate the number of people wounded or missed by police bullets during those same years. Thus, in comparison to deaths by execution, deaths by police use of deadly force are a phenomenon of enormous proportions.

From another angle, however, the frequency of deadly force looks quite small. There are 17,000 police departments in the United States, and American police have killed somewhere between 4,000 and 8,000 people over the last 15 years. Thus, arithmetic indicates that most police departments have killed nobody over the last 15 years. There are nearly a half million sworn police personnel in this country, and they encounter thousands of potentially violent situations every day; but even the greatest estimates of killings by police indicate that fewer than one in 60 officers have killed anybody over the last 15 years. Further, the limited data available suggest that most police shootings take place in large cities, so that rates of police killings in America's small jurisdictions are probably far lower than this one in 60 aggregate rate.

Understandably, therefore, police use of deadly force is not viewed as an issue of importance by citizens and police in many of America's smaller jurisdictions. Frequently, I hear police chiefs from smaller departments question the relevance to their departments of both research into deadly force and recommendations for unambiguous departmental deadly force policies which further limit the broad shooting discretion found in most state laws. "Deadly force is a big city problem," they argue, "my department has 30 people, and the only person we've ever shot was a rum runner in 1926. We've been doing just fine the way things are. I know my men, and I trust their judgment. The law in my state says that they can use their guns to defend themselves or innocent citizens, or to apprehend fleeing felons. Why should I make waves and get more specific than that if we have no problem?"

One reason for such a chief to make waves is that, in addition to its consequences upon its victim, a single shooting can have severe consequences for the community, for the department, for the officer involved, and for the chief. How would the

citizens of that community react if, in a bad moment, one of the chief's officers exercised the great discretion available under law by shooting a local youth fleeing from the scene of such a felony as the theft of a bicycle? Such a shooting can unravel years of good police work. Such a shooting can expose a police agency to great civil liability. Such a shooting can torment an officer who acted within the vague rules defined for him or her, and who did not realize the enormity of the act until it was too late for any corrective action. Such a shooting can be prevented by the simple expedient of directing officers not to use their guns in such nonthreatening circumstances. By refraining from "making waves" while deadly force is not a problem, such a chief may be postponing action until too late.

This book is an attempt to provide information on deadly force policies and practices. It draws upon the literature and research of deadly force, most of which has appeared in the last several years. Its origins may be traced to constant requests to the Police Foundation for information on deadly force. These have come from mayors, county executives, legislators, city attorneys, private attorneys, public interest law groups, police chiefs, sheriffs, police organizations, citizens' groups, and the media. Often these requests come from small and medium sized jurisdictions in which single shootings have made deadly force a major concern. In some cases, that concern has also expressed itself in disorder, protests, and tensions which have led to the downfall of city administrations and police chiefs, and in enormous burdens to tax payers. A small midwestern jurisdiction, for example, was recently directed in a jury decision to pay $5.75 million to the survivors of a young man shot and killed by its police department.

The authors whose works appear in this book address some of the more frequent and volatile questions about deadly force. The book opens with a section on the frequency of police deadly force. In the first chapter, Lawrence W. Sherman and Robert H. Langworthy test the adequacy of existing data on police deadly force, and conclude that there is considerable room for improvement. Next, in an excerpt from their seminal study of

deadly force, Catherine H. Milton and her colleagues analyze police shooting incidents in several cities.

In the book's second section, separate chapters by J. Paul Boutwell and Lawrence W. Sherman discuss one of the most controversial deadly force related issues: the power of the police to shoot suspected fleeing felons.

Questions about the relationship of race to deadly force are treated in four chapters in the book's next section. Regardless of its inadequacies, the information available clearly indicates that minorities—especially blacks—are shot by police in numbers that greatly exceed their representation in the general population. John S. Goldkamp provides a thoughtful essay about the relatively great frequency of police killings of members of minority groups, and describes two alternative interpretations of this racial disproportion. Three analyses of deadly force by Marshall W. Meyer, this editor, and Paul Takagi are then presented.

Issues concerning internal police departmental policies on deadly force and firearms are discussed and analyzed in the last section of the book. J. Paul Boutwell of the Federal Bureau of Investigation starts this section with a discussion of the civil liability of police evolving from use of deadly force. Next, in one of the earliest and most influential discussions of deadly force, Samuel G. Chapman, who studied this issue for the President's Commission on Law Enforcement and Administration of Justice, addresses the need for internal departmental shooting policies. The book closes with three of my own pieces on deadly force. One describes the effects of a restrictive deadly force policy in the New York City Police Department; a second analyzes questions and data related to use of firearms by off-duty officers, and the third examines policy related questions, and offers specific recommendations on effective management of police deadly force.

My own feelings about this book are mixed. On the one hand, I am delighted to have witnessed the development of a body of literature on police deadly force. On the other hand, it is troubling that this body of literature is of such recent vin-

tage: one would have thought, that by this stage in the development of our democracy, questions about the authority of the state to kill would long ago have been settled. It is troubling also that deadly force is such a divisive topic. As I noted earlier, in New York City in 1973, deadly force was perceived as neither controversial nor politicized, and it remains that way there and in most American police jurisdictions. In other places, however, it is highly controversial and highly politicized. Access to data on when and under what circumstances police kill frequently is denied, and those who have merely reported upon the findings of their research have been castigated for doing so. I hope that this book, which includes the perspectives of government officials, police practitioners, and academic criminologists of both the traditional and radical persuasion contributes to both the enhancement of knowledge about deadly force and the reduction of tension caused by studying it and discussing it.

James J. Fyfe

CHAPTER 1

MEASURING HOMICIDE BY POLICE OFFICERS

LAWRENCE W. SHERMAN AND
ROBERT H. LANGWORTHY

Criminologists have long viewed homicide as the least difficult type of crime to measure.[1] The difficulty of disposing of bodies, the generally high level of agreement between the *Uniform Crime Reports* and the *Vital Statistics of the United States,*[2] and the monitoring function of coroners in recording homicide events all support the view that official statistics provide a highly accurate measure of homicide. The excellence of this official measurement, however, is confined to citizens killing other citizens. The official measurement of officials killing citizens falls far short of excellence. The widespread American belief that official killings do not constitute violence[3] is reflected by the complete absence of such killings from the *Uniform Crime Reports,*[4] most police departments' annual reports, and the limited summary treatment they receive in the *Vital Statistics,* where no figures are published below the state level.

The paucity of official data on official killings has become more noticeable in recent years as both public and scholarly interest in police-caused homicide has intensified. Public policy debates questioning the propriety of police use of deadly force,

SOURCE: "Measuring Homicide by Police Officers," *Journal of Criminal Law and Criminology* (December, 1979),70:4:546-560.

often prompted by major protest demonstrations after specific police-homicide incidents in minority communities, have commanded the attention of the United States Civil Rights Commission, the Department of Justice, and even the White House.[5] Both legal scholarship[6] and empirical research[7] have reflected the growing public concern with this category of homicide, to which the *Vital Statistics* attributes 1.77 percent of all homicides in the United States from 1971 to 1975.[8] But that figure, like many others used in this area, has yet to be examined critically through comparisons with other sources of data. Policy discussions and empirical research both require that the problems of measurement be addressed before any conclusions are drawn from the available data.

The adequacy of current methods of measuring homicide by police officers poses three important questions. A first question is whether the number of these killings occurring each year throughout the country can be measured. While the quest for an accurate count of the "absolute incidence" of any form of conduct may be futile,[9] it is not unreasonable to expect a society to know how many of its citizens are killed by officials acting under what is ruled by other officials (*i.e.,* police chiefs, prosecutors, grand juries, judges, or juries) after the fact to be proper use of the authority of the state. Without some approximation of the actual number of events that fit some consistent definition of police killings, it is difficult to address the public policy issues raised by those events at the national level.

A second question is how well the relative incidence of police killings from one police department to the next can be measured. Local public policy debates over the quality of police services often focus on specific police shooting events, but they could just as easily focus on comparisons to other cities. For example, the fact that city X has twice the rate of police killings as city Y, which is similar to X in other important respects, could be most relevant to the evaluation of a police chief's performance, the selection of a new firearms policy, or a decision about what size gun the police should carry. All of these decisions require accurate measurement of the relative incidence of police homicides across specific cities.

The third question, and the one most relevant to criminological theory, is whether the pattern of differences across police departments in police homicide rates can be measured to explain that pattern with theoretical and public policy variables. This question is related to, but distinct from, the question of how accurately specific cities can be compared. For as it will be shown, . . . available measures contain too much error either to estimate the national incidence of police killings or to make reliable comparisons of specific cities, but not too much error to compute apparently valid statistical relationships between police homicide rates and other characteristics of police departments and the communities they serve.

AVAILABLE SOURCES OF DATA

Three basic sources of data on homicides by police officers are generally available: death certificates, police department internal affairs records, and newspaper stories. A fourth source, the supplemental homicide reports filed by police departments with the Uniform Crime Reporting Section of the FBI, is not generally available to researchers because of the FBI's reservations about the quality of those data.[10] Each of the available data sources has substantial limitations.

DEATH CERTIFICATES

If the American system of vital statistics actually worked in the manner its federal overseers intend it to, then death certificates would provide a nearly perfect count of official homicides by police officers throughout the country. Assuming that the system works as intended, most of the empirical studies of police homicides have made some use of the national and state level tabulations of the death certificates reporting the cause of death published by the National Center for Health Statistics.[11] Unfortunately, at least six major flaws in the system cause it to grossly underestimate the number of "deaths by legal intervention-police," defined by the International Classification of Diseases as "injuries inflicted by the police or other law-enforcing agents, including military on duty, in the course of

arresting or attempting to arrest lawbreakers, suppressing disturbances, maintaining order and other legal action."[12]

American vital statistics are part of a world health statistics system in which causes of death are defined and agreed upon by the periodic Geneva conventions that revise and promulgate the International Classification of Diseases (ICD). Membership in the system and use of the ICD at all levels is voluntary, and within the United States it extends down the federal ladder to each county's chief medico-legal officer (usually either an elected coroner or an appointed medical examiner). The system employs a standard death certificate (or a variant which contains the same information) which each state must use in order to participate in the national death registration system.[13] "Natural" or usual deaths may be certified by any licensed medical doctor. Medico-legal officers must fill out the death certificates on violent and other unusual deaths (their usual jurisdiction amounting to about 20 percent of all death certifications nationally),[14] ideally supplying all the information necessary for classification of the cause of death according to the ICD categories. The death certificate then goes to the funeral director, who in turn secures a burial permit from the local registrar, who then records the death and forwards the death certificate to the state registrar. The state registrar records the death and sends an official copy of the death certificate to the National Center for Health Statistics (NCHS), where coders assign each case to one of the ICD categories and enter them into the national mortality data published in the annual *Vital Statistics of the United States.*[15]

Almost every step of this system is vulnerable to serious flaws. The first flaw is the often poor quality of the medical diagnoses of the causes of death. Two studies conducted in the early 1950s showed high rates of error by either attending physicians or coroners' physicians. One study found 39 percent of a Pennsylvania sample of death certificates to be based on "sketchy" diagnostic information, with 18 percent having an equally likely or preferred diagnosis.[16] More relevant was an independent study of 1,889 autopsied deaths in Albany, New

York, in which the medical researchers concluded from their own evaluation of the recorded clinical information, autopsy protocols (reports), and laboratory reports that 57 percent of the homicide and suicide deaths in the sample could have been misclassified as to the circumstances of death.[17]

No matter how accurate the diagnosis, however, a second flaw in the system seriously hinders accurate data collection: the apparently widespread lack of the coroners' awareness of, support for, and legal obligation to comply with the system's request for the full information necessary to code the causes of death according to ICD categories. One leading medical examiner has claimed that his colleagues around the country are generally "turned off" by the ICD categories, particularly where any stigma to the victim or his family may result from the use of the categories.[18] A board-certified forensic pathologist (a level of technical qualification only some medico-legal officers attain) observed that those with her qualifications may be more likely to be aware of the ICD categories, but not necessarily more likely to employ them or provide information consistent with them.[19] Even the Model State Vital Statistics Act published by the NCHS fails to make any mention of the ICD categories, let alone require compliance with them.[20]

The lack of concern for the ICD categories exacerbates a third flaw in the system: the vagueness of the instructions for completing the Standard Death Certificate. This vagueness facilitates the omission of the information necessary to distinguish a civilian-caused homicide from a death by legal intervention of police. This is especially true since the critical information is supplied in item 20d of the certificate, "How Injury Occurred," which has a very small space with room for only five or six words. The NCHS handbook on death registration for medico-legal officers paradoxically urges both "complete reporting" and the use of "as few words as possible [to] describe the injury-producing situation."[21]

The latter principle is clearly evident in one of the handbook's examples that might be relevant to police-caused homicide. In the example, a pulmonary hemorrhage due to stab

wounds is described in item 20d as "stabbed by a sharp instrument."[22] No mention is made of *who* did the stabbing; it could have been either a criminal assailant or a police officer defending himself when attacked during a family fight. Since there are known instances of facts being omitted,[23] it is likely that critical information about police officers is omitted from the responses to the vague question of "How Injury Occurred."[24]

In fact, omission of the police role in a killing may often be quite probable given a fourth flaw in the system: the close relationship between the local police and the medico-legal office. A case study of a rural coroner's office found that

> [t]he coroner is enmeshed in the legal-political structure of the county in which he practices. This immersion places upon him certain informal controls which can be exercised to insure continuing cooperation between the Coroner, Sheriff, Prosecuting Attorney and the medical community. These informal restrictions may be as significant as the law in determining cause of death procedures.[25]

This relationship may well lead medico-legal officials to omit police involvement from the information they provide on how the injury occurred. One forensic pathologist observed:

> The ease of doing the job and serving the public in a medical examiner's or coroner's office largely depends upon the cooperation of the police. So it doesn't help to antagonize the police unnecessarily. On the other hand, the doctors won't pull a cover-up job. When you sign the certificate, you have to put down homicide. You just may not put down the full background circumstances of death.[26]

The relationship between the doctors and the police may be as much individual as it is organizational, which exposes a fifth flaw in the system: diversity of procedures used (and completeness of information supplied on the death certificate) among different coroners, even within the same office. In the New York City Medical Examiner's office, for example, the older examiners rarely indicate that police effected a homicide because they feel it places an "unnecessary onus" on the police. A recent chief medical examiner in New York City encouraged his

colleagues to indicate police involvement, a policy contrary to that of his predecessors. But each examiner still makes his own decisions about how to fill out the death certificate.[27]

The sixth flaw in the system is that the transmission and coding of the data suffers both mechanical and conceptual errors. On one occasion, 6,000 death certificates were lost during transmission from Massachusetts to the NCHS.[28] More important, however, may be the complete lack of any coding instructions, other than the ICD definition quoted above,[29] for death by legal intervention of the police. Thus, while NCHS is able to say publicly how it would code borderline situations such as an off-duty police officer killing his wife in self-defense,[30] it is not clear that the coding would always follow the publicly provided interpretations. Ambiguity of the coding rules is further suggested by the disagreement between the tabulations of the New York City Health Department (equivalent to a state-level death registrar reporting directly to NCHS) and those of NCHS. In 1971, the NYCHD counted thirty-three police homicides while NCHS counted thirty-two; in 1972, the respective figures were thirty-four and twenty-four; in 1973, thirty-seven and forty-one; in 1974, twenty-three and twenty-five; and in 1975, eighteen and twenty.[31] Since the differences vary in direction from year to year, one may infer that the differences in coding decisions are arbitrary rather than systematic.

POLICE INTERNAL AFFAIRS RECORDS

In large, bureaucratized police departments, specialized internal affairs units are usually responsible for all investigations of possible serious criminal misconduct by police officers.[32] This often includes investigations of police use of deadly force, although other units occasionally investigate such incidents. Even when homicides by police are investigated by other units, records of the investigations and the incidents may be stored at the internal affairs unit. These records provide the basis for the counts of homicides by police that some, but not all, police departments supply on request to the news media and social scientists.

In the opinion of several police researchers, these records usually provide fairly accurate counts of deaths caused by specific police departments. As the basis for national data collection on the incidence of police homicides, however, these records are limited, for they are generally not kept in smaller police departments where police homicides also occur.[33] While some states (California, Oregon, Minnesota, and others) now require all police agencies to report these data as part of their general homicide statistics to a state level crime statistics unit, this practice is far from universal.

Although police records are not gathered for the purpose of comparative analysis across large cities, they have been used in that manner.[34] These data have at least four limitations as a basis for comparative analysis. One is that many police departments refuse to make the data available to the public or to researchers. Another limitation is that the figures that are released sometimes are different from figures obtained from other sources. Responding to a request from the New York City Police Department, for example, the Dallas, Texas, police department reported a lower count than had been reported in a study of that department's records done by a local university.[35] A third limitation is the considerable cost involved in obtaining data from hundreds or thousands of separate police departments. A fourth limitation arises even when figures can be obtained, as differences in definitions may undermine the comparability of the data from one department to the next. Some departments, for example, may omit accidental deaths, police officer suicides, off-duty killings, or killings taking place outside the city limits, while others may include them. In short, police records seem to be as problematic as death certificates for both nation-wide and cross-city measurement.

NEWSPAPER STORIES

In some cities, newspaper stories may provide the most accurate count of police homicides. This will be true only where a newspaper's editorial policy defines all homicides as newswor-

thy. An exhaustive reading of the back issues of such a newspaper, while highly labor-intensive, should yield a complete annual count of such incidents. The Kansas City, Missouri, police department records, for example, show the exact count of police homicides for the year 1974 as an exhaustive reading of the *Kansas City Star*.[36] Yet editorial policies are subject to change, and they vary from one city to the next. Many police homicides, in the few large cities in which they are a common occurrence, such as New York, are not reported in local newspapers. Consequently, newspaper stories are of limited use for assessing the relative incidence of police homicides across cities.

For similar reasons, news reports provide a poor basis for measuring the absolute incidence of police homicides around the nation. One study employed a national news-clipping service throughout much of the 1960s, collecting over a thousand reports of police homicides.[37] Our secondary analysis of a three-year period of these data, however, showed that they yielded substantially lower counts at the state and national levels than the NCHS statistics derived from death certificates, with 53 percent fewer deaths nationally in 1966, 41 percent fewer in 1967, and 56 percent fewer in 1968. In only six states in 1968 did the newspaper count yield a higher figure than the NCHS count. From seven to eleven states showed equal figures from the two counts each year, but all of these had either zero or one death reported per year. Not one state showed consistently higher news-based counts than NCHS counts over the full three-year period examined.

Every data source has certain problems, and what may appear on conceptual grounds to be a major flaw in the collection of data may make little difference in practice. The flaws in news-based counts of police homicide seem to be serious enough to eliminate them from further consideration as a possibly useful data source for most purposes, and the preceding empirical analysis of those data supports that conclusion. The rest of the article subjects the other two data sources to an empirical analysis designed to answer the three central questions about the adequacy of the measurement they provide.

VITAL STATISTICS AS A NATIONAL MEASURE OF POLICE HOMICIDE

The only nationwide data collection system on police homicide is the vital statistics compilation of death certificate data. Our empirical evaluation of the adequacy of vital statistics as a national measure of police homicide consists of a comparison of a nonrandom, convenience sample of those data to police-generated data matched by place and time at the state level of the jurisdictions examined and the county level for New York City (see Table 1). The thirteen jurisdictions of the comparisons include all those at the state and county level for which we could obtain police-generated statistics. In nine of the thirteen jurisdictions (not counting New York City totals) the death counts from police-generated data for the total years available exceed the counts of the vital statistics compiled by the National Center for Health Statistics. In only three of the thirteen do the NCHS figures exceed those based on police-generated data, and in one of those jurisdictions (Nebraska) the difference is only three deaths over three years. Moreover, in the two jurisdictions besides Kings County (Brooklyn) in which NCHS figures are larger, the police-generated data are derived from the supplemental homicide reports to the FBI which the FBI defines as unreliable.[38] The NCHS figure for Kings County is larger than the police figure for two apparent reasons: 1) the Brooklyn medical examiners probably provide full information on the death certificates, as their chief indicated some of his colleagues do, and 2) the Transit Authority Police, Housing Authority Police, and other law enforcement agencies in New York City also kill people, with those deaths possibly included in the NCHS count but definitely not included in the New York City Police Department count.

The most striking aspect of Table 1 is the more than 50 percent underreporting of the NCHS data relative to the police-generated data, not just overall, but also within differing elements of the data: in New York City (total), in California, in the heavily urban areas grouped together, and in the less urban areas grouped together. According to NCHS national data, the

TABLE 1 VITAL STATISTICS* AND POLICE-GENERATED DATA ON POLICE HOMICIDES BY JURISDICTION AND YEAR

JURISDICTION	YEAR																		TOTAL YEARS AVAILABLE FOR BOTH SOURCES		
	1970			1971			1972**			1973			1974			1975			1976					
	VS	PG	% DIFF.	VS	PG	% DIFF.	VS	PG	% DIFF.	VS	PG	% DIFF.	VS	PG	% DIFF.	VS	PG	% DIFF.	VS	PG	% DIFF.	VS	PG	% DIFF.
1. Heavily Urban Areas																								
CALIFORNIA[1]	41	46	− 11	56	93	−40	16	76	− 79	37	64	− 42	35	84	− 58	36	87	−59	36	94	−36	257	544	− 53
NEW JERSEY[2]	10	2	+400	8	NA	—	12	NA	—	3	1	+200	10	4	+150	2	NA	—	4	NA	—	23	7	+229
NEW YORK COUNTY[3]	1	NA	—	6	38	−84	0	23	—	10	25	− 60	4	18	− 78	5	23	−78	5	NA	—	25	127	− 80
BRONX COUNTY[3]	2	NA	—	5	13	−62	4	15	− 73	11	14	− 21	3	13	−77	6	15	−60	7	NA	—	29	70	− 59
KINGS COUNTY[3]	1	NA	—	17	16	+ 6	16	20	− 20	13	12	+ 8	13	9	+ 44	8	8	0	4	NA	—	67	65	+ 3
QUEENS COUNTY[3]	3	NA	—	4	15	−73	2	8	− 75	6	8	− 25	5	6	− 17	1	4	−75	2	NA	—	18	41	− 56
STATEN ISLAND[3]	0	NA	—	0	1	—	2	1	+100	1	0	—	0	1	—	0	2	—	0	NA	—	3	5	− 40
(NEW YORK CITY TOTAL)[3]	17	NA	—	32	83	−61	24	67	− 64	41	59	− 31	25	47	− 47	20	52	−62	18	NA	—	142	308	− 54
																			SUBTOTAL			422	859	− 51
2. Less Urban and Non-Urban Areas																								
ALASKA[2]	1	NA	—	1	NA	—	0	NA	—	0	2	—	0	1	—	1	NA	—	0	NA	—	0	3	−
NEBRASKA[2]	2	NA	—	3	NA	—	2	0	—	3	0	—	3	5	− 40	1	NA	—	1	NA	—	8	5	+ 60
OREGON[1]	2	NA	—	3	NA	—	0	NA	—	2	NA	—	4	9	− 56	2	4	−50	2	4	−50	8	17	− 53
SOUTH CAROLINA[1]	1	NA	—	5	NA	—	0	NA	—	4	NA	—	8	NA	—	2	NA	—	2	6	−66	2	6	− 66
VERMONT[2]	1	0	—	0	0	—	0	0	—	0	1	—	1	1	0	0	NA	—	0	NA	—	2	2	0
WISCONSIN[2]	1	NA	—	1	4	−75	0	3	—	3	8	− 63	3	7	− 57	4	NA	—	1	NA	—	7	22	− 68
																			SUBTOTAL			27	55	− 51
																			TOTAL			449	914	− 51

NA = Not Available
VS = Vital Statistics Data
PG = Police-Generated Data
1 = PG Data Reported to State Statistical Analysis Center (SAC)
2 = PG Data Reported to FBI on Supplemental Homicide Forms
3 = PG Data Compiled by New York City Police
* Years 1970-73 are taken from published data; 1974-76 data are taken from computer tapes
** 1972 is a 50 percent sample

jurisdictions in Table 1 accounted for 25 percent of all deaths by legal intervention of police for 1971-75. Yet these jurisdictions show a combined underreporting of 51 percent during the period 1970-76 (with some years omitted in some jurisdictions). At the very least, then, the total national incidence of police homicide in that period was probably about 26 percent higher than the NCHS data reported.

It is always dangerous to generalize from a nonrandom sample, even when 1) the sample constitutes one-fourth of the count obtained from the entire universe; 2) the bias in much of the sample (California and New York) seems to be toward more professional (and perhaps more complete) reporting by coroners and medical examiners; and 3) the sample shows similar underreporting rates for both heavily urban and less urban areas. If such a generalization were made, however, the 51 percent underreporting rate applied nationwide would yield an estimate of 3,673 police homicides throughout the country during the period 1971-75. Dividing this estimate of police homicides by the total of 101,665 homicides from all causes throughout the country during that period[39] shows that the police may be responsible for 3.61 percent of all homicides—about one out of every twenty-eight. In New York City alone, the figure was even higher: 3.7 percent; in California, it was higher still at 4.18 percent.

Yet it must be stressed that generalizing the underreporting rate is a suspect procedure. There is no way of being certain that death certificates for police homicide are reported as incompletely in the majority of jurisdictions for which we were unable to obtain police-generated data. Moreover, as Table 2 shows, in some big cities the NCHS figures exceed those derived from other sources. Regional variations in rates of both homicide and police homicide further complicate the procedure, as well as the possibility that regular homicides are also underreported at varying rates.

What Table 1 does suggest is that the NCHS data cannot be used to measure the national incidence of homicide by police officers. Since the police-generated data do not encompass the entire nation, it is safe to say that this country simply does not

know how many of its own citizens it kills each year under the authority of the state.

MEASURES OF RELATIVE INCIDENCE ACROSS CITIES

The second question facing the available data sources is whether they can be used to measure the relative incidence of police homicide from one police department or city to another. The method used here to evaluate the NCHS data for this purpose is to compare those data on decedent's *city of residence* (not place of death)—the only form in which city level data are available—to data obtained from a variety of alternate sources (primarily but not only police-generated data) on the number of people killed by police in each city (place of death) or by the city's main police department (agency responsible for death).[40] There are four sources of error, then, built into this comparison: the place of residence may differ from place of death, place of death may differ from agency responsible for death, place of residence may differ from agency responsible for death, and alternate data sources vary across cities and also change from year to year within cities. In some years up to three different figures from alternate data sources are averaged to obtain the comparison figure reported in Table 2. Given this mixture of definitions and types of data, the level of agreement for each city in each year is surprisingly high.

Both NCHS and alternate data were obtained for a total of 133 city-years from thirty-six jurisdictions of over 250,000 population (counting New York's five boroughs separately). The raw death counts provided by the two sources of data show a substantial positive association ($r = .64$, $r^2 = .41$, $r_s = .62$, annual data not displayed). When the death counts are standardized by population, the strength of the correlations is reduced somewhat but the Pearson's coefficient remains substantial ($r = .53$, $r^2 = .28$, $r_s = .38$, annual data not displayed). Computations omitting California cities and 1972 data (in which year the NCHS based its statistics on only a 50 percent sample) show insignificant differences from the computations using all 133 city-years. None of the correlations, however, account for even half of the variance.

TABLE 2 MEAN ANNUAL DEATHS AND DEATH RATES FROM HOMICIDE BY POLICE OFFICERS BASED ON VITAL STATISTICS AND ALTERNATE DATA IN 36 JURISDICTIONS FOR VARIOUS YEARS FROM 1966 TO 1976.

CITY	NO. OF YEARS COMPARED	MEAN DEATHS PER ANNUM VS*	MEAN DEATHS PER ANNUM A**	MEAN DEATHS PER 100,000 PQ* PER ANNUM VS	MEAN DEATHS PER 100,000 PQ* PER ANNUM A	RATIO OF MEAN DEATHS PER ANNUM A/VS
1. ATLANTA	4	6.25	10.50	1.41	2.37	1.68
2. BALTIMORE	2	3.00	8.00	0.34	0.91	2.67
3. BIRMINGHAM	5	1.80	6.00	0.63	2.10	3.33
4. BOSTON	2	2.00	2.50	0.32	0.40	1.25
5. CHICAGO	7	9.29	33.00	0.29	1.03	3.55
6. CLEVELAND	2	12.50	10.50	1.84	1.55	0.84
7. COLUMBUS	2	2.50	2.00	0.46	0.37	0.80
8. DALLAS	2	10.50	7.50	1.29	0.92	0.71
9. DENVER	2	1.00	4.00	0.19	0.78	4.00
10. DETROIT	3	15.67	29.67	1.13	2.14	1.89
11. DISTRICT OF COLUMBIA	3	4.67	10.67	0.64	1.45	—
12. HONOLULU	2	0.00	0.50	0.00	0.07	—
13. HOUSTON	2	0.50	15.00	0.04	1.14	30.00
14. INDIANAPOLIS	3	7.00	4.00	0.96	0.55	0.57
15. JACKSONVILLE	2	0.50	5.50	0.10	1.05	11.00
16. KANSAS CITY, MO.	3	0.00	3.33	0.00	0.94	0.00
17. LONG BEACH	4	0.50	1.75	0.14	0.50	3.50
18. LOS ANGELES	4	7.50	21.25	0.27	0.76	2.83
19. MEMPHIS	3	0.13	5.25	0.02	0.81	40.39
20. MILWAUKEE	2	1.00	3.00	0.14	0.43	3.00
21. OAKLAND	5	1.40	2.00	0.40	0.57	1.43
22. PHILADELPHIA	11	9.45	14.18	0.50	0.74	1.50
23. PHOENIX	2	0.00	1.50	0.00	0.24	—
24. PORTLAND	4	0.75	1.00	0.20	0.27	1.33
25. SAN ANTONIO	2	1.00	3.00	0.13	0.40	3.00
26. SAN DIEGO	4	2.00	1.25	0.28	0.17	0.63
27. SAN FRANCISCO	4	2.25	3.25	0.32	0.46	1.44
28. SAN JOSE	4	2.00	1.50	0.41	0.31	0.75
29. SEATTLE	2	1.00	3.50	0.20	0.70	3.50
30. ST. LOUIS	2	4.00	6.50	0.72	1.16	1.63
31. SACRAMENTO	4	3.00	2.00	1.14	0.76	0.67
32. NEW YORK COUNTY	5	5.00	24.80	0.34	1.70	4.96
33. BRONX COUNTY	5	5.80	14.00	0.41	0.98	2.41
34. KINGS COUNTY	5	13.40	13.00	0.54	0.52	0.97
35. QUEENS COUNTY	5	3.60	8.20	0.18	0.42	2.28
36. STATEN ISLAND	5	0.60	1.00	0.19	0.32	1.67
(New York City Total)*	(5)	(28.40)	(61.60)	(0.37)	(0.80)	(2.17)

*VS = Vital Statistics
**A = Alternate Source of Data

	$z = 3.59$	$r = .69$	$r = .56$	
	$s = 1.98$	$r^2 = .48$	$r^2 = .31$	$\bar{b} = 1.66$
		$r_s = .67$	$r_s = .44$	
	$n = 36$	$r = .50$	$r = .31$	$n = 36$
*Not included is calculation of statistics		$n = 36$	$n = 36$	

Given the extreme rarity of police homicide events, much of the variation of both data sources for the 133 city-years is probably mere year-to-year statistical instability. As Table 2 shows, none of the jurisdictions in the computations exceeded a mean vital statistics count of sixteen deaths per year, and only four jurisdictions exceeded that level using the alternate data sources. Consequently, both the death counts and death rates per 100,000 are much more stable when their mean levels for all available years (from two to eleven years per city) are employed (Table 2). This procedure increases the correlations between both the death counts and the death rates per 100,000 population provided by the two data sets, but it still leaves over one-half of the variance to be accounted for.

Table 2 also shows that the absolute differences between the NCHS data and the alternate sources are much higher at the city level, or at least in certain cities, than at the state level. Contrary to the ratio of two-to-one found in Table 1, the mean ratio of NCHS to alternate data for the cities in Table 2 is almost four-to-one. This ratio, however, is heavily influenced by two outlier cases, Houston and Memphis, and is moreover inappropriate to calculate since there are three values of infinity in the data set. A least squares estimate, however, is appropriate, and it yields a b of 1.66, which is slightly lower than the two-to-one ratio found in Table 2. Because of the differences in place of death versus place of residence present in the city level data, however, it is questionable whether this ratio or the one derived from Table 1 (which relies much less on city level data) is more appropriate.

On the other hand, eight cities (including Brooklyn) in Table 2 show higher death counts with NCHS data than with the alternate data sources. In three of the eight, the alternate sources of data contain the *Uniform Crime Report* supplementary homicide reports, for which certain cities fail to complete the section describing the circumstances of the homicide. Whatever the reason, the fact that the alternate data do not produce consistently higher death counts prevents any conclusion that the alternate data provide a "better" measure of the relative incidence of police homicides across cities.

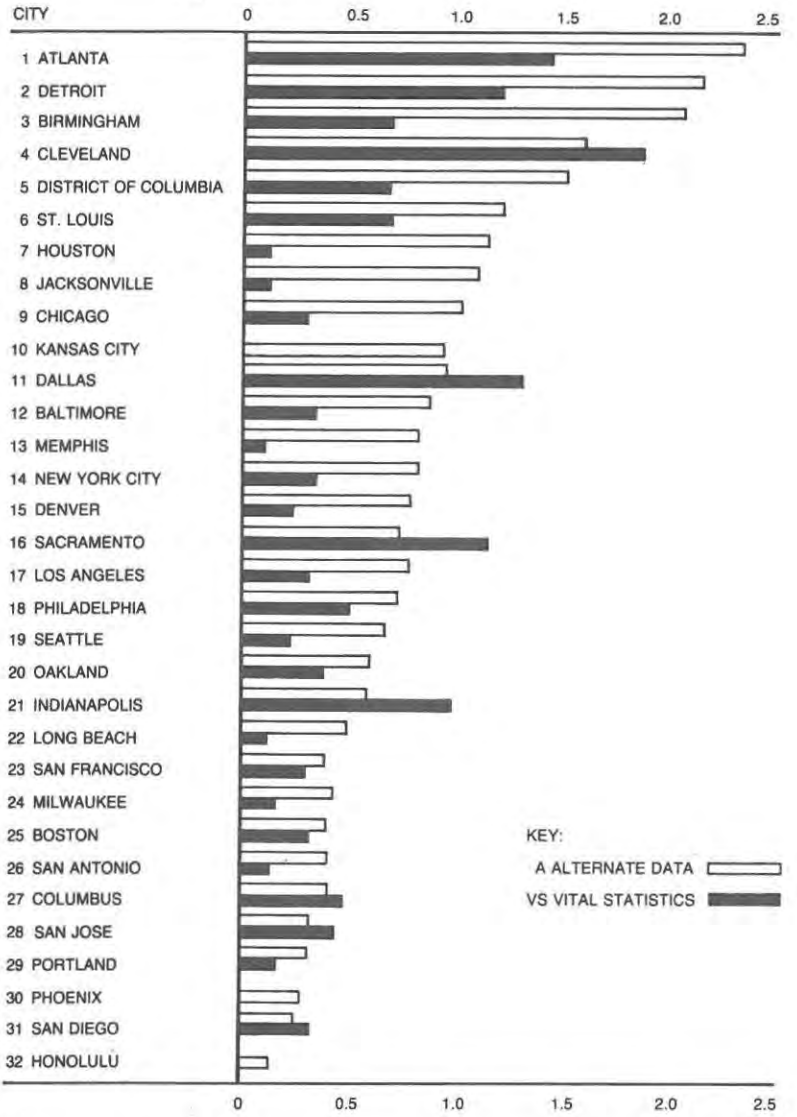
Rather, two conclusions about measuring relative incidence are suggested by Table 2. One is that while the two data sets show roughly the same *patterns* of relative incidence, several cities, especially Kansas City, Houston, and Memphis, show radical disagreement. Figure 1 illustrates both the general similarity of the overall pattern and the wide discrepancies in particular cases. The second conclusion is, therefore, that although the data are not accurate enough to be used to compare one specific city to another, either data set might be appropriate to use as a measure of the pattern of variation in police homicide rates in relation to independent variables that might explain that variation. And as Figure 1 demonstrates, there is a great deal of variation to be explained.

MEASURES OF PATTERNED VARIATION ACROSS CITIES

The third question facing the available data sources is whether they provide a reliable measure of patterns of variation. This question is tentatively answered by the interpretations of Table 2 and Figure 1. Since both data sources show roughly the same patterns, it appears more likely that each of them is reliably measuring the true patterns.[41] The level of agreement on the patterns between the two data sources is low enough, however, so that further empirical comparisons are necessary. Another method of comparison is to examine the correlations of the rates produced by the two data sources with the same theoretically relevant independent variables. If the data sources are both approximating the same patterns, then the rates they produce should yield similar correlations with the independent variables.

Table 3 displays the correlations of the rates from the two data sources with seventeen independent variables from three separate theoretical domains. Many other variables and theoretical domains offer possible explanations for variations in police homicide rates; these variables are offered only as illustrations. A substantive analysis of these correlations is beyond the

FIGURE 1. VITAL STATISTICS AND ALTERNATE DATA MEAN ANNUAL RATES OF HOMICIDE BY POLICE OFFICERS PER 100,000 POPULATION IN 32 CITIES.



scope of this article, but the theoretical rationales for and predicted directions of the relationships with the independent variables can be briefly summarized.

Among community characteristics, it can be predicted that population density would be positively related to police homicide rates, both because it is related to other kinds of violence which might prompt police homicide and because shots fired in denser areas are more likely to hit someone (whether or not the person hit is the intended target). Gun density would be expected to be positively related to police homicide because greater gun density should increase the frequency of defense of life situations in which police homicides occur. Unemployment and suicide, as measures of declining social cohesion, would be expected to be positively related to police homicide, given the theory that governmental social control increases as social cohension declines. It would be expected that the violent index crime rate and the homicide rate would be positively related to the police homicide rate because these rates may increase police perceptions of danger in their work and make them more prone to use violence as a possible preemption of attacks on them. The police per 1,000 population ratio and the violent arrest rate both should be positively related to police homicide, since both of those variables provide an increased risk or exposure of citizens to police use of deadly force.

Among police organizational structure variables, it can be predicted that geographic decentralization (precincts per square mile) would be negatively related with police homicide, since it is associated with a "watchman"[42] style of low-level law enforcement. Administrative intensity (percentage of personnel in support units), span of control (number of supervisors per line officer), differentiation (percentage of all personnel in other units than basic patrol), and self-regulation (percentage of personnel assigned to internal investigations) would be predicted to be positively related to the police homicide rate, since all are rough measures of bureaucratization and more bureaucratized law enforcement agencies may be expected to mete out more legal sanctions of all forms, including killings.[43]

TABLE 3 A COMPARISON OF CORRELATIONS OF SELECTED VARIABLES WITH NCHS AND POLICE-GENERATED POLICE HOMICIDE RATES FOR SELECTED YEARS AND CITIES

Independent Variable	Predicted Sign	Correlation (r) With					
				Matched Cities and Years, Selected Years, 1967-76			
		(1) Annual Mean NCHS Rate of Police Homicides Per 100,000 Population 1974-1976	(N)	(2) Annual Mean Alternate Data Source Rate of Police Homicides Per 100,000 Population 1974-1976	(N)	(3) Annual NCHS Rate of Police Homicides Per 100,000 Pop.	(N)	(4) Alternative Data Source Annual Rate of Police Homicides Per 100,000 Pop.	(N)
Community Characteristics									
1. Population Density	+	+.08	(48)	+.04	(20)	+.20	(27)	+.15	(27)
2. Gun Density	+	+.28*	(48)	+.45*	(16)	+.25	(27)	+.54**	(27)
3. Unemployment Rate	+	−.20	(47)	−.25	(17)	−.22	(27)	−.35*	(27)
4. Suicide Rate	+	−.04	(48)	−.39	(16)	−.11	(27)	−.23	(27)
5. Violent Index Crime Rate	+	+.37**	(48)	+.47*	(20)	+.40*	(27)	+.55***	(27)
6. UCR Homicide Rate	+	+.55***	(48)	+.72***	(20)	+.60***	(27)	+.84***	(27)
7. Police Per 1,000 Population	+	+.45***	(44)	+.50***	(18)	+.31	(24)	+.55**	(24)
8. Violent Arrest Rate	+	+.31*	(45)	+.42*	(19)	+.19	(26)	+.36*	(26)
Police Organizational Structure									
9. Geographic Decentralization	−	−.02	(47)	+.08	(19)	+.09	(27)	+.12	(27)
10. Administrative Intensity	+	+.12	(42)	−.31	(17)	.00	(22)	+.08	(22)
11. Span of Control	+	−.10	(43)	+.32	(18)	+.02	(23)	+.25	(23)
12. Civilization	+	−.23	(42)	−.39	(18)	−.33	(23)	−.48**	(23)
13. Differentiation	+	−.13	(43)	−.50*	(18)	+.12	(23)	+.05	(23)
14. Self-Regulation	+	+.35*	(41)	+.08	(17)	+.37*	(23)	+.36*	(23)
Police Organizational Policies									
15. Arrests (all offenses) per 100,000 population	+	+.29*	(45)	+.40*	(19)	+.31	(26)	+.43*	(26)
16. Disciplinary Formalism	−	+.10	(37)	+.13	(15)	+.01	(19)	+.06	(19)
17. Disciplinary Pressure	−	−.12	(36)	+.19	(14)	+.02	(18)	−.09	(18)

Key
* = Significant at .05 level
** = Significant at .01 level
*** = Significant at .001 level

Among police organizational policies, it can be predicted that the overall arrest rate would be positively related to the police homicide rate because every arrest provides an opportunity for the arrestee to resist arrest, a response that could lead to a police homicide. One would expect both disciplinary formalism (the percentage of all complaints of police misconduct that are investigated) and disciplinary pressure (the percentage of the complaints investigated that are substantiated) to be negatively related to police homicide rates, since police officers may be less likely to kill citizens where they perceive a greater risk of punishment for misconduct in situations where the justifiability of the homicide may be unclear or subject to conflicting opinions.

Table 3 presents the correlations of the 1976 values[44] of most of the independent variables[45] with two sets of the measures of police homicide rates. One set (columns 1-3) is selected to match the data for the independent variables as closely in time as possible, although it used a three-year (1974-76) annual mean rather than a one-year (1976 only) figure to stabilize year-to-year fluctuations. The consequences of that selection procedure, however, are to reduce the number of cities for which alternate data are available and to bias the alternate data sample heavily in favor of California. While the data for all of the fifty-three cities over 250,000 population for which data on the independent variables were available (up to forty-eight are used to compute the correlations reported in column 1 of Table 3), only data from a maximum of twenty (ten of which are in California) out of the 157 cities over 100,000 population were available to compute the correlations reported in column 2. It is not possible to compute the correlations of the independent variables with NCHS data using only the cities included in the calculation of the same correlations using alternate data sources since up to half of the cities included in the alternate data sources have less than 250,000 population and NCHS figures are therefore unavailable.

The second set of the measures of police homicide rates (columns 3 and 4) provides direct comparisons of the two when

correlated with independent variables matched by both year and city for all of the nonrandom convenience sample for which alternate data on police homicide rates were available through the period 1967-76. The consequence of this procedure is to move the data on police homicide rates further away in time from the data on the independent variables, and inconsistently so from one city to the next. Whatever problems this consequence may pose for a substantive analysis, however, it should not be a great hindrance to achieving the present objective of determining whether the two data sources yield similar correlations.

Considering the diversity of procedures employed, the results are remarkably consistent. Overall, the two data sources and data sets tend to yield similar results, with the alternate data sources producing stronger correlations and with most of the correlations in the theoretically predicted directions. When "agreement" is defined as the correlations from both data sets showing the same sign and statistical significance at at least the .05 level, or showing both correlations as not significant regardless of sign, then a comparison of columns 1 and 2 shows 88 percent agreement, and a comparison of columns 3 and 4 shows 65 percent agreement. The level of agreement between columns 3 and 4 would have been even higher if the significance level of the correlations of variables twelve and fifteen with the NCHS data (column 3) had been greater by 1/100th. The generally high level of agreement suggests that both data sources are indeed tapping similar patterns of variation.

The alternate data sources produce stronger correlations more than three times out of four. When only statistically significant correlations are compared, the correlations using alternate data sources reported in column 2 are larger than those using NCHS data reported in column 1 for 87.5 percent of the comparisons; when the nonsignificant correlations are included, the results are almost identical (88.2 percent higher). For columns 3 and 4, the correlations with alternate data sources are greater for 89 percent of the comparisons of statistically

significant correlations and for 77 percent of the comparisons of all correlations.

Contrary to the findings on the strength of the correlations, however, the alternate data sources do not produce correlations that are more often in the theoretically predicted direction. For the significant correlations, 100 percent of those derived from NCHS data are in the predicted direction, while only 86 percent of those in column 2 and 78 percent of those in column 4 (derived from alternate data sources) are as predicted. For all correlations, however, the findings are mixed: a higher percentage of NCHS correlations are as predicted in the first data set (65 percent of column 1 versus 53 percent of column 2), while a higher percentage of the alternate data source correlations are as predicted in the second data set (71 percent in column 4 versus 59 percent in column 3).

The modest degree of overall success of the theoretical predictions (for 89 percent of all the significant correlations and 62 percent of all the correlations), whatever it may say about the adequacy of the theories, lends further support to the conclusion that the data sources measure similar patterns and perhaps that they both measure an actual pattern of variation.

To the extent that these procedures are able to answer the question of whether available data sources adequately measure patterns of variation in police homicide rates, then, the answer seems to be affirmative. Other independent variables, of course, might have been selected that possibly could produce different results. On the basis of the correlations with the variables that were selected, however, the similarity of results between the two data sources suggests that either source might be appropriate for cross-city analysis of patterns. Since the NCHS data are consistently available (though, unfortunately, only on tape) for all large cities since 1967, this finding is particularly important since it means that at least one complete data set on police homicide can be matched by year to the corresponding data on independent variables. The matching will allow multivariate analysis and other more sophisticated analytic approaches.

CONCLUSIONS

This analysis provides tentative answers to three central questions about the adequacy of current measurement of homicide by police officers in the United States. First, it suggests that the national incidence of police homicide is substantially underreported, possibly by around 50 percent and that the police may account for closer to 3.6 percent of all homicides rather than to 1.8 percent, as previously had been reported. Even these figures, however, are largely speculative. In any case, the analysis strongly suggests that there is no adequate basis for arriving at accurate national estimates of the number of citizens killed by police officers each year.

Second, the analysis reveals many instances in which the *Vital Statistics* data and data from other sources on the number of police homicides in specific cities are in substantial disagreement. This finding suggests the conclusion that none of the available data sources should be used to compare police homicide rates from one particular city to another. Since in any particular city there is a substantial likelihood that the number of police homicides derived from any one data source is in error, comparisons of specific cities are likely to be dangerously misleading.

The most encouraging finding of this analysis is its answer to the third question. Judging from the similarity of the correlations of police homicide rates derived from the *Vital Statistics* and from alternate data sources with theoretically relevant independent variables, both of these data sources seem to be producing the same total patterns of variation across cities. Either data source may therefore be appropriate to use for correlational analysis of the factors associated with those patterns. While the alternate data sources tend to produce stronger correlations, they are only available on a haphazard basis. The *Vital Statistics* data may therefore be preferable for those analytic purposes for which a more complete data set is required.

These three conclusions place previous research on police homicides in a new light. The conclusions of those studies that

have employed NCHS data on the national incidence and trends of police homicide[46] should be reevaluated now and treated with great caution. Similarly, those studies of police homicide that have made specific comparisons from one city to another or among a small group of cities also should be used with great caution.[47] Those studies that have focused solely on correlational analysis, however,[48] now can be viewed with greater confidence from the standpoint of measurement, whatever the theoretical quality of the analysis.

The overwhelming implication of this analysis is that our present procedures for measuring homicide by police officers should be improved. Since both the *Uniform Crime Report* system and the *Vital Statistics* system are voluntary, there may be little that can be done with them to improve our national measurement of the absolute incidence of these events. Reporting systems at the state level, required by state law,[49] however, show a great deal of promise, and would probably be the best long-term way to improve the measurement of both the absolute and relative incidence of public homicide across states and cities.

Finally, it is worth noting the irony in this analysis: while the police may have the most to gain by undercounting the number of citizens they kill and while it is true that many police departments fail to undertake any count at all, it is the police that have provided the largest figures on the numbers of citizens killed. For whatever reasons, the source of the undercounting of police homicides is not the police, but rather the local medico-legal officers and the national system of vital statistics. If any general fault or blame is to be assessed on any group for the demonstrably shoddy state of the official measurement of police homicides, the medico-legal officers may be a more appropriate target than the police.

Rather than assessing blame, however, a more useful response would be for all institutions concerned to improve the quality of their data. If the National Center for Health Statistics, the United States Public Health Service, and the American Association for Vital Records and Public Health Statistics revised the Standard Death Certificate to include a check box for

police homicide; if the National Center for Health Statistics compiled mortality data by city of occurrence rather than by decedent's city of residence; if police departments published in their annual reports the number of citizens they killed each year; if the Uniform Crime Statistics published the numbers of citizens killed as reported in the supplemental homicide reports supplied by local police departments; and if all state legislatures required local police departments to file a report with a state agency whenever a citizen is killed, it would be much easier to monitor trends and differences in the use and possible abuse of police power. Since some democracies require a written report to the national government every time a police officer draws a weapon,[50] there improvements in the American system for reporting the taking of life would appear feasible.

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Notes

1. *See* Sellin, *The Significance of Records of Crime,* 67 Law Q. Rev. 489, 494 (1951); Wolfgang, *A Sociological Analysis of Criminal Homicide,* in Crime in America 53 (B. Cohen ed. 1970) (both are cited in

S.F. Messner, Income Inequality and Murder Rates; Some Cross-National Findings (1978) (paper presented to the 73d Annual Meeting of the American Sociological Association)).

2. *See* Hindelang, *The Uniform Crime Reports Revisited,* 2 J. Crim. Just. 1 (1974). *But see* Cantor and Cohen, Comparative Measures of Homicide Trends: Methodological and Substantive Differences in The Vital Statistics and Uniform Crime Report Time Series (1933-75). Working paper 7821, Program in Applied Social Statistics, Department of Sociology, University of Illinois at Urbana-Champaign.

3. In a 1969 survey, for example, 57 percent of a national sample said that "police shooting looters" was not an act of violence. M. Blumenthal, L. Chadiha, G. Cole & T. Jayartne, Justifying Violence 73 (1972), *cited in* Archer and Gartner, *Legal Homicide and Its Consequences,* in Violence: Perspectives on Murder and Aggression 221 (Kutash ed. 1978). Archer and Gartner also cite Professor Short's account of how the research staff of the National Commission on the Causes and Prevention of Violence, which had originally defined the scope of study neutrally to include all uses of force, including police killings, was influenced to narrow the scope of study to all "illegal violence"—thereby excluding most governmental use of force. Archer and Gartner, *supra* at 222-23. *See also* Short, *The National Commission on the Causes and Prevention of Violence: Reflections on the Contributions of Sociology and Sociologists,* in Sociology and Public Policy: The Case of Presidential Commissions (Komarovsky ed. 1975).

4. *See* Takagi, *A Garrison State in "Democratic" Society,* in Police Community-Relations 358-71 (Cohn and Viano eds. 1976).

5. *See* Sherman, *Restricting the License to Kill: Recent Developments In Police Use of Deadly Force,* 14 Crim. L. Bull. 577 (1978); U.S. Commission on Civil Rights, Police Practices and the Preservation of Civil Rights: A Consultation. (Dec. 12-13, 1978, Washington, D.C.). *See also* Gilman, *In Washington, A New Zeal For Prosecuting Police,* Police Magazine, November 1978, at 18.

6. *See* Day, *Shooting the Fleeing Felon: State of the Law,* 14 Crim. L. Bull. 285 (1978); De Roma, *Justifiable Use of Deadly Force by the Police: A Statutory Survey,* 12 Wm. & Mary L. Rev. 67 (1970); Finch, *Deadly Force To Arrest: Triggering Constitutional Review,* 11 Harv. C.R.-C.L. . Rev. 361 (1976); Mayhall, *Use of Deadly Force in the Arrest Process,* 31 La. L. Rev. 131 (1970); Zittler, *Policeman's Use of Deadly Force in Illinois,* 48 Chi.-Kent L. Rev. 252 [1971).

7. *See* Harding & Fahey, *Killings By Chicago Police, 1969-70; An Empirical Study,* 46 S. Cal. L. Rev. 284 (1973); Jacobs and Britt, *Inequality And Police Use of Deadly Force: An Empirical Assessment Of A Conflict Hypothesis,* 25 Soc. Prob. 403 (1979); Kania and Mackey, *Po-*

lice Violence as a Function of Community Characteristics, 15 Criminology 27 (1977); Kobler, *Police Homicide In A Democracy,* 31 J. Soc. Issues 163 (1975); Takagi, note 4 *supra;* Robin, *Justifiable Homicide by Police Officers,* 54 J. Crim. L. C. & P. S. 225 (1963); Uelman, *Varieties of Police Policy; A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County,* 6 Loy. L.A.L. Rev. 1 (1973); Fyfe, *Shots Fired: A Typological Examination of New York City Police Firearms Discharges* (1978). Unpublished Ph.D. dissertation, State University of New York at Albany; Milton, *Police Use of Deadly Force* (1977). Washington, D.C.: Police Foundation.

8. During this period, there were 1,800 deaths attributed to law enforcement officers included in the 101,665 homicides from all causes. Vital Statistics of the United States (1965-1974).

9. *See* Biderman and Reiss, *On Exploring The "Dark Figure" of Crime,* in 374 The Annals of the American Academy of Political and Social Science 1 (1967).

10. Many police agencies fail to provide some or all of the descriptive information on those forms that is necessary to discriminate justifiable homicides by police from other forms of homicide. Interview with Paul M. Zolbe, Chief, Uniform Crime Reporting Section, FBI (July 5, 1978).

11. *See, e.g.,* Goldkamp, *Minorities as Victims of Police Shootings: Interpretation of Racial Disproportionality and Police Use of Deadly Force,* 2 Just. Sys. J. 169 (1976); Jacobs and Britt, note 7 *supra;* Kania and Mackey, note 7 *supra;* Kobler, note 7 *supra;* Takagi, note 4 *supra;* Milton, note 7 *supra.*

12. National Center for Health Statistics, International Classification of Diseases, Adapted for Use in the United States 501 (8th rev. 1967).

13. 2 Vital Statistics of the United States (Part A) 6-9 (1973).

14. *See* I. Wayne, Suicide Statistics in the United States: An Exploration of Some Factors Affecting the Quality of Data (1969). Terminal Progress Report MH-15104, *cited in* Bradshaw, The Social Construction of Suicide Rates 52 (1973), unpublished Ph.D. Dissertation, Department of Sociology, Syracuse University.

15. For a description of the system, see National Center for Health Statistics, Medical Examiners' and Coroners' Handbook on Death and Fetal Death Registration (1971).

16. *See* Moriyama, Baum, Haenszel and Mattison, *Inquiry Into Diagnostic Evidence Supporting Medical Certifications of Death,* 48 Am. J. Pub. Health (1376-87 (1958).

17. *See* James, Patton and Heslin, *Accuracy of Cause of Death Statements on Death Certificates,* 70 Pub. Health Rep. 39-51 (1955).

18. Telephone Interview with Michael Baden, M.D., then chief medical examiner of New York City (July 17, 1978).

19. Interview with Sydney Katz, M.D. (December 19, 1978).

20. *See* National Center for Health Statistics, Model State Vital Statistics Act and Model State Vital Statistics Regulations, 1977, at 78-115 (1978).

21. *Id.* at 8.

22. *Id.* at 18.

23. For example, almost 17 percent of the 1973 death certificates reporting that an autopsy had been performed failed to complete a simple yes-no question about the autopsy. 2 Vital Statistics of the United States (Part A) 6-18 (1973).

24. Even when the police officer's role is described, there may be insufficient information to discriminate between legal and illegal actions of the police. While the ICD definition of this cause of death implies that the death certificate is filled out after the proper officials have determined whether or not a police homicide was justified, in practice that is probably not the case. The necessary review procedures can go on for months after a killing, but the death certificate typically must be completed before a burial is possible. Since burials usually occur within a week after a death, it seems virtually impossible for a death certificate to be based on a final ruling on the justifiability of the death. If a police officer is convicted of murder for an on-duty homicide a year after the fact, there seems to be no provision in the vital statistics system for changing the cause of death from legal intervention to homicide. Since officers are convicted so rarely for on-duty murder, however, this issue may have little impact on the system's data. Kobler found that only 3 of 1,500 officers in his sample of police killings were convicted on criminal charges related to the killing. Kobler, *supra* note 7, at 164. The first conviction of an officer for on-duty criminal homicide charges in the history of the New York City Police (since 1844) did not occur until the mid-1970s. *See* Hoffman, *The Man Who Defends Killer Cops,* 10 N.Y. Magazine 76 (1977).

25. Bradshaw, *supra* note 14, at 53. What is true for rural coroners may also be true for big city medical examiners as well. One line of speculation over the reason for the dismissal of New York City Medical Examiner Michael Baden, for example, was that he had failed to be sufficiently responsive to the wishes of the New York County prosecutor. *See Baden Planning to Sue the City Over His Ouster,* N.Y. Times, Aug. 8, 1979, at B4.

26. Katz interview, note 19 *supra.*

27. Baden interview, note 18 *supra.*

28. 2 Vital Statistics of the United States (part A) 6-19 (1973).

29. *See* text accompanying note 12 *supra.*

30. Such a situation would not be coded as death by legal intervention. Letter from Harry Rosenberg, Chief, Mortality Branch, National Center for Health Statistics (July 27, 1978).

31. NCHS Micro-data Detail Tape (Mortality): File figures, New York City Department of Health.

32. L. Sherman, Scandal and Reform: Controlling Police Corruption 146-49 (1978).

33. In Fort Lupton, Colorado, for example, a 10-officer police department shot and killed three citizens in one year. *See generally* Greeley Tribune, 1977-78.

34. *See, e.g.,* Milton, note 7 *supra.*

35. Fyfe, *supra* note 7, at 516 n.5.

36. Even the same exact count from both data sources, however, provides no assurance that all police homicides have been counted. The following table shows how a total count of 25 deaths in one year found in both the police records and the newspapers could be found when the actual number of deaths was 50. A procedure that recorded the names of the victims could capture the deaths in table cells b and c, thereby raising the total number of deaths counted to 35. But the cases in cell d would go unnoticed, by definition, using these two data sources, as they would in the comparisons of two data sources made in Tables 1 and 2.

Reported in Newspapers

Reported In Police Files		Yes		No	Total
Yes	a)	15	b)	10	25
No	c)	10	d)	15	25
Total		25		25	50

37. *See* Kobler, note 7 *supra.*

38. *See* note 10 *supra.*

39. Vital Statistics of the United States, Annual 1971-75.

40. A list of the alternate data sources used in each city for each year is available from the authors at One Alton Road, Albany, N.Y. 12203.

41. *See* E. Webb, D. Campbell, R. Schwartz and L. Sechrest, Unobtrusive Measures (1966).

42. *See* J. Wilson, Varieties of Police Behavior (1968).

43. *See* D. Black, The Behavior of Law (1976).

44. The table does not include gun density and population density, which use a 1974-76 average and 1975 data, respectively. The only year for which data on most of the independent variables were available was 1976.

45. Variables 1, 7, 9-14, 16, and 17 were computed from Police Foundation, Police Practices: The General Administrative Survey (1978) and Police Executive Research Forum, Survey of Police Operational and Administrative Practices, 1977 (1978); variable 2 was computed from data tapes supplied by the National Center for Health Statistics using the procedure suggested by Cook, *The Effect of Gun Availability on Robbery and Robbery Murder: A Cross-Section Study of 50 Cities,* 3 Pol'y Rev. Ann. 743 (1979) and is composed of the average of the proportion of suicides committed with a gun and the proportion of homicides committed with a gun; variable 3 was computed by averaging the percent of the workforce unemployed reported in the U.S. Bureau of Labor Statistics area trends in January, April, June, September and December 1976; variable 4 was computed from data tapes supplied by the National Center for Health Statistics; variables 5 and 6 were computed from FBI Crime in the United States 1976 (1977); and variables 8 and 15 were computed from data supplied on tape by the Federal Bureau of Investigation. All population figures used to compute 1976 rates were derived from Police Foundation, *supra,* and Police Executive Research Forum, *supra.* A complete list of the cities and years included for each correlation is available from the authors.

46. *See, e.g.,* Goldkamp, note 11 *supra;* Takagi, note 4 *supra.*

47. *See, e.g.,* Harding and Fahey, note 7 *supra;* Milton, note 7 *supra.*

48. *See, e.g.,* Jacobs and Britt, note 7 *supra;* Kania and Mackey, note 7 *supra;* Uelman, note 7 *supra.*

49. *See, e.g.,* Minn. Stat. §626.533(2) (1976), which requires that a report of all firearms discharges by police officers in the line of duty be filed with the Minnesota Department of Public Safety.

50. *See* Baun, *The Danish Police System,* 1 Police Stud. 53 (1978).

CHAPTER 2

ANALYSIS OF SHOOTING INCIDENTS

CATHERINE MILTON, JEANNE WAHL HALLECK, JAMES LARDNER, AND GARY L. ABRECHT

This chapter contains observations about 320 shooting incidents from 1973 and 1974, gathered from seven police departments. These data and selected characteristics of the cities and police departments, together with some very preliminary conclusions, are presented to serve as a guide to police administrators and to suggest areas for more extensive analysis in future research.

While the small sample size taken from a two-year period does not allow statistically significant conclusions to be drawn at levels usually acceptable to behavioral scientists, some findings are meaningful for policy-making officials. However, readers should take care in making comparisons between departments and should recognize that the data merely characterize the present level of shooting incidents in individual cities; the data do not explain why or how the rates got there. Furthermore, it would be inappropriate to be critical of police administrators for substantial percentage increases in shooting rates from one year to the next. Such changes many actually represent a very small number of incidents—such as five shootings instead of three—or may be attributable to factors entirely beyond a chief's control.

SOURCE: *Police Use of Deadly Force,* Washington, D.C.: Police Foundation, 1977, pp. 13-37.

DATA COLLECTION

The seven cities ranged in size from Birmingham, Alabama, with a population of slightly less than 300,000, to Detroit, Michigan, with a population of almost 1.4 million persons. The field researchers[1] visited only the city police department and did not collect information from other law enforcement agencies operating in a jurisdiction, such as transit or housing authority police. The researchers reviewed shooting incident reports, department regulations, and descriptions of procedures for the use of firearms. In addition, they interviewed administrative personnel and spoke informally, while riding on patrol or in other settings, with other members of the department.

Because information was available from all cities except Detroit[2] for calendar years 1973 and 1974, the staff reviewed a total of 320 incidents[3] involving the use of firearms by members of the seven police departments over a two-year period. Only incidents that involved shootings by police were included; deaths or injuries of civilians by other means attributable to police action were eliminated from consideration. Shootings by both on- and off-duty personnel were tabulated, including personal disputes involving off-duty officers. Five incidents (all nonfatal) involving shootings of police by their fellow officers also have been included. Discharges that did not hit anyone, shootings of animals, suicides, or instances in which a police weapon was used by someone other than an officer were excluded from the study.

OBSERVATIONS ABOUT THE DATA

Observations about the data[4] are organized into the following three categories:

1. A description of the circumstances of the shooting incidents and the characteristics of the citizens and police involved. These observations include ratio of fatal to nonfatal incidents; sex, age, and race of shooting victim; possession of a weapon by shooting victim; type of incident in which the shooting occurred; status and assignment of the officer involved; and adjudication of the incident by the department.

2. An examination of the relationship between the shooting rates of individual cities and population size, police department size, the Index crime rate, and the violent crime rate.

3. An examination of the relationship between the use of fatal force by citizens against the police and by police against citizens. For this purpose, nationwide figures have been used.

Although it is reasonable to suppose that relationships of some kind do exist between various factors and shooting rates, a serious problem exists in attempting to isolate each variable to determine the nature and extent of its influence. Neither the data collected for this study nor existing knowledge about these matters is capable of providing that information. For example, a change in administration or in the written policy of a department might be followed by a reduction in shootings, but it is extremely difficult to tie the two together. The change in shooting rate might have come about because of an unrelated revision of the department's training program or because of a significant population shift in the community. Even to attempt such an analysis, researchers would have to collect data far beyond the scope of this pilot study. We hope that the preliminary findings presented here will encourage others to do just that.

GENERAL CHARACTERISTICS OF SHOOTING INCIDENTS, OFFICERS, AND CITIZENS

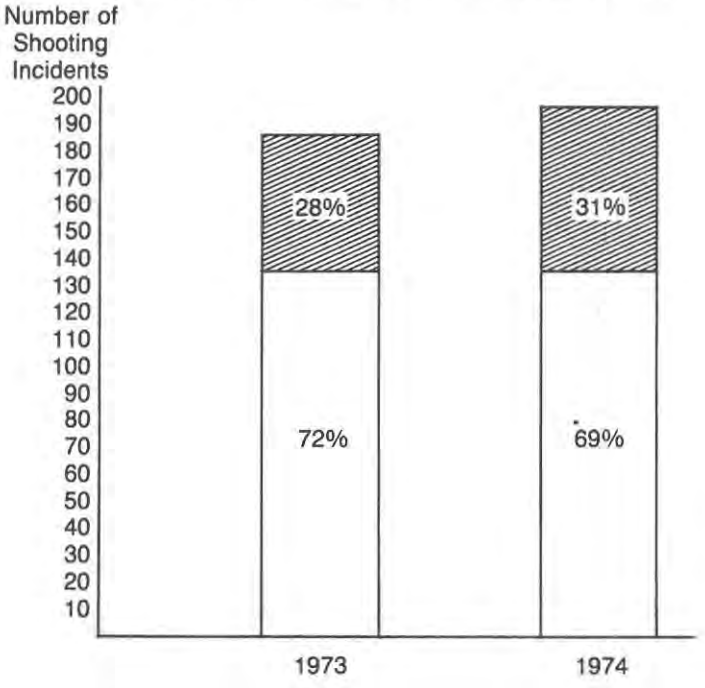
Ratio of Fatal to Nonfatal Shootings

Of the 320 shooting incidents analyzed in this chapter, close to one-third (96) were fatal shootings. Of the total number of shootings in all seven cities in both calendar years (378), 29 percent were fatal and 71 percent nonfatal, as Figure 1 shows. The ratio differs from city to city in the study, ranging from one-quarter to a little more than one-third of all incidents, as shown in Table 1; however, the number of fatal shootings is generally too small in individual jurisdictions and the study period too short to support a conclusion that major differences in this ratio exist among cities. Furthermore, comparative data

from studies in other cities . . . show a similar ratio of fatal to nonfatal shootings.

As noted in the introduction to this report, the decision to include nonfatal shootings in this study was made primarily because the number of fatal shootings was quite low in some cities, and also because it was assumed that the distinction between the two was frequently a matter of chance; however,

FIGURE 1
RATIO OF FATAL TO NONFATAL SHOOTINGS: SEVEN CITIES



NOTE: The figure is based on the total number of shooting incidents (378) occurring in the seven cities during the two-year period; it includes *all* incidents occurring during the full year 1973 in Detroit.

subsequent analysis of all shooting incidents suggests that fatal shootings are more likely to occur when subjects are armed (see Figure 5). It should be noted, however, that the small sample size and the uncertain validity of data concerning the presence of a weapon make this only a tentative conclusion.

In 1973, 376 civilians were killed in the United States by law enforcement officers, according to statistics gathered by the National Center for Health Statistics, U.S. Public Health Service. The total number of fatal shootings that year in the seven sample cities, 51,[5] represents almost 14 percent of the national total, even though the population of the seven cities is only 1.9 percent of the entire population, based on 1973 Bureau of the Census population estimates.[6]

Sex (N = 314)

Nearly all of the subjects shot by the police were known to be male (308 out of 320), and six were identified as female. In the remaining six instances either the police report was incomplete, or officers reported shooting a suspect who escaped, and was not subsequently located. In those cases, age, sex, and race are unknown.

Age (N = 290)

The reported ages of the shooting victims ranged from 14 to 73. More than one-third (35 percent) were between the ages of 19 and 24. By way of comparison, 11 percent of the population and 26 percent of all persons arrested for Index crimes in the seven cities were in that age category. Almost three-quarters (73 percent) of all shooting victims whose ages were known were under 30, and 50 percent were 24 years old and under. The data presented in Figures 2 and 3 suggest that existing department sanctions against the shooting of juveniles (see Table 11) are being observed. Although young persons between the ages of 13 and 18 represented 39 percent of all persons arrested for Index crimes in the seven sample cities in 1973, only 12 percent of the shooting victims were in that age group—a figure in direct proportion to their representation in the general population of those cities.

TABLE 1
FATAL AND NONFATAL SHOOTING INCIDENTS, 1973 AND 1974

City and Population[a]	Percentage of Shootings		Total Number of Shootings
	Fatal	Nonfatal	
Birmingham 295,686	27	73	41
Oakland 345,880	24	76	17
Portland 378,134	33	67	9
Kansas City 487,779	23	77	26
Indianapolis 509,000	36	64	36
Washington, D.C. 733,801	31	69	70
Detroit 1,386,817	29	71	179
TOTAL	29	71	378[b]

[a] Cities are ranked by population size, according to Bureau of the Census 1973 population estimates; the Indianapolis population figure refers to police district and is based on 1970 census.

[b] This figure represents all incidents occurring in both calendar years in all seven cities.

Comparative data from studies of police homicides by Robin (1963) and Kobler (1975)[7] show similar age breakdowns. Kobler's study of 911 civilian victims over a five-year period (1965-69) reports an age range of 12 to 81. The largest group of victims were between 17 and 19; approximately 50 percent were between the ages of 17 and 27. In Robin's study of 32 homicides by police officers in Philadelphia (1950-60), exactly half of the group was under the age of 24. Robin collected similar data from nine other cities which showed the largest percentage of victims to be in the 20-to-25-year-old range (32 percent); overall, 50 percent were under age 28.

Race (N = 309)

Of the number of nonfatally shot civilians whose race was known (169), almost 80 percent were black, as were 78 percent of those killed by police use of firearms. Overall, 79 percent of the shooting victims were black. The percentage of black shooting victims is disproportionately high in comparison with the percentage of blacks in the total population; however, the figure corresponds quite closely to black arrest rates for Index crimes (see Figure 4).[8]

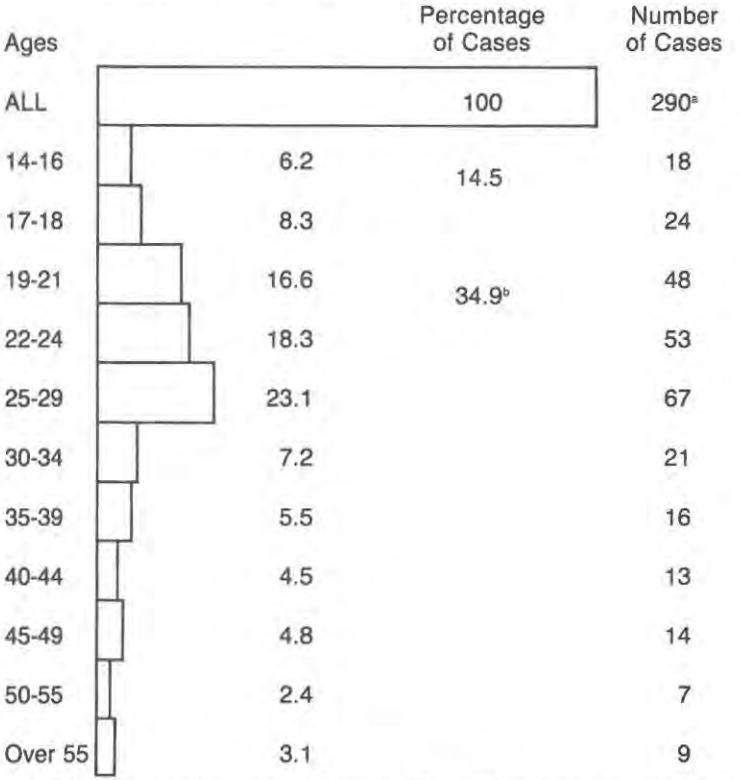
In Robin's study of Philadelphia police homicides, 87.5 percent of shooting victims were black, in contrast to blacks' 22 percent representation in the city's population and 30.6 percent representation in the arrest population during those same years (1950-60). In his expanded study of nine additional cities, almost 62 percent of shooting victims were black. In contract, Kobler's study reported a substantially lower percentage of black victims: 42 percent. However, that study included both rural areas and, as Kobler points out, a disproportionate number of cases from the western states. There the population make-up is likely to differ from that of the large urban centers, which have been the source of most of the data on this subject gathered up to now.

Victim Armed (N = 315)

According to police reports, 57 percent of the 315 civilians shot were armed; 45 percent (143), with guns; and 12 percent (36), with other weapons, primarily knives. Fifty-four percent (52) of the subjects killed were armed with guns, and 15 percent (14) were armed with other weapons. Forty-two percent (91) of the persons nonfatally shot were armed with guns; in addition, 10 percent (22) were found to have had other weapons. Although many persons shot were unarmed (43 percent), the data, as shown in Figure 5, suggest that those who were armed were more likely to be fatally shot. (Suspects were considered to be armed only if a weapon was reported to have been recovered or, in a few instances, if the records contained additional evidence that supported the officer's report.)

Kobler's findings concerning the presence or absence of a weapon in police homicides closely parallel these: In 25 percent of the cases he studied, no weapon was recovered; in this study, 31 percent of all those persons fatally shot were unarmed. Fifty percent of all victims had firearms, an additional 15 percent were armed with knives, and 10 percent apparently had other weapons.

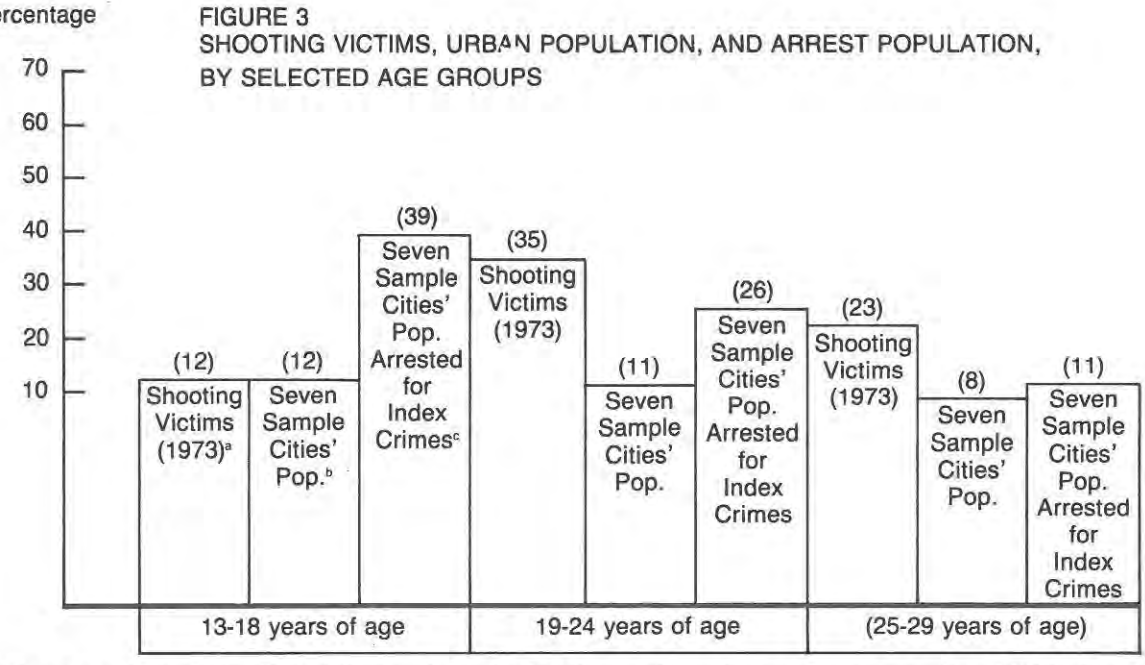
FIGURE 2
AGE OF SHOOTING VICTIMS



[a] In 24 cases, ages were unknown; 5 additional cases were not included in the table because the shooting victims were police officers. Of the total not tabulated (30), 9 were fatal and 21 were nonfatal shooting incidents.

[b] The percentage of victims under 25 is 49.4—almost half.

FIGURE 3
SHOOTING VICTIMS, URBAN POPULATION, AND ARREST POPULATION, BY SELECTED AGE GROUPS

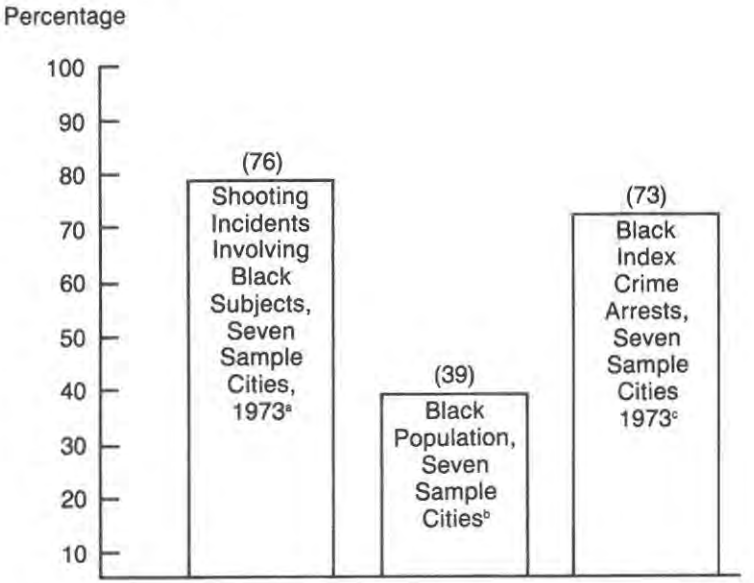


[a] The percentage of shooting victims varies only slightly—and in only one category—when 1974 incidents are added to those occurring in 1973: 13-18 years of age, 14 percent; 19-24 years of age, 35 percent; 25-29 years of age, 23 percent.

[b] Seven sample cities population figures are based on 1970 census data.

[c] Figures are derived from 1973 UCR report.

FIGURE 4
SHOOTING VICTIMS, CITY POPULATION, AND ARREST POPULATION, BY RACE



[a] Shooting incidents involving black subjects in 1973 and 1974 combined (from seven sample cities) equal 79 percent.
[b] City population and black population figures from 1970 Bureau of Census data.
[c] Figures are derived from 1973 UCR Report.

Type of Incident (N = 320)

On examination of the nature of the circumstances surrounding each shooting incident, some incidents were relatively easy to categorize. For example, the police dispatcher received a call requesting officers to respond to the scene of a burglary; when officers arrived, subjects were found on the premises, shots were exchanged, and a suspect was shot. However, in many incidents a series of events occurred which meant that officers responding to one presumed set of circumstances found

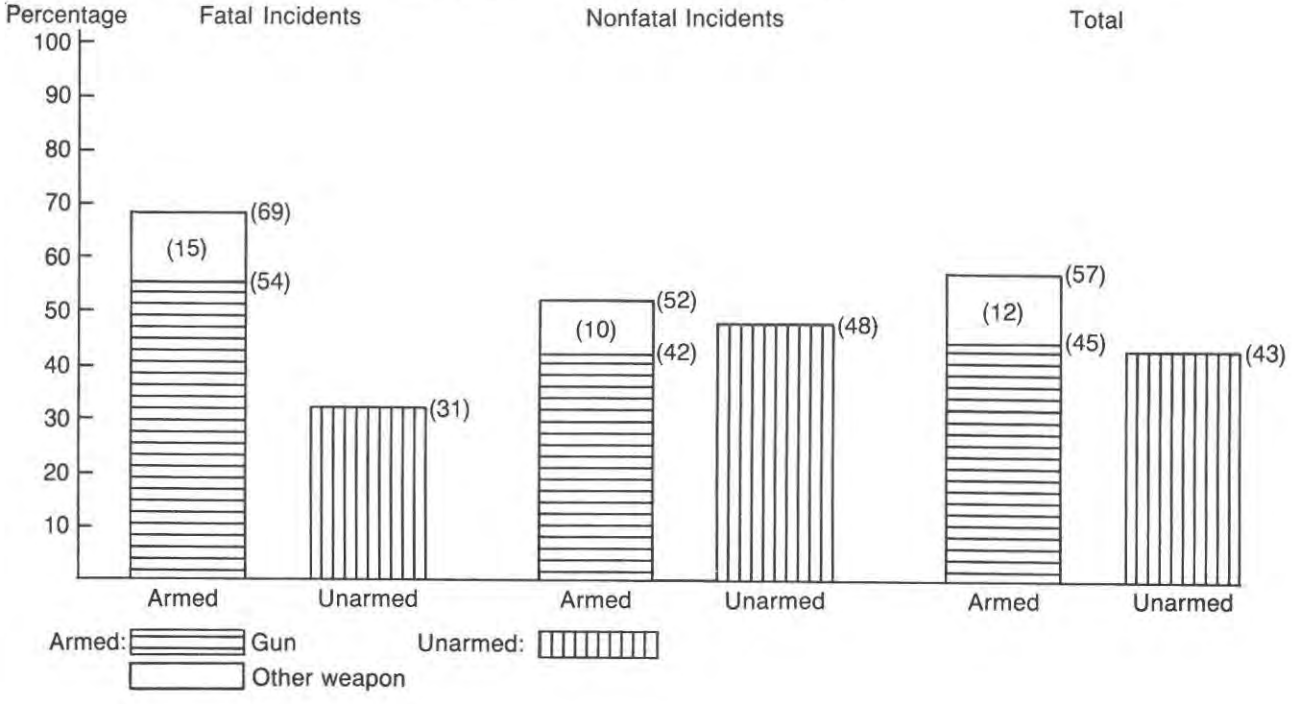
themselves confronted with another. To the extent possible, incidents were classified according to the primary activity reflected in official reports.

According to department records, almost all 320 persons shot were seemingly involved in criminal incidents—either directly engaged in illegal activity or acting in a suspicious manner. Of the rest, four were bystanders, one was a citizen attempting suicide, and five were police officers.[9] Almost one-third (32 percent) of the incidents to which the police responded involved disturbance calls: family quarrels, fights, assaults, disturbed persons, or reports of man or woman with a gun. Twenty-one percent of the incidents involved reports of a robbery in progress or pursuit of robbery suspects; a nearly equivalent amount (20 percent) involved a burglary in progress, larceny, tampering with an auto, or pursuit of subjects after an incident of this nature.

In 8 percent of the cases, persons shot were originally stopped for a traffic offense or stolen vehicle check; in a number of these instances, the shooting occurred in the course of pursuit. Only 4 percent of the shootings were either personal disputes involving the officer, accidental firings at friends or coworkers, or the result of horseplay. Another 4 percent of the incidents involved stakeouts or decoy operations. Miscellaneous situations, including escapes, investigation of accidents, serving of warrants, and other circumstances, constituted 11 percent of the total number of shootings (see Table 2).

Although some studies of shooting incidents have characterized subjects as "confronting" and sometimes "resisting" or "fleeing" at the time of shooting, our review of the data suggests that it is often extremely difficult to categorize incidents in this fashion. These postures are not always mutually exclusive, and both police and victim reports of shooting incidents are to some degree self-serving and not always easily verifiable. A complicating factor is that the presence of other witnesses may, depending on the circumstances, merely add to the number of conflicting accounts. Similar difficulties occur in trying to identify shootings which are "accidental" or "by mistake"—a problem researchers appear to share with grand juries.

FIGURE 5
PERCENTAGE OF VICTIMS REPORTED ARMED AND TYPE OF WEAPON



Officer Status and Assignment (N = 320)

Of the 320 shooting incidents, 17 percent (55) involved off-duty officers, and 21 percent of the shootings occurring on duty involved plainclothes officers.[10] Several incidents involving plainclothes officers on their way to or from work were recorded as off-duty incidents. According to police reports, the majority of off-duty incidents came about because the officer happened upon the scene of criminal activity or was in a public place, such as a bar, when a disturbance occurred. Relatively few off-duty incidents appear to have been initiated by officers. As Table 4 shows, the ratio of nonfatal to fatal shootings by off-duty and plainclothes officers is very nearly the same as that of all incidents (2:1).

TABLE 2
TYPES OF INCIDENTS TO WHICH POLICE RESPONDED

Incident[a]	Percentage of Total	Number of Incidents
Disturbance calls: Family Quarrels Disturbed Persons Fights Assaults "Man With a Gun"	32	102
Robbery in Progress, Pursuit of Robbery Suspects	21	66
Burglary in Progress, Larceny, Tampering with Auto, or Pursuit of Subjects	20	63
Traffic Offenses: Pursuits Vehicle Stops	8	25
Officer Involved in Personal Dispute, Horseplay, or Accident	4	14
Stakeout or Decoy	4	13
Other	11	37
TOTAL	100	320

[a] These incidents were classified from police records for this research. The categories do not represent formal charges or final dispositions.

TABLE 3
STATUS AND ASSIGNMENT OF OFFICERS INVOLVED IN SHOOTING INCIDENTS

	Percentage	Total (Number)
Incidents Involving Off-Duty Officers	17	320
Incidents Involving Plainclothes Officers (as Percentage of On-Duty Incidents)	18 (21)	320 (265)

Information about officer status and assignment represents the only officer-related information consistently available in all cities. The major difficulty in collecting personal information about officers, similar to that gathered about persons shot, is that such information is not likely to be included in the shooting incident report and must be retrieved from other sources. This procedure is time consuming and, in some instances, not feasible because of concerns about the confidentiality of personnel files. Needless to say, future research efforts looking more intensively into the question of police use of firearms should include more information about officers in the scope of inquiry.

TABLE 4
RATIO OF FATAL TO NONFATAL SHOOTINGS BY OFF-DUTY AND PLAINCLOTHES OFFICERS

	Fatal (percent)	Nonfatal (percent)	Total (percent)
Incidents Involving Off-Duty Officers	29	71	100
Incidents Involving Plainclothes Officers	27	73	100

Disposition (N = 199)

According to police department records, almost 92 percent of shooting episodes in all cities except Detroit were found to be justified or not to have resulted in any formal punitive action, such as a reprimand or suspension by the department. Detroit was not included in this tabulation because information about adjudication of police offenses was not available from incident reports.

Only two departments found less than 90 percent of shooting incidents in any single year to be justified. One of these departments was the second largest city, Washington, D.C. (84 percent), which has a well established Weapons Review Board that scrutinizes all firearms discharges.[11] This finding is consistent with those of other researchers; for example, Uelman found that, on an annual basis, 88 percent of the shooting cases he reviewed in Los Angeles County were disposed of as justified.[12]

Note that review procedures, possible sanctions, and terminology vary among departments, resulting in some difficulty in interpreting the outcome of administrative review. For the incidents not considered to be justified, department action generally consisted of a reprimand rather than suspension or termination.

RELATIONSHIP BETWEEN SHOOTING RATES AND CITY CHARACTERISTICS

In addition to looking at information about shooting victims, the researchers also tried to determine whether there is a correlation between shooting rates in individual cities and city characteristics, such as population size and the level of criminal activity reflected in crime rates.

Population Size

In examining the relationship between population size and shooting rates, it appears that the data support generally assumed trends. On the whole, larger cities have more shootings

than smaller cities, and the influence of urbanization is reflected in the increased rate of shootings in larger cities. Factors other than population size, however, affect the shooting rate. Table 5 shows that more variation in rates occurs within a group of cities of similar size than between cities of dissimilar size. The most noteworthy example of this variation is Birmingham, which had a higher shooting rate than other cities of similar size.

TABLE 5
COMPARISON OF POPULATION SIZE AND SHOOTING RATES, 1974

Population Category	City	Population	Number of Shootings	Rate of Shootings per 100,000 People (1974)
295,000 to 475,000	Birmingham	295,686	25	8.5
	Oakland	345,880	10	2.9
	Portland	378,134	6	1.6
475,000 to 750,000	Kansas City	487,799	10	2.1
	Indianapolis	509,000[a]	28	5.5
	Washington, D.C.	733,801	40	5.5
More than 1,000,000	Detroit	1,386,817	77	5.6

[a] The figure refers to police district population.

Department Size

Another factor thought to influence the number of shootings is police department size. The idea that the more personnel on the street, the greater the opportunity for interaction between police and citizens is not substantiated by the data presented. Table 6 shows the varied experience of the seven cities in this regard—variations that are particularly striking when one compares the rates of shootings per 1,000 officers between cities with similar ratios of officers to population (e.g., Detroit

and Washington, or Indianapolis and Birmingham). Any further exploration of this subject, however, should take into account the proportion of the force assigned to street work, in addition to the total number of personnel in the department.

TABLE 6
RATES OF POLICE SHOOTINGS OF CIVILIANS PER 1,000 OFFICERS[a]

City	Number of Officers	Rate of Shootings per 1,000 Officers	Number of Officers per 1,000 Population
Portland	714	4.2	1.8
Washington, D.C.	4,937	6.0	4.1
Indianapolis	1,110	7.2	2.1
Oakland	722	9.6	2.0
Kansas City	1,310	12.2	2.6
Detroit	5,575	21.8	4.0
Birmingham	637	25.0	2.1

[a] Figures are derived from 1973 UCR report and 1973 police data from the seven sample cities.

Index Crime and Violent Crime Rates

An examination of Index crime[13] rates and shooting rates in the seven cities over the two-year period shows no consistent relationship between changes in the number and rate of shootings and changes in Index crime rates. In some instances, Index crime rates increased while the rate of shootings decreased; in other cases, the reverse was true. Kansas City experienced the greatest increase in Index crime rates of the seven cities. At the same time, the shooting rate decreased 38 percent in that city. A comparison of the violent crime rates reported by the FBI (homicide, rape, robbery, and aggravated assault)[14] with shooting rates in the seven cities over the same two-year period produced a somewhat similar pattern.[15] This is

not entirely surprising, given the fact that a sizable number of shooting incidents occurred in conjunction with less serious offenses which are not reflected in Index or violent crime rates (see Table 2).

TABLE 7 RATE INCREASES AND DECREASES IN SHOOTING INCIDENTS, INDEX CRIMES, AND VIOLENT CRIMES, 1973 AND 1974

City[a]	Percentage Change in Shooting Rates	Percentage Change in Index Crime Rates	Percentage Change in Violent Crime Rates
1. Indianapolis	+250	+15	+40
2. Portland	+100	+15	+35
3. Birmingham	+ 56	+17	+20
4. Oakland	+ 43	- 3	+ 6
5. Washington, D.C.	+ 33	+ 7	- 0.6
6. Detroit	- 25	+18	+18
7. Kansas City	- 38	+26	+27

[a] Ranked from highest increase in shootings (1) to greatest decrease in shootings (7).

Although a two-year period is insufficient to document established trends, the data from Detroit and Kansas City are nonetheless worth noting. In both cities, shooting rates decreased in 1974 even though both Index and violent crime rates increased. In early March 1974, the Detroit Police Department abolished STRESS (Stop the Robberies, Enjoy Safe Streets), a controversial plainclothes unit whose members had been involved in 17 fatal shootings over a three-year period. In Kansas City, a new police administrator took office in November 1973 and soon therafter issued a more restrictive firearms policy in response to a particularly controversial shooting incident. In neither instance can it be said, on the basis of available data, that the reduction in shootings was or was not directly attributable to administrative actions. The impact of those actions can be determined only by comprehensive, long-range studies.

Police administrators contemplating changes in their firearms policies will quite likely want to know the answers to the following:

1. What is the relationship between the use of fatal force by citizens against police and by police against citizens?
2. Does a reduction in the number of shooting incidents by police result in increased risk to the police, as measured by serious injuries or deaths?

As noted in the introduction, we did not collect detailed information about serious injuries or shootings of police officers. However, some observations can be made from a comparison of police and civilian deaths, using national figures over a 15-year period and figures from the 1973-74 study period in the seven cities. In Table 8, the number of civilians killed by police was obtained from the National Center for Health Statistics; as noted earlier, at least 90 percent of the deaths are presumed to be the result of firearms use. The data concerning deaths of law enforcement agents killed by civilians were obtained from the FBI; the number of deaths resulting from firearms from 1969 through 1975 is indicated in the table.

An examination of national figures fails either to support or to refute with any certainty the proposition that a reduction in the number of civilian deaths, possibly reflecting increased restraint on the part of the police officers, results in increased risk to officers' lives. However, a decrease is apparent in the 1-to-5 ratio of police killed to police killings, noted by Kobler for the ten-year period 1960-69. That ratio is now 1 to 4 for the period 1960 through 1974, and to 1 to 3 for the period 1970 through 1974.

These figures and similar data from the seven cities shown in Table 9 are simply presented for the reader's information and as a suggested starting point for further research. Any attempt to draw conclusions about such a relationship from these data would be, at best, premature.

Table 10 presents a comparison between the circumstances of the shootings (fatal and nonfatal) of civilians in the seven study cities and the circumstances under which police officers were killed during the same two-year period. The results indicate, as might be expected, that robbery is a high-risk venture for all concerned; disturbance calls appear to present an even greater risk to police officers and civilians. This latter finding suggests that departments that place an emphasis on "dangerous felons" in written firearms policies and in related training curricula may be overlooking a substantial problem area.

TABLE 8 POLICE AND CIVILIAN DEATHS: 1960-1975

Year	Number of Law Enforcement Agents Killed as a Result of Criminal Action[a]	Number of Civilians Killed by Police
1960	28	245
1961	37	237
1962	48	187
1963	55	246
1964	57	278
1965	53	271
1966	57	298
1967	76	387
1968	64	350
1969	86 (83)[b]	354
1970	100 (93)	333
1971	129 (124)	412
1972	116 (111)	300
1973	134 (127)	376
1974	132 (128)	375
1975	129 (127)	not available

[a] From 1972 on, total includes federal law enforcement agents.
[b] Numbers in parentheses indicate those killed by firearms.

TABLE 9 POLICE AND CIVILIAN DEATHS, 1973 AND 1974: SEVEN SAMPLE CITIES

City	1973		1974	
	Police Deaths[a]	Civilian Deaths	Police Deaths[a]	Civilian Deaths
Birmingham	1	5	0	6
Detroit	3	28	5	24
Indianapolis	0	2	2	11
Kansas City	0	5	0	1
Oakland	3	1	2	3
Portland	0	0	1	3
Washington, D.C.	1	10	1	12

[a] As a result of criminal action.

TABLE 10 CIRCUMSTANCES SURROUNDING SHOOTING OF CIVILIANS AND DEATHS OF POLICE OFFICERS, 1973-1974

Type of Incident	Percentage of Police Officers Killed Nationwide	Percentage of Civilians Killed by Police Officers, Seven Sample Cities	Percentage of Fatal and Nonfatal Shootings of Civilians by Police Officers, Seven Sample Cities
Robbery, Pursuit of Robbery Suspect	20	21	21
Burglary, Pursuit of Burglary Suspect	6	13	20
Disturbance Calls	24	36	32
Traffic Stops	14	13	8
All Other[a]	36	17	19
TOTAL	100	100	100

[a] Because information on the circumstances surrounding shootings of civilians and police is maintained differently by different agencies, many categories proved to be noncomparable and had to be merged in the category "All other."

Notes

1. Individuals with police experience were hired as field researchers to visit selected cities to gather data. One is currently a lieutenant in the District of Columbia Metropolitan Police Department; one is a writer and former D.C. police officer; and one is a lieutenant in the Birmingham, Alabama, police department.

2. As noted in the introduction, the staff collected information about shooting incidents from the Detroit police department for the entire year 1974, but only the last six months of 1973, because of the size of the department and the large number of cases to be reviewed. However, because the total number of shootings (both fatal and nonfatal) in that city in 1973 is known, that figure is used in several of the tables in this chapter and is identified as such. Similarly, there are occasional references to the total number of shootings—378—in all seven cities over the entire two-year period.

3. The term "incident" refers to the shooting of an individual subject even though several individuals may have been shot in one episode.

4. For the most part, data were collected by Police Foundation field researchers from department reports of shooting incidents. Relevant items of information were obtained by reading through a number of reports in each individual folder; in most instances, personnel information was maintained in a separate location and could not within the time available be correlated with data from shooting incident reports.

5. This figure includes *all* fatal shootings of civilians by police officers in Detroit in 1973.

6. It should be kept in mind that a small number of civilian deaths reflected in Public Health Service statistics are the result of means other than firearms.

7. Gerald D. Robin, "Justifiable Homicides by Police," *Journal of Criminal Law, Criminology, and Police Science* 54 (1963): 224; Arthur L. Kobler, "Figures (and Perhaps Some Facts) on Police Killing of Civilians in the United States, 1965-1969," *Journal of Social Issues* 31, 1 (1975): 185-91.

8. Age may be a very significant factor in the disproportionate number of black victims in comparison to their representation in the population. In some jurisdictions—New York City, for example—the median age of black males is 23.1 as compared to 33.3 for white males (Bureau of Census, 1970 data). The arrest rate for Index crimes of persons in the age groups 13-18 and 19-24, the vast majority of whom are male, is considerably higher than the arrest rate of persons 26 years of age and above.

9. Characteristics of police officers shot are not included in tabulations of age, race, or presence of weapon.

10. An incident was considered to involve plainclothes officers only if the officers were on duty and assigned as such.

11. The Washington, D.C., department reports that in the year preceding the publication of this report, less than 60 percent of the cases reviewed by the board were found to be justified. This figure, however, includes discharges which did not take effect. Such incidents were excluded from analysis in this report.

12. Gerald F. Uelman, "Varieties of Police Policy: A Study of Police Policy Regarding Use of Deadly Force in Los Angeles County," 6 *Loyola L. Rev.* 39 (1973).

13. Index crime offenses, as reported by the FBI, are murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and auto theft.

14. Victimization rates for personal crimes of violence, as recorded by LEAA surveys, are undoubtedly higher; however, data are not available on a comparable basis for all seven cities.

15. Although both Portland and Indianapolis reflected the highest increases in shooting and violent crime rates, it should be noted that the actual number of shootings in Portland increased only from three to six.

CHAPTER 3

USE OF DEADLY FORCE TO ARREST A FLEEING FELON—A CONSTITUTIONAL CHALLENGE, PARTS I AND III

J. PAUL BOUTWELL

INTRODUCTION

From the 15th century to the present day, a law enforcement officer's use of deadly force[1] to apprehend one fleeing from a crime has been largely governed by the felony-misdemeanor classification of crimes.[2] An officer may use deadly force to prevent the escape of a fleeing felon, but he may not use such force to apprehend a fleeing misdemeanant. The rationale for permitting deadly force to be used against a felon, at least at early common law and in 18th century America, was that all felonies—murder, rape, manslaughter, robbery, sodomy, mayhem, burglary, arson, prison break, and larceny—were punished by death.[3] The use of deadly force was seen as merely speeding up the process. "It made little difference if the suspected felon was killed in the process of capture since, in the eyes of the law, he had already forfeited his life by committing the felony."[4]

SOURCE: "Use of Deadly Force to Arrest a Fleeing Felon—A Constitutional Challenge, Part I," *FBI Law Enforcement Bulletin* (September 1977) 46:9:27-31;
"Use of Deadly Force to Arrest a Fleeing Felon—A Constitutional Challenge, Part III," *FBI Law Enforcement Bulletin* (November 1977) 46:11:9-14.

On the other hand, deadly force could not be used against a fleeing misdemeanant under any circumstances. "[T]o permit the life of one charged with a mere misdemeanor to be taken when fleeing from the officer would, aside from its inhumanity, be productive of more abuse than good. . . .The security of person and property is not endangered by a petty offender being at large. . . ."[5]

Through the years, the line between felonies and misdemeanors has become less distinct. The number of crimes classified as felonies has increased significantly. Our concept of punishment has undergone substantial changes since the early days of common law. Yet, there has not been a significant change in the rule permitting the use of deadly force to arrest any fleeing felon. This has meant, therefore, that deadly force is authorized in many more situations today than existed in earlier days.

While there is general agreement that deadly force is justified against a fleeing felon when the felony committed is a dangerous or violent one, there is considerable controversy over the use of such force when the felony is a minor, nonviolent one. The argument is that many of today's minor felonies are simply not analogous to the felony classification at common law when the fleeing felon rule was formulated.

Efforts to reform the common-law fleeing felon rule have been directed primarily toward limiting the use of deadly force to dangerous felons. While there has been some movement away from the "any felony" rule during this century, it has remained essentially intact. Those who have sought to restrict the use of deadly force in arrest situations have done so on four fronts; namely, (1) legislative reform, (2) state civil court action, (3) departmental policy restrictions, and (4) challenge to the rule's constitutionality.

One state's codification of the common law fleeing felon rule has been declared unconstitutional by a federal Court of Appeals.[6] While the U.S. Supreme Court vacated judgment in the case, it did so on a procedural deficiency and not on the merits of the court's holding.[7] Therefore, the opinion of the appeals court continues to represent, at least on the merits, a

conflict with other federal circuits as to whether the use of deadly force to apprehend a nondangerous fleeing felon is a constitutional violation.

This article, while discussing efforts made toward legislative reform and departmental policy restrictions, emphasizes the challenge that has been made in federal court to the constitutionality of the rule. This type of litigation will be distinguished from a state court civil suit.

THE COMMON LAW FLEEING FELON RULE

The common law rule permitting the use of deadly force to effect the arrest of any fleeing felon has been both severely criticized and staunchly defended. A summary of the commonly expressed arguments for and against the rule is presented to bring the different views into sharp focus. Even though some of the points are more moral and sociological than legal, they should add to our understanding of the rule and illustrate why controversy seems to develop when the rule is discussed.

Argument for the Rule

Society requires protection against criminals. Criminal laws are enacted to give legal content and efficiency to such protection. Enforcement of these laws requires prosecution of those who violate them. Arrest of the violator is a condition precedent to the entire enforcement procedure. The whole criminal justice system breaks down unless society can require peaceable surrender to the exertion of law enforcement authority. Therefore, society benefits from that which facilitates arrest. Obviously, the right to use deadly force facilitates arrest. Its lawful use notifies the criminal that flight is not an option open for his consideration. If he flees from the commission of a felony, against the order of an officer of the law, he should realize that he invites the risk of injury or death. This does not mean that the officer will always exercise the right to shoot, but it should not mean that the advantage should belong to the criminal.

If effective law enforcement is to be maintained, certainly an arrest should not be made to turn on who can run the fastest. There is no constitutional right to commit a felony and then escape the consequences by fleeing. There is no constitutional right to flee from an officer lawfully exercising his authority. It has been said that if a fleeing felon is injured or killed, he must be regarded as the author of his own misfortune.[8]

A law enforcement officer is called upon to make a difficult, on-the-spot legal judgment. His facts are often vague and ambiguous. Yet, his decision must be swift. If he uses force, it must not be unreasonable. This standard presupposes that a law enforcement officer is endowed with foresight. Of those who would change the rule, some would require the officer, before using deadly force, to believe the felon will use force against others if not immediately apprehended. How can a police officer ever know, reasonably or otherwise, whether the felon will use force against others?[9]

Given the long history and current status of justification, the ready availability of handguns to the populace at large (including nonviolent felons), and the needs of law enforcement in a society where violence is widespread, the justifiable homicide statutes which permit deadly force against any fleeing felon are not unreasonable.[10]

Surely a police officer should not be imprisoned if he mistakes a nondangerous felon for a dangerous one or a nonforcible felon from a forcible one. A police officer faced with an emergency situation makes a mistake and uses deadly force against a nondangerous felon. He and his employing agency may or may not be civilly liable, he may or may not be disciplined for not following a departmental policy, but it should not be said, out of awareness of his difficult job in emergency situations, that he assumes the risk of going to jail for his mistake.

Argument Against the Rule

The common law distinction between felony and misdemeanor crimes for the purpose of determining the scope of the privilege to use deadly force is grossly inadequate for modern-day law enforcement. A felony usually is based merely on the

length of sentence involved, and some misdemeanors embrace conduct more dangerous than many felonies.

In 15th century England, as well as 18th century America, the rule reflected the social and legal context of felonies at that time. They were punishable by death. It made little difference if the suspected felon were killed in the process of capture, since in the eyes of the law he had forfeited his life by committing the felony. It was assumed that a suspected felon facing death upon capture was more desperate than a misdemeanant, and greater force was required for his apprehension. Only a few crimes were felonies. In most American jurisdictions, the social and legal context of felonies today bears little resemblance to that of the early common law. For example, some modern code revisions classify felonies according to five different categories ranging from Class A felonies, the most serious, down to Class E felonies, the least serious.[11]

Felonies today include numerous crimes not involving force or violence, such as property-based crimes and compliance with complex government regulations (e.g., income tax fraud). Since the felony-misdemeanor distinction is usually based merely on the length of sentence involved, and since some misdemeanors involve conduct more dangerous than some felonies, a deadly force justification, which makes no distinction between felonies or does not address the gravity and need of such force, bears elements of irrationality.[12]

Deadly force should not be permitted when the felony committed is a minor, nondangerous one. Felonies against property, which as larceny, forgery, and counterfeiting, are regarded as being nondangerous. Deadly force should be permitted only to apprehend or prevent escape of a dangerous felon. The crime for which the arrest or recapture is sought should involve conduct including the use or threatened use of deadly force.

Speaking against the common law rule, Professor Michael Mikell stated:

> It has been said, 'Why should not this man be shot down, the man who is running away with an automobile? Why not kill him if you cannot arrest him?' We

> answer: because, assuming that the man is making no resistance to the officer, he does not deserve death.... May I ask what we are killing him for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? If we catch him and try him, we throw every protection around him. We say he cannot be tried until 12 men of the grand jury indict him, and then he cannot be convicted until 12 men of the petit jury have proved him guilty beyond a reasonable doubt, and then when we have done all that, what do we do to him? Put him before a policeman and have a policeman shoot him? Of course not. We give him three years in a penitentiary. It cannot be then that we allow the officer to kill him because he stole the automobile, because the statute provides only three years in a penitentiary for that. . . . Is it for fleeing that we kill him? Fleeing from arrest is also a common law offense and is punishable by a light penalty, a penalty much less than that for stealing the automobile. If we are not killing him for stealing the automobile and are not killing him for fleeing, what are we killing him for?[13]

And also from Professor Wechsler:

> . . . [T]he preservation of life has such moral and ethical standing in our culture and society, that the deliberate sacrifice of life merely for the protection of property ought not to be sanctioned by law.[14]

As can be readily seen, valid points are to be made on both sides of the argument. It is also clear that the debate deals with competing interests of society at the highest rank—interests in protecting human life against unwarranted invasion and in promoting peaceable surrender to the exertion of law enforcement authority. Yet, the balance that has been struck to date is very likely not the best one that can be. In the area where any balance is imperfect, there must be some room for different views to prevail.[15]

The American Law Institute's almost 50 years of consideration of the problem demonstrates that the area in which we are treading is one still characterized by "shifting sands and obscured pathways."

RESTRICTIONS UPON THE USE OF DEADLY FORCE THROUGH LEGISLATIVE REFORM

Most states have justification statutes dealing with the use of deadly force by law enforcement officers to effect arrest. They may be divided into three groups; namely, those that follow the common law rule, those that have modified the rule and mandate that only "forcible" felonies justify the use of deadly force, and those that have adopted the Model Penal Code. Each approach will be discussed.

Codification of the "Any Felony" Rule

At least 24 states currently have codifications of the common law fleeing felon rule.[16] It would not be accurate to assume, however, that states with such statutes are relying on archaic law or that the respective state legislative bodies have not considered different versions of the rule. At least 17 of the 24 states have revised and updated their penal codes since 1970 and have preserved the rule in legislative recodifications. The Missouri House of Representatives, for example, rejected an attempt to amend their statute in June 1975.[17]

Under the provisions of a typical state statute, four requirements must be present to justify deadly force: (1) The officer must have probable cause to believe that a felony has been committed and that the person to be arrested committed it; (2) the arresting officer must give the defendant notice of his intention to arrest; (3) the defendant either flees or forcibly resists; and (4) whatever force the officer uses must be necessary to effect the arrest.[18] While an officer cannot use deadly force to apprehend a fleeing misdemeanant, he is privileged to use such force regardless of the felony that is committed.

The significance of "necessity" as a limitation upon the use of deadly force was illustrated recently in a civil rights case. At approximately 10 p.m. two officers received a radio dispatch indicating an "entry in progress, three Negro males on the scene . . . ." Armed with a 12-gauge shotgun, one officer positioned himself at the scene on a well-lighted public sidewalk,

while his partner circled around to the rear of the homes located on the block. The officer on the sidewalk was five to ten yards away when he observed three black males emerge from the gangway located between two houses. Each one was of junior high school age and approximately 5 feet 6 inches tall. The plaintiff, one of the three boys, had in his hand a thin, 12-inch-steel-blue file. He turned and faced the officer for an instant after he was ordered to halt. All three then retreated into the gangway of an adjacent house. The officer fired his shotgun over their heads as they ran. The officer ran up the sidewalk, parallel to their path of retreat, and positioned himself directly in front of that gangway. The plaintiff was now facing the officer again. He was approximately 45 feet from the officer. The officer fired a second shot directly at the plaintiff, hitting him in the head. Another boy was also hit. A civil rights action against the police officer claiming money damages for the use of excessive force in connection with the arrest was commenced in federal district court by the two injured.

The trial was a bench trial, which means simply that the trial judge, in addition to deciding questions of law, also makes the necessary factual determinations. He decided that the officer's version of the events, related above, represented the factual backdrop against which the liability issue would be determined. The officer testified that he believed the plaintiff wielding the file had a long-barreled revolver and that he feared for his life. He also testified that he believed that mere flight by one suspected of burglary justified the use of his shotgun. Under state cases, the test for liability was whether the amount of force used by the arresting officer was reasonable under the existing circumstances. While an officer may use deadly force to apprehend any fleeing felon, he must reasonably believe it *necessary* to prevent escape.

The trial judge held that the defendant's second shot, aimed directly at the suspects, was unreasonable and unjustified. The judge took into account not only the officer's frightened state of mind, but also the lighting conditions, the proximity of the boys to the officers, the physical appearance of the file, the

suspects' retreat, and the defendant's awareness that his partner covered the only available avenue of escape, and determined the officer used excessive force in effecting the arrest. While the defendant may have actually feared for his life, he said, a defense is still not established. The belief must also be reasonable under all the existing circumstances. Judgment was for the plaintiff.[19] The judge's decision was affirmed on appeal.[20]

Statutes Limiting Use of Deadly Force to "Forcible" Felonies

Seven states have justification statutes which specify the felonies for which deadly force may be used.[21] These statutes permit such force only for "forcible" felonies. The force used must be necessary to effect arrest. In addition, if a person is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay, then deadly force is permitted.

The officer knows which felonies are "forcible" because they are defined by statute. In states which have such statutes, the law enforcement officers memorize those felonies so that there is no misunderstanding as to what constitutes a forcible felony. Generally, training academies use the acronym MA M. BARKER to teach what felonies are forcible—M is for murder, A for arson, M for mayhem, B for burglary, A for aggravated battery, R for rape, K for kidnapping, E for extortion, and R for robbery.

The officer, in deciding whether or not to use deadly force, asks himself two questions: (1) Has the person to be arrested committed a forcible felony? and (2) Is it necessary to use deadly force? If the answer is "no" to either question, then he may not use such force. Take this illustration. A thief steals a $500 diamond ring from the counter of a jewelry store. A deputy is attempting to arrest the thief, but he flees. The thief does not have a weapon. The deputy is *not* justified in using deadly force, since theft, although a felony under these circumstances, is not a forcible felony.[22]

Model Penal Code

The Model Penal Code proposes that the use of force be justifiable only where the arresting officer believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force, or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.[23] The philosophy of this approach is to ignore the technical classification of a crime as a felony or misdemeanor and to focus instead on a balance of interests—the need to apprehend suspects and preserve the safety of the arresting officers as against the value of human life.

Seven states have justification statutes which have adopted the Model Penal Code.[24] New York adopted the Model Penal Code approach in 1965, but returned to the forcible felony rule in 1967. Idaho adopted it in 1971, but repealed it three months after its effective date in 1972.[25]

TITLE 42 U.S.C. 1983 SUITS

The essential elements of a section 1983 case are (1) conduct of some *person,* (2) acting under *color of state law,* and (3) which *deprives* another of *rights, privileges, or immunities secured by the Constitution* or laws of the United States. The essence of the action is a claim to recover damages for injury wrongfully done to another person. The liability is personal.

Allegations of misconduct in 1983 suits are drawn from a broad spectrum of rights, privileges, and immunities afforded protection by the federal Constitution and laws of the United States. The approach is for the complainant to allege a violation of the fourteenth amendment, section 1, which contains the following language: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The key phrases, "privileges and immunities," and "due process of law," and "equal protection of the laws" are the vehicles by which 1983 protections are usually identified. For example, the guarantee against unreasonable searches and seizures contained in the fourth amendment is applicable to state officers by reason of the "due process" language of the fourteenth amendment. Thus, an officer acting contrary to the fourth amendment might be held liable for denying a citizen his constitutional right to due process.

Practically all routine law enforcement work has the potential of becoming the subject of complaint by an irate citizen who demands satisfaction by way of a civil suit under this statute. Therefore, one of the heavy responsibilities of each law enforcement officer is to recognize and protect the rights, privileges, and immunities of persons within the jurisdiction he serves. Section 1983 crystallizes the officer's duty in this respect where constitutional or federal rights are concerned. Thus, the statute implies that an officer has a specific duty to avoid depriving others of the enjoyment of these guarantees and that, by his failure to comply with that duty, he may incur personal liability for the resulting injuries.

Does this mean that an officer, who is negligent in the use of his firearm, may be sued in federal court under 1983 for the violation of a constitutional right?

Section 1983 was not intended to be a substitute for state tort action, nor grant a federal forum for every citizen's claim or injury by a state official. Negligence, as such, is not actionable as a civil rights complaint. The official conduct must deprive another of a constitutional right.[26] Yet, conduct that a state court would classify as negligence has formed the basis of a 1983 suit. Let us look at some examples of constitutional classifications and see how plaintiffs have fashioned their complaints so as to bring their case into federal court as a 1983 case of action.

THE FOURTH AMENDMENT

The fourth amendment declares in part: "The right of the

people to be secure in their *persons* . . . against unreasonable searches and seizures, shall not be violated . . . ." This constitutional provision has long been interpreted to embrace security from arbitrary intrusion by the police. The following case illustrates how one federal court applied this language to facts that sound of negligence. An officer, after reporting to the scene of a disturbance, observed a young boy leave the scene. The officer pursued, thinking the boy had a gun. The boy carried a tire tool in his hand, which he dropped when the officer yelled for him to "halt." All the witnesses, including the officer, heard the tool drop. The officer testified that as he lowered his gun he accidentally pulled the trigger, putting a hole through the boy's thigh. The district judge found the officer's use of force amounted to gross or culpable negligence; however, he was of the opinion that the plaintiff could not prevail under federal law since 1983 was not intended as a means of recoupment for injuries caused by the negligence of a state officer acting in the course of his duty. With this the appellate court disagreed. The appeals court reasoned that gross or culpable conduct was the equivalent of arbitrary action; that is, the officer's action was more than just simple negligence. "Our concern here is with the raw abuse of power by a police officer . . . and not with simple negligence on the part of a policeman or any other official."[27] Such arbitrary action is a constitutional violation.

CRUEL AND UNUSUAL PUNISHMENT—THE EIGHTH AMENDMENT

Plaintiffs have also contended that the use of deadly force against a nonviolent fleeing felon is cruel and unusual punishment in violation of the eighth amendment. In a recent case, officers investigating a burglary attempt killed the plaintiff's son as he was fleeing from an arrest. The plaintiff contended that the state statute, which followed the common law "any felony" rule, was unconstitutional on its face and as it was applied because it permitted the administration of cruel and unusual punishment in violation of the eighth amendment. Deadly force can be constitutionally authorized only when nec-

essary to protect "one's own life or safety, or the life and safety of others."

The three-judge court, convened to determine the constitutionality of the state statute permitting the use of deadly force to arrest any felon, held that the statute was not in violation of the eighth amendment. The amendment deals with punishment, and the short answer to the plaintiff's contention was that the state statutes simply were not dealing with punishment. An officer in effecting an arrest cannot use *any* force for the purpose of punishing a person and to do so is a crime under title 18, United States Code, section 242. It may be better as a value judgment to allow nonviolent felons to escape rather than incur the risk of killing them. But that is a policy question for the state legislature, not for the federal courts to decide in the guise of constitutional adjudication, the court said. The panel went on to hold that the state statute was not unconstitutionally overbroad or vague and was not violative of the equal protection clause of the fourteenth amendment.[28]

> The use of deadly force by law enforcement officers in effecting an arrest is a well-recognized ground for a 1983 case. Yet, the exact place in the Constitution of a right to be free from such force is not clear and has been the subject of disagreement in the decisions of the Federal courts of appeal.

DUE PROCESS

The fifth amendment to the U.S. Constitution provides in part: "No person shall deprived of life, liberty, or property, without due process of law. . . ." The fourteenth amendment applies the same limitation on the states: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The use of deadly force by law enforcement officers in effecting an arrest is a well-recognized ground for a 1983 case. Yet, the exact place in the Constitution of a right to be free from such force is not clear and has been the subject of disagreement in the decisions of the federal courts of appeal. Sev-

eral opinions have expressed the thought that the right arises from the due process clause of the fourteenth amendment; that is, the right to be secure in one's person, a right to life itself, which stands separate and apart from any specific right found in the Bill of Rights. Such a right is fundamental and basic to an ordered society and is inherent in the Constitution. It is thus protected by the due process clause. The claim is, therefore, that the state fleeing felon statute violates the due process clause of the fourteenth amendment because, procedurally, it permits the arbitrary imposition of death by the officer, violates the presumption of innocence, and denies the suspect a right to trial by a jury. Of course, the arguments would apply as well to the use of deadly force against the violent, dangerous felon. Courts, in applying a due process analysis, attempt to balance the interests of society in guaranteeing the right to life of an individual against the interest of society in insuring public safety. They have not agreed on where the balance should be struck.

Two cases illustrate the conflict. Both are from states which follow the common law "any felony" rule, and perhaps best illustrate the constitutional challenge made against the rule. One case is from Connecticut; the other is from Missouri.[29]

Connecticut Case

An officer, while cruising in his patrol car in the ordinary course of his duties, observed an automobile occupied by three young males. Both cars proceeded for several blocks at a lawful rate of speed. Through radio contact, the officer determined the vehicle had been reported stolen. The boys became aware they were being followed and accelerated to about 80 miles per hour. The officer followed in hot pursuit. After traveling several blocks, they reached the end of the road. Both the stolen vehicle and the patrol car slid to a stop, causing a large cloud of dust. Since the occupants of the car were not immediately visible, the officer climbed to the top of a nearby embankment. He observed two men running across a nearby field and called for

them to halt. They momentarily turned to face him, but then began to run away. The officer fired his gun at the leg of one of the fleeing suspects, but struck him in the left buttock, causing internal injuries which resulted in his death. It was stipulated that none of the occupants had threatened physical injury to the officer in any manner.

The rule in Connecticut is that an arresting officer may use deadly force if he reasonably believes it necessary to effect an arrest, or to prevent the escape from custody of a person whom he reasonably believes has committed or attempted to commit a felony.[30]

Missouri Case

Two young boys entered the office of a golf driving range at night by means of an unlocked window for the purpose of stealing money. As they departed through a back window they were intercepted by a policeman. He ordered them to stop, but rather than submit to arrest, they fled in different directions. As another officer, who had just arrived on the scene, rounded the building, he collided with one of the boys. They both fell to the pavement. The officer grabbed the boy's leg, but he broke from the officer's grasp and ran. The officer pursued, but was losing the race. He shouted: "Stop, or I'll shoot," but the boy did not stop. Believing that it was necessary to take further action to prevent escape, the officer fired a warning shot. The bullet, however, struck the youth in the head, causing his death. It was stipulated by the parties that the officer's use of his gun was "reasonably necessary under the circumstances and was authorized by the statutes of the State of Missouri."

The pertinent Missouri statutes read as follows:

Justifiable Homicide

Homicide shall be deemed justifiable when committed by any person in either of the following cases:

(3) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully . . . keeping or preserving the peace.

Rights of Officer in Making Arrests

If, after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all necessary means to effect the arrest.[31]

A civil rights action was instituted in each case under title 42, United States Code, section 1983, alleging that the individual officers, acting under color of state law, deprived the fleeing persons of their lives without due process of law. The officers' answers were the same; namely, they acted in good faith plus they had a reasonable basis to believe their conduct was lawful. In each case, the arresting officer simply relied upon validity of the state statute, which permits a law enforcement official to use deadly force in apprehending a person who has committed a felony.

The plaintiffs' contention was that such statutes as these are unconstitutional, and they should be declared so by the federal courts. While such declarations may not affect the liability of the current defendants, it would remove the defense of good faith in future damage actions of this kind. They asked the courts in each case to fashion a constitutional standard which would restrict the use of deadly force in effecting an arrest to violent felonies or circumstances where there is substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

In the Connecticut case, the federal appellate court rejected the plaintiff's argument: ". . . [S]tates must be given some leeway in the administration of their systems of justice, at least insofar as determining the scope of such an unsettled rule as an arresting officer's privilege for the use of deadly force. Further, in the light of the shifting history of the privilege, we cannot conclude that the Connecticut rule is fundamentally unfair."[32]

In the Missouri case, the federal district court held that a defense of good faith had been established and therefore denied an award of damages. The court concluded there was no longer a controversy between the parties which would permit the granting of declaratory relief; therefore, the court declined to

rule on whether the Missouri statutes were unconstitutional. Even if the statutes were unconstitutional, the court reasoned, the defense was still available to the officer, since he reasonably believed in their constitutionality at the time. No appeal was taken from the denial of damages, but the plaintiff appealed the court's denial of declaratory relief. The federal appellate court disagreed with the district court and remanded the case for consideration on the merits of the constitutional issue. The good faith defense cannot serve as a reason for denying equitable relief. Furthermore, the appellate court disagreed that the parties lacked sufficient adverse interest. The result of a declaratory judgment in favor of the plaintiff would be to remove the defense of good faith in future damage actions. "Those who would use a statute as a shield must be prepared to defend the constitutional validity of that shield."[33]

On remand, the district court held the Missouri statutes did not violate the U.S. Constitution. To abolish the use of deadly force would deprive the state and its citizens of their rights to security, safety, and a feeling of protection. To pick and choose those crimes warranting the application of deadly force is the duty of the legislature. "It is not the role of a federal judge to legislate for the people of a state."[34]

On the second appeal, the federal appellate court again reversed and held the Missouri statutes unconstitutional. Statutes as broad as these deny due process in that they create a conclusive presumption that all fleeing felons pose a danger to the bodily security of the arresting officers and the general public. The court reasoned:

> The police officer cannot be constitutionally vested with the power and authority to kill any and all escaping felons, including the thief who steals an ear of corn, as well as one who kills and ravishes at will. For the reasons we have outlined, the officer is required to use a reasonable and informed professional judgment, remaining constantly aware that death is the ultimate weapon of last resort, to be employed only in situations presenting the gravest threat to either the officer or the public at large. Thus we have no alternative but to find [the statutes] unconstitutional in that they permit

police officers to use deadly force to apprehend a fleeing felon who has used no violence in the commission of the felony and who does not threaten the lives of either the arresting officers or others.[35]

On May 16, 1977, the U.S. Supreme Court vacated the judgment of the Court of Appeals and remanded the case with instructions to dismiss the complaint. For a declaratory judgment to issue, there must be a dispute which calls for an adjudication of adverse interest. There was no such dispute in this case. The plaintiff's claim of a present interest was twofold: (1) that he would gain emotional satisfaction from a ruling that his son's death was wrongful; and (2) he has another son, who *if* ever arrested on suspicion of a felony, *might* flee or give the appearance of fleeing, and would therefore be in danger of being killed by defendant or other police officers. As to the first claim, the Court stated that emotional involvement in a lawsuit is not enough to meet the case or controversy requirement, and were the law otherwise, few cases could ever become moot. As to the second claim, the Court stated that such speculation is insufficient to establish the existence of a present, live controversy.[36]

In disposing of the case in the manner described above, the Supreme Court emphasized it was not considering the merits of the Court of Appeals' opinion. Therefore, the question whether the use of deadly force to apprehend a nondangerous fleeing felon constitutes a violation of the U.S. Constitution remains open. The Missouri case represents the only federal appellate court opinion which, on the merits, has indicated that it does.

CONCLUSIONS

Critics of the common law rule claim the use of deadly force against a nondangerous fleeing felon is an abuse of deadly force. The possible remedies against such abuse—namely, civil liability or criminal prosecution, or both—are ineffective deterrents. Where the state has a justifiable homicide statute which codifies the common law "any felony" rule, it operates to form a shield for the officer, not only against criminal liability but

also against civil liability. Thus, civil courts, while not technically bound to do so, usually recognize in the state statutes a legislative policy toward which they will defer in defining tort liability. Even while doing so one court pointed out: " . . . the preferable rule would limit the privilege to the situation where the crime involved causes or threatens death or serious bodily harm, or where there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed."[37]

Every modern law enforcement executive knows well his duty to insure efficient and effective firearms training before an officer is assigned a weapon. Yet, the executive's responsibility does not rest there. He realizes, in addition, that the officers under his command are entitled to clear and specific instruction on the circumstances under which the use of a firearm is permissible. This takes form in written departmental policy.

One law enforcement executive has remarked that "a policy without teeth is just about as effective as a patrol car with four flat tires." Policy must be reinforced by effective instruction from recruit training at the academy through advanced inservice or firearms training throughout an officer's career.

Notwithstanding departmental policy and excellent instruction in both the skill and proper use of a sidearm, the final decision to use it must rest with the individual officer. That decision will be formed in some measure by his own moral and ethical judgment concerning the use of deadly force. The administrator should be as concerned with an officer who is afraid to use his sidearm when the situation requires its use as he is with the officer's reckless and unjustified use. He fulfills his administrative duty when he addresses both issues. A recent Police Foundation report[38] makes the point that many departments lack adequate recordkeeping procedures designed to identify and monitor officers' conduct involving the use of excessive force and repeated involvement in shooting incidents. The authors point out " . . . the lack of systematic centralized data collection in many departments inhibits the rational devel-

opment of new policies, training programs, and enforcement procedures."[39]

One important misconception about deadly force that became evident in the several cases reviewed in this article is that officers think they have the ability to shoot to wound when the person shot at is fleeing the scene. In case after case, the testimony of the officer was to the effect that he actually shot at an arm or leg, but the bullet struck the head, the neck, or the back. One coroner's report stated: "Given a moving target, in a range of seventy-five yards, or less, the target will probably be hit, but not where the gun was aimed. Therefore, the police officer should not think he is going to inflict a nonfatal wound by shooting at an arm or leg. He should fully expect the shot to be fatal."[40]

Contrary to the popular image of police work, a decision to use deadly force against a fleeing suspect is a rare one for most law enforcement officers. Yet, of all the decisions an officer is called upon to make in emergency arrest situations, whether to use deadly force can turn out to be the most agonizing and tormenting of all. Officer Marshall's testimony about his decision to shoot at a fleeing felon, which led to the Connecticut case of *Jones* v. *Marshall,* is a powerful example of the conflicting emotions affecting an officer faced with a decision whether to use deadly force.[41] In another case, the permanent paralysis of a 15-year-old boy who was caught with a stolen car and the distressed emotions of the defendant police officer following the shooting emphasize the tragedy of the legal, but unwise, use of deadly force.[42]

Law enforcement personnel everywhere have a vital interest in what constitutes the legal use of deadly force. Especially is this true of administrators. They should follow any effort to restrict its legal use, whether that restriction comes through legislative reform, their own state court decisions, or continued constitutional attack in federal courts. Beyond this, the administrator has a more difficult responsibility. He must decide when the use of deadly force is wise and prudent and support that decision with clear policy and effective training.

Notes

1. "Deadly force" as a term of legal art means force by an officer for the purpose of causing, or which he knows creates a substantial risk of causing, death or serious bodily injury. See *Schumann* v. *McGinn,* 240 N.W. 2d 525 n. 1 (Minn. 1976).

2. Plucknett, *A Concise History of the Common Law,* 424-54 (5th Ed. 1956).

3. Comment, *Deadly Force to Arrest: Triggering Constitutional Review,* 11 Harv. Civ. Rights—Civ. Lib. L. Rev. 361 (1976) (hereinafter cited as Comment, 11 Harv. Civ. Rights—Civ. Lib. L. Rev. 361).

4. *Petrie* v. *Cartwright,* 70 S.W. 297, 299 (Ky. 1902). See Note, *The Use of Deadly Force in Arizona by Police Officers,* 1973 L. & Soc. Order 481, 482.

5. *Head* v. *Martin,* 3 S.W. 622, 623 (Ky. Ct. App. 1887). See Pearson, *The Right to Kill in Making Arrests,* 28 Mich. L. Rev. 957, 964 (1930).

6. *Mattis* v. *Schnarr,* 547 F. 2d 1007 (8th Cir. 1976),cert. filed 45 U.S.L.W. 3669.

7. *Ashcroft* v. *Mattis,* 45 U.S.L.W. 3751 (1977).

8. Note, *The Use of Deadly Force in the Apprehension of Fugitives From Arrest,* 14 McGill L. J. 293 (1968). See also, Comments of Professor John Barker Waite reported in Model Penal Code, Tent. Draft No. 8 (1958), §3.07, p. 60.

9. *Mattis* v. *Schnarr, supra* note 6, at 1023 (Judge Gibson, dissenting).

10. *Jones* v. *Marshall,* 528 F. 2d 132 (2nd Cir. 1975).

11. N.Y. Pen. Law §55.05(1) (1973).

12. *Jones* v. *Marshall, supra* note 10, at 142. Chief Justice Burger's comment in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 419 (1971) (dissenting opinion): "I wonder what would be the judicial response to a police order authorizing 'shoot to kill' with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a 'shoot' order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter."

13. 9 American Law Institute Proceedings 186-187 (1931), quoted in *Mattis* v. *Schnarr, supra* note 6, at 1014.

14. ALI Proceeding (1958), p. 285; *Schumann* v. *McGinn, supra* note 1, at 541.

15. *Jones* v. *Marshall, supra* note 10, at 142.

16. The 24 states, according to Comment, 11 Harv. Civ. Lib. L. Rev. at 368 n. 30, are: Alaska Stat. §11.15.090 (1970); Ariz. Rev. Stat. Ann. §13-461 (Supp. 1972); Ark. Stat. Ann. §41-510(2)(a) (Spec. Pamphlet 1976); Cal. Penal Code §196 (West 1970); Colo. Rev. Stat. Ann. §18-1-707(2)(b) (1973); Conn. Gen. Stat. §53a-22 (c)(2) (1975); Fla. Stat. Ann. §766.05 (Supp. 1975); Idaho Code §19-610 (1970); Ind. Code §35-1-19-3 (Burns 1975); Iowa Code §755.8 (1971); Kan. Stat. Ann. §21-3215(1) (1974); Minn. Stat. §609-065(3) (1974); Miss. Code. Ann. §97-3-15 (1972); Mo. Rev. Stat. §559.040 (Vernon 1969); Mont. Rev. Code. Ann. §94-2512 (Spec. Supp. 1973); Nev. Rev. Stat. §200-140(3)(b) (1973); N.H. Rev. Stat. Ann. §627-5(11)(b)(1) (Supp. 1973); N.M. Stat. Ann. §40A-2-7 (1963); Okla. Stat. Ann. tit. 21, §732 (1951); R. I. Gen. Laws §12-7-9 (1969); S.D. Comp. Laws Ann. §22-16-32 (1967); Tenn. Code Ann. §40-808 (1956); Wash. Rev. Code Ann. §9.48.160 (1961), §9A.16.040(3) (1975) (effective July 1, 1976); Wis. Stat. §939.45(4) (1973).

17. *Mattis* v. *Schnarr, supra* note 6, at 1022.

18. Mo. Rev. Stat. §554,190, §559,040 (1969).

19. *Clark* v. *Ziedonis,* 368 F. Supp. 544 (E.D. Wis. 1973).

20. *Clark* v. *Ziedonis,* 513 F.2d 79 (7th Cir. 1975).

21. According to Comment, 11 Harv. Civ. Rights—Civ. Lib. L. Rev., at 368 n. 31, they are: Ga. Code Ann. §26-902 (1972); Ill. Rev. Stat. ch. 38, §7-5(a)(2) (1973); N.Y. Penal Law §35.30(1)(a)(ii) (McKinney Supp. 1971); N.D. Cent. Code §12.1-05-07(2)(d) 1975; Ore. Rev. Stat. §161-239 (1973); Pa. Stat. Ann. tit. 18, §508(a)(1)(ii) (1973); Utah Code Ann. §76-2-404(2)(b) (Supp. 1975).

22. Harvie, *The Police Officer's Use of Force: Law and Liability* 10, published by Police Training Institute, University of Ill. (undated).

23. Model Penal Code, §§3.04-3.11 (Proposed Official Draft, 1962).

24. According to Comment, 11 Harv. Civ. Rights—Civ. Lib. L. Rev. at 369 n. 32, these states are: Del. Code Ann. tit. 11 §467(c) (1974); Hawaii Laws, Act 9, ch. 3 (1972) (effective 1973) §307(3); Ky. Rev. Stat. §503.090(2) (1975); Maine Rev. Stat. Ann. tit. 17A §107-2(B) (1975) (effective March 2, 1976); Neb. Rev. Stat. §28-839(3) (Supp. 1974); Tex. Penal Code art. 2, §9.51(c) (1974); North Carolina allows the use of deadly force to arrest one fleeing from a felony with a deadly weapon in addition to those situations in which the Model Penal Code formulation authorizes deadly force. N.C. Gen. Stat. §15A-401(d)(2)(b) (1973).

25. Note, *Justification: The Impact of the Model Penal Code on Statutory Reform,* 75 Column. L. Rev. 914, 955 (1975).

26. *Paul* v. *Davis,* 47 L. Ed. 2d 405 (1976).

27. *Jenkins* v. *Averett,* 424 F. 2d 1228, 1232 (4th Cir. 1970). See also *Reed* v. *Philadelphia Housing Authority,* 372 F. Supp. 686 (E.D. Pa. 1974).

28. *Cunningham* v. *Ellington, supra* note 39.

29. *Jones* v. *Marshall, supra* note 10; *Mattis* v. *Schnarr, supra* note 6.

30. Conn. Gen. Stat., §53a-22.

31. Mo. Rev. Stat., *supra* note 18.

32. *Jones* v. *Marshall, supra* note 10, at 142. See also *Wiley* v. *Memphis Police Department,* 548 F. 2d 1247 *(6th Cir. 1977); Wolfer* v. *Thaler,* 525 F. 2d 977 (5th Cir. 1976), *cert. denied* 425 U.S. 975 (1976); *Hilton* v. *State,* 348 A. 2d 242 (Me. 1975).

33. *Mattis* v. *Schnarr, supra* note 6, at 1020.

34. *Mattis* v. *Schnarr,* 404 F. Supp. 643, 651 (E.D.) Mo. 1975).

35. *Mattis* v. *Schnarr, supra* note 6, at 1020.

36. *Ashcroft* v. *Mattis, supra* note 7.

37. *Jones* v. *Marshall, supra* note 10, at 140.

38. Police Foundation, "Police Use of Deadly Force" (1977).

39. *Id.* at 141.

40. Coroner's Report in *Jones* v. *Marshall,* 383 F. Supp. 358 (D. Conn. 1974), *aff'd* 528 F. 2d 132 (2nd Cir. 1975), reported in Goldstein, Dershowitz, & Schwartz, *Criminal Law: Theory and Process* 331 (1974).

41. Goldstein, Dershowitz, and Schwartz, *Criminal Law: Theory and Process* 327-30 (1974).

42. *Schumann* v. *McGinn, supra* note 2, at 541.

CHAPTER 4

EXECUTION WITHOUT TRIAL: POLICE HOMICIDE AND THE CONSTITUTION*

LAWRENCE W. SHERMAN

The national debate over the State's right to take life has been sidetracked, in a sense, on the issue of "capital punishment," or more precisely, execution after trial. Far more deadly in impact is the body of law permitting execution without trial through justified homicide by police officers. In 1976, for example, no one was executed and 233 persons were sentenced to death after trial, yet an estimated 590 persons were killed by police officers justifiably without trial.[1] Even in the 1950s, when an average of seventy-two persons were executed after trial each year,[2] the average number of police homicides was 240 a year, according to official statistics,[3] and 480 a year according to one unofficial estimate.[4] Since record keeping began in 1949, police actions have been by far the most frequent method with which our government has intentionally taken the lives of its own citizens.

The significance of police homicide is not, however, derived solely from its frequency. Equally important is the nature of

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the crimes that justify police use of deadly force. Unlike executions after trial, executions before trial are not limited to extremely serious crimes such as murder, rape, and treason. Twenty-four states follow what is thought to be the traditional common-law doctrine, which permits the use of deadly force whenever necessary to prevent a felony or to arrest someone whom an officer has reasonable grounds to believe has committed a felony[5]—any felony, including, in at least one state, spitting on a policeman.[6] Eight states have adopted the more restricted version of this common-law doctrine proposed by the Model Penal Code;[7] ten other states have adopted statutes allowing police to use deadly force to arrest suspects of "violent" or "forcible" felonies,[8] which in some states may include burglary.[9] Even under these relatively recent restrictions, most police officers are still legally empowered to shoot unarmed fleeing burglary suspects in the back.

The available evidence suggests that when the police do use deadly force, their targets are often suspects of less serious crimes.[10] Approximately half of the people at whom police shots were fired in the several cities studied have not carried guns, and the proportion of those shot while fleeing is substantial.[11] To be sure, many police homicides occur in defense of life, although the data are not precise enough to determine how many. There is no doubt, however, that many executions without trial occur in response to crimes against property without any defense justification.

A review of the legal history of police homicide shows that the rule that any felony warrants the use of deadly force is a common law anachronism to which our courts and legislatures continue to cling long after the Crown Courts have treated the doctrine as dead and Parliament has laid it to rest through criminal law reform. More important, an analysis of the constitutional status of the any-felony rule shows that it should be held to violate the due process clause of the fifth amendment, the ban on cruel and unusual punishment of the eighth amendment, and the equal protection clause of the fourteenth amendment. Both the historical and constitutional lines of inquiry sug-

gest that only the defense-of-life doctrine is appropriate to govern police use of deadly force.

I. THE ANY-FELONY RULE: AN HISTORIC ANACHRONISM

The original meaning of the common-law justification for homicide to effect a felony arrest was very different from its current meaning. A barbaric legal doctrine[12] transplanted to England before the common law began,[13] the justification arose at a time when (1) there were no accurate and reliable weapons available that could kill at any distance, (2) the label "felony" was reserved for only the most serious crimes, all of which were punishable by death, and (3) there was virtually no communication among law enforcement officers in different communities. Each of these three elements of the historical context has changed drastically over the centuries, and with it the practical meaning of the doctrine.

The medieval weaponry used in "hue and cry"[14] during the early years of the any-felony rule was apparently limited to knives, swords, farm tools, and halberds. The longbow was not introduced until 1415,[16] and in 1504 the Tudors restricted the crossbow to lords and large landowners.[15] Henry VIII allowed noblemen and wealthy commoners to own guns,[17] but "[t]he musket of Shakespeare's time could not reach an enemy thoughtless enough to stand farther than eighty or ninety yards away."[18] A "typical" London street brawl in the reign of Henry VIII was put down by a band of constables, none of whom were armed with any weapons other than those used in hand to hand combat.[19] In this technological context, then, the practical meaning of the deadly force doctrine was that suspects could be killed if they resisted in a hand to hand struggle, but it did not mean that they could be killed from a distance behind while they were in flight.

That meaning changed in the nineteenth century with the invention of the revolver. Police officers in large American cities, who had been disarmed since the decline of Indian attacks before the Revolutionary War, began to carry revolvers in the

1850s after criminals used revolvers to shoot and kill their colleagues.[20] The dumping of thousands of army revolvers on the surplus market after the Civil War speeded the general rearmament of an increasingly violent urban society[21] and led to official acceptance of police use of revolvers.[22] The immediate effect of this change was that the police could, and did, shoot fleeing suspects who were posing no immediate threat to anyone.

The effect of the revolution in weaponry on police homicide was compounded by the expansion in the scope of felonies. Originally reserved under the common law for felonious homicide, mayhem, arson, rape, robbery, burglary, larceny, prison breach, and rescue of a felon, all punishable by death,[23] the felony label was attached to many more crimes after the advent of the revolver.[24] Moreover, while the scope of felonies was expanding, the scope of capital felonies contracted, leaving the death penalty in most states only applicable to treason and crimes endangering life or bodily security.[25] These changes in the legal context of police homicide significantly altered the meaning of the common-law any-felony doctrine. The changes greatly expanded the number of situations in which the police could kill without trial, and they created a gross difference in proportion between the severity of the post-trial penalty and the severity of the penalty for attempting to escape arrest.

While advances in weapon technology and changes in the criminal law were expanding the scope and potency of the any-felony rule, one of the primary reasons for its existence was fading. By the late nineteenth century, the rise of bureaucratic police agencies with the capacity to communicate information about suspects at large was undermining the necessity for the use of deadly force in the apprehension of felons. The escaping suspect of eleventh-century England might establish a new life in another community with little fear of eventual capture, and the social goal of retribution was thus easily frustrated by a fleeing felon. By the eighteenth century, however, Justice Fielding was circulating descriptions of wanted criminals outside of London,[26] and by the early twentieth century American detectives consulted their colleagues in other cities about vari-

ous thieves and their whereabouts.[27] The effect of the increasingly sophisticated apprehension techniques meant that it was no longer absolutely necessary to kill a suspect, if his identity were known, in order to insure his eventual capture.

These changes in the scope and impact of the any-felony doctrine did not escape public notice and criticism. An 1858 *New York Times* editorial questioned one of the first police shootings there, making a value judgment supported by the constitutional analysis below. The *Times* suggested, "if a policeman needed to defend his life, the use of force was permissible, but if he was chasing a suspect, he had no right to shoot the man. A policeman either had to be swift enough to catch the suspect or justice must be lost."[28] Another *Times* editorial the same year expressed grave concern about a possible future in which "[e]very policeman is to be an absolute monarch, within his beat, with complete power of life and death over all within his range, and armed with revolvers to execute his decrees on the instant, without even the forms of trial or legal inquiry of any kind,"[29] a future that, to a large extent, has been realized.

These changes did not escape the notice of the courts. As early as 1888 the Supreme Court of Alabama, observing the legislative inflation of crimes to felony status, pronounced that "the preservation of human life is of more importance than the protection of property." The court restricted the common-law rule by disallowing deadly force in the prevention of secret felonies not accompanied by force.[30] Several other decisions grappled with the obsolete common-law standard,[31] but generally the courts were, as one commentator noted, "reluctant to abandon a convenient pigeon-hole disposal of cases on the basis of whether the crime was a felony or a misdemeanor."[32]

Meanwhile, the English common law had already effectively abandoned the absolute right to kill to prevent felonies or apprehend felons. It replaced the any-felony doctrine with a balancing test emphasizing necessity and proportion:

> The circumstances in which it can be considered reasonable to kill another in the prevention of crime must be of an extreme kind; they could probably arise only in

> the case of an attack against a person which is likely to cause death or serious bodily injury and where killing the attacker is the only practicable means of preventing the harm. *It cannot be reasonable to kill another merely to prevent a crime, which is directed only against property.*[33]

This principle was so well established in case law that by 1879 the Criminal Code Bill Commission took it as a "great principle of the common law" that the "mischief done by [the use of force to prevent crimes should not be] disproportioned to the injury or mischief which it is intended to prevent."[34] Moreover, a close reading of the original common-law codifiers Foster, Blackstone, Hawkins, and East reveals so many internal contradictions and exceptions to the right to kill all felons[35] that one may question whether there ever was such a rule. Thus, in 1965 the Criminal Law Revision Committee reported to Parliament that despite "old authority" for the right to kill all felons, "the matter is very obscure; . . . owing no doubt to the restraint of the police there is a dearth of modern authority on it;" and concluded that their central proposal to reclassify crimes would have no effect on police powers since "the likelihood that anything would turn nowadays on the distinction between felony and misdemeanor is very slight."[36]

In this country, however, the use of the distinction remained anything but slight. As recently as 1977 the Sixth Circuit upheld a Tennessee statute under which the Memphis police shot and killed a sixteen-year-old burglary suspect fleeing from a hardware store.[37] Noting that "the legislative bodies have a clear state interest in enacting laws to protect their own citizens against felons," and that the statute "merely embodied the common law which has been in force for centuries and has been universally recognized"[38] (something that we have seen is clearly *not* the case in English common law), the court rejected a broad constitutional challenge to the statute. An argument that the statute violated the eighth amendment's ban on cruel and unusual punishment was rejected on the grounds that police homicide is not "punishment."[39] The assertion that the statute violated due process protections was rejected on the

grounds that state interests served by police homicide were more important that an individual's right to trial before being killed by police.[40] While recognizing that the Eighth Circuit had recently held that a similar Missouri statute did violate fifth and fourteenth amendment due process guarantees,[41] the Sixth Circuit criticized that decision for intruding into legislative matters.[42] Finally, the Sixth Circuit case dismissed a claim of racial discrimination in violation of the fourteenth amendment because "both white and black fleeing felons . . . have been fired upon or shot by Memphis police."[43] The Supreme Court denied certiorari.[44]

The Sixth Circuit's cursory treatment of the threshold issue of whether police homicide constitutes punishment, however, is hardly definitive. Measured against well established Supreme Court standards, police homicide clearly constitutes punishment. When police homicide is viewed as punishment, the fifth, fourteenth, and eighth amendment arguments that all present police homicide statutes and case law are constitutionally unsound are much more compelling.

II. CONSTITUTIONAL ANALYSIS

A. The Characterization of Police Homicide as Punishment

The often elusive definition of punishment in philosophy and jurisprudence has been a "major obsession with the English linguistic philosophers of this century."[45] The definitions vary sharply, with distinctions focusing upon the intent of the putative punisher, or the purpose of inflicting pain or suffering.[46] As the recent ruling in *Bell v. Wolfish*[47] reveals, the issue of intent has likewise proved to be divisive in the Supreme Court's efforts to define deprivations that constitute punishment. Justice Rehnquist, delivering the opinion of the Court, held that in determining whether particular conditions accompanying pretrial detention amount to punishment in the constitutional sense a "court must decide whether the disability is imposed for

the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."[48] "Absent a showing of an expressed intent to punish," Justice Rehnquist continued, "that determination will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it],' "[49] (quoting *Kennedy v. Mendoza-Martinez,*[50] apparently as the controlling case on the subject). Justice Stevens, however, pointed out in his dissent that the *Mendoza* Court also recognized that evidence of intent would sometimes be "unavailable or untrustworthy."[51] "In such cases," Justice Stevens said "the [*Mendoza*] Court stated that certain other 'criteria' must be applied 'to the face' of the official action to determine if it is punitive."[52] Even Justice Rehnquist, whose opinion in *Bell v. Wolfish* reveals a very restrictive conception of what constitutes punishment, cited the seven *Mendoza* criteria approvingly. Although he did not, as Justice Marshall pointed out,[53] make full use of them, he nonetheless refers to them as "useful guideposts in determining" what is punishment, calling them "the tests traditionally applied to determine whether a governmental act is punitive in nature."[54]

With the original intent of the Gothic chieftains in establishing the kill-to-arrest rule lost in history, and determination of the subjective intent of police officers acting within the rule vulnerable to "hypocrisy and unconscious self-deception,"[55] it is necessary to turn to the criteria used in *Mendoza* and apply them "to the face" of police homicide to determine whether that action constitutes punishment. The decision offered seven criteria:

[1] Whether the sanction involves an affirmative disability or restraint,
[2] whether it has historically been regarded as a punishment,
[3] whether it comes into play only on a finding of *scienter,*
[4] whether its operation will promote the traditional aims of punishment—retribution and deterrence,

[5] whether the behavior to which it applies is already a crime,

[6] whether an alternative purpose to which it may rationally be connected is assignable for it, and

[7] whether it appears excessive in relation to the alternative purpose assigned . . . .[56]

The *Mendoza* Court noted that all of these criteria are relevant to the inquiry, although they "may often point in differing directions."[57] All seven criteria, however, suggest that police homicide constitutes punishment, as is clear when each criterion is examined.

(1) *Whether the sanction involves an affirmative disability or restraint.* Recent pronouncements by the Court leave no doubt that the sanction of police homicide constitutes "an affirmative disability or restraint." It is not only a deprivation of rights, but a deprivation of "the right to have rights,"[58] not only a sanction, but a "unique" sanction. As Justice Brennan stated, "[i]n a society that so strongly affirms the sanctity of life, . . . the common view is that death is the ultimate sanction."[59] Five members of the present Court have "expressly recognized that death is a different kind of punishment from any other which may be imposed in this country" and stated that "[f]rom the point of view of the defendant, it is different in both its severity and finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action."[60] The right to life has consistently been held fundamental and preeminent.[61] Its deprivation has the same effect no matter what the expressed purpose may be.

(2) *Whether it has historically been regarded as punishment.* The historical record clearly demonstrates that executions without trial, including the kill-to-arrest doctrine, were generally viewed as punishment. Thieves were often killed outright during the hue and cry, even after they had been captured. "Let all go forth where God may direct them to go," urged the tenth-century laws of Edgar; "Let them do justice on the thief."[62] Suspicion sufficed to convict thieves without any

trial at all, and "execution in such cases often followed immediately on arrest."[63] According to the preamble to Act 24 of Henry VIII, it appears that the common law authorized the victims of crimes and attempted crimes to kill the criminal, regardless of whether it was necessary to prevent the felony.[64] In the twelfth and thirteenth centuries "outlaws could be beheaded by anyone, and a reward was paid for their heads under Richard I."[65] Abjurors of the realm (felons who had escaped into religious sanctuary and agreed to leave the country forever) who strayed from the highway on their journey to the sea could also be beheaded by anyone.[66] In the context of the times in which the kill-to-arrest doctrine evolved, it was clearly linked to a philosophy of summary justice that can only be viewed as punishment.

Modern commentators have taken the same view of the historical status of the doctrine. Professor Perkins notes that "as the felon had forfeited his life by the perpetration of his crime, it was quite logical to authorize the use of deadly force."[67] Another commentator on killing fleeing felons described "the extirpation [as] but a premature execution of the inevitable judgment" in the era of capital punishment for all felonies.[68] With the passing of that era, premature execution is of course more severe than the "inevitable judgment." The historical character of police homicide as punishment, however, is not altered by the modern disproportion between pretrial and post-trial sanctions.

(3) *Whether it comes into play only on a finding of* scienter. The basis and parameters of the *Mendoza* Court's "*scienter*" criterion are unclear. Of the two cases cited to support the relevance of *scienter* to a punishment characterization,[69] one in fact holds that penalties may constitute punishment regardless of *scienter,* apparently contradicting the point for which it was cited. The holding stated that, regardless of *scienter,* any fine imposed on an import merchant for underestimating the value of certain goods was "still punishment and nothing else."[70] The other case cited in *Mendoza* only mentions in passing that the exemption from a federal child labor "tax" of employers who

do not know that their workers are underage suggests that the tax is really a penalty. The Court in that case opined that, "[S]cienter is associated with penalties, not with taxes."[71] Neither case actually holds that punishment is only imposed after finding a *scienter*.

The apparent contradictions notwithstanding, the Supreme Court has held that "the general rule at common law was that *scienter* was a necessary element . . . of every crime."[72] Regardless of criticisms of this usage,[73] one may proceed from it to infer that when an officer finds sufficient cause to believe someone is a felon and thus has met a requisite justification for killing him, the officer finds *scienter* at the same time. If the officer does not have probable cause to believe that *scienter* is present, then he does not have probable cause to believe the person is a felon, and killing is not justified. Justified police homicide therefore historically presumes *scienter*, and satisfies the apparent meaning of this *Mendoza* criterion of punishment.

(4) Whether its operation will promote traditional aims of punishment—retribution and deterrence. Police homicide clearly promotes retribution, the first of the two "traditional aims of punishment" named by the *Mendoza* Court. As the dissent in *Mattis v. Schnarr*,[74] a recent Eighth Circuit decision argued in support of the any-felony rule, which the court had found unconstitutional, "[t]here is no constitutional right to commit felonious offenses and to escape the consequences of those offenses." In that context, "consequences" strongly implies "just desserts," or retribution.

Whether police homicide, or indeed any punishment, actually promotes deterrence, the second of the two traditional aims named, may be an impossible question to answer.[75] If undisputed empirical evidence of a deterrent effect is required to evaluate whether a sanction is a punishment, then many social scientists would argue that few sanctions qualify. If, on the other hand, a deterrent effect need only be hypothesized for the sanction to be a punishment, then police homicide passes the test. The assumption by legal scholars that police homicide has a deterrent effect is reflected in the American Law Institute's

debates over the issue. The deterrence of flight from arrest[76] and the deterrence of robbery[77] were both specifically mentioned, albeit with differences of opinion. The deterrence hypothesis is also implied in recent federal cases, such as *Jones v. Marshall,*[78] a Second Circuit opinion in which a three-judge panel upheld Connecticut's common law permitting police to kill fleeing felons, observing that the states had the right to place a higher value on order than on the rights of suspects. The only way such a homicide could achieve order is through deterrence.

(5) *Whether the behavior to which it applies is already a crime.* All of the behavior to which police homicide applies is already a crime, or the officer must reasonably believe it to be a crime. There is however, some question about *which* crime police homicide is punishing. As Professor Mikell asked in his often quoted statement to the American Law Institute:

> May I ask what we are killing [the suspect] for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? . . . It cannot be . . . that we allow the officer to kill him because he stole the automobile, because the statute provides only three years in a penitentiary for that. Is it then . . . for fleeing that we kill him? Fleeing from arrest . . . is punishable by a light penalty, a penalty much less than that for stealing the automobile. If we are not killing him for stealing the automobile and not killing him for fleeing, what are we killing him for?[79]

No matter how little sense it makes in relation to the post-trial penalty, we are in fact killing the auto thief for the volatile combination of felony and flight, both of which are crimes.

(6) *Whether an alternative purpose to which it may rationally be connected is assignable for it.* The purposes of capture and crime prevention, rather than punishment, may no doubt be rationally connected to police homicide as alternatives to the purpose of punishment. Just as the *Wolfish* Court held that overcrowding and other disabilities imposed on pretrial detainees in a federal jail did not constitute punishment because they were merely an "inherent incident" of the objective of insuring

detainee's presence at trial, it could be argued that death is merely an inherent incident to insuring that felony suspects are captured and that felonies are prevented. By this logic, death from police homicide is not a punishment if the expressed intent of the officers using deadly force is to apprehend felony suspects.

An equally strong case, however, could be made that the presence of multiple purposes in a governmental action does not automatically grant preeminence to the non-punitive purpose. One purpose of prison systems in some states is the manufacture of license plates, but a penitentiary sentence could hardly be described as merely an inherent incident of a legitimate state interest in manufacturing license plates. Implicit in the *Wolfish* Court's reasoning is a judgment about the primary purpose of any governmental action that has more than one purpose. Punishment rather than apprehension can be judged the primary purpose of police homicide. As one court once noted, "[t]he reason for . . . killing felons . . . in attempts to arrest them . . . is obvious . . . [T]he safety and security of society require the speedy arrest and punishment of a felon."[81]

Unlike the other *Mendoza* criteria, this one is explicitly qualified by the succeeding criterion, which questions whether the possible alternative purpose to punishment appears excessive. No matter what the primary purpose of police homicide is judged to be, then, if it appears excessive in relation to a non-punitive purpose, it must be defined as punishment. As Justice Stevens interprets *Mendoza* in his *Wolfish* dissent, "when there is a significant and unnecessary disparity between the severity of the harm to the individual and the demonstrated importance of the regulatory objective, . . . courts must be justified in drawing an inference of punishment."[82]

(7) *Whether it appears excessive in relation to the alternative purpose assigned to it.* The disparity between the death of a suspect and the purposes of prevention (of nonviolent crimes) and capture is both significant and unnecessary, and therefore excessive in relation to those purposes. It is significant in the case of capture because, once again, the means used to prevent

the suspect's escape is far more severe than the maximum penalty that would be imposed upon sentencing for all crimes (depending on the jurisdiction) except murder, treason, and rape. It is significant in the case or prevention of nonviolent crimes because the evil imposed is greater than the evil presented. It is unnecessary in the case of capture because most suspects can eventually be recaptured, and in the case of prevention because nonlethal intervention is usually possible. A sanction that takes a life to prevent the theft of an ear of corn[83] or a chicken[84] cannot, in a society that values life, be other than excessive.

Each of the *Mendoza* criteria point to the conclusion that the use of deadly force to capture felons and prevent felonies constitutes punishment, and is therefore subject to the constitutional restraints on the use of punishment. Even if it were ruled not to be punishment, however, it is still a deprivation of rights subject to the due process requirements of the fifth and fourteenth amendments. Although a ruling that police homicide constitutes punishment has the added advantage of subjecting it to eighth amendment review, that review is generally reached only after due process guaranties have been satisfied.[85] In the case of police homicide, the due process guaranties are anything but satisfied.

B. Due Process Requirements

Although police homicide raises serious due process questions if viewed merely as a deprivation of rights, when recognized as punishment its apparent violation of due process guaranties is striking. The framers "intended to safeguard the people of this country from punishment without trial by duly constituted courts,"[86] and "under the due process clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[87] The limitation on imposing death, under the fifth amendment, is particularly strict. It requires that "[n]o person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury." Indeed, the Eighth Circuit observed that a literal reading of the due process clause would mean that "life

could never be taken without a trial."[88] And that is precisely what it should mean, with respect to life taken under the authority exercised on behalf of the State. A less rigid standard, however, must be applied when deadly force is used by an individual in accordance with the self-defense doctrine.[89] In addition to personal defense, this doctrine includes the defense of "another person against what is reasonably perceived as an immediate danger of death or grievous bodily harm to that person from his assailant."[90]

The Eighth Circuit, the only circuit to hold that the any-felony rule violates the fourteenth amendment, finds this interpretation too extreme. "Such a literal reading," it stated, "would fail to recognize the interests of the state in protecting the lives and safety of its citizens," and therefore the court held that the situations in which the State can take a life without according a trial to the person whose life is taken are to be determined by balancing society's interest in public safety against the right to life of an individual.[91] Irrespective of their conclusion, the use of the balancing test is a fundamentally flawed procedure for determining whether the right to a form of due process specified in the Constitution is applicable. The fifth amendment does not depend upon a showing that it is in the community's best interests that the procedures be accorded.[92] As Professor Dworkin has observed, "a right against the Government must be a right to do something even when the majority would be worse off for having it done."[93] The majority is no doubt worse off whenever a fleeing felon escapes, but that should not alter the felon's fifth amendment right to grand jury review and trial before he is executed.

The balancing test is, however, the prevailing method of determining how much process is due once it is determined that due process applies.[94] Although the severity of individual deprivation and the relative importance of governmental interest in summary action is arguably incommensurable,[95] even a balancing procedure should lead reasonable men and women to a more restrictive scope of executions without trial. Both the fifth and fourteenth amendments specifically forbid deprivation

of life without due process of law, so there is no question that some process is due. The issue of when to allow executions without the due process of trial must then balance the individual's fundamental right to life[96] and the right not to be deprived of life without the due process of trial[97] against the state's interest, not just the interest in general public safety, but its narrow interest in protecting the property and lives of other specific individuals. We have long since decided that life is more important than property, and that no property offender, no matter how serious or recidivistic, may be executed after trial for his offenses. It should follow that the state's interest in protecting the property of others is not compelling enough to allow execution without the due process of trial.

The state's interest in protecting the lives and bodies of other individuals is, however, far more compelling, and much more appropriate for a balancing test.[98] When someone poses an immediate threat of grievous injury to another, the use of a balancing test would lead to the conclusion that the state's interest in protecting the other person allows it to commit an execution without the due process of a trial. It is not necessary, however, to adopt the balancing test procedure in order to conclude that police officers may kill in defense of life. The self-defense doctrine gives them that power as individuals irrespective of their association with the state. The police can kill those posing an immediate threat of violence without violating the fifth amendment rights of those killed, just as any citizen can. The legitimate concern some courts have shown with police officer's safety[99] can, accordingly, be satisfied without a fleeing-felon or any-felony rule. If a fleeing felon whom the officer reasonably believes to be armed turns toward the pursuing officer with reasonably apparent intent to shoot the officer, the officer may kill him under the self-defense doctrine. The fleeing-felon rule in no way increases the officer's safety beyond the safeguard of the self-defense rule.

If a balancing test is used, however, the final and most difficult problem is to assess the state's interest in insuring public safety. An escaped felony suspect is certainly free to

commit other crimes, but that should not be a compelling justification for the use of deadly force. A released convict who has served a full penitentiary sentence may be equally likely to commit more crimes, but that justifies neither his execution nor his incarceration beyond the end of his sentence. Far more compelling is the deterrence argument that the failure to kill fleeing felons will encourage more felonies. No empirical attempt to evaluate this argument has been made to date, but let us assume, *arguendo,* that each police homicide prevents eight or even eighty, robberies. Are we to measure the value of life in such utilitarian terms? Is it a lesser evil that a life be lost than several hundreds or thousands of dollars be stolen? In a society that punishes million-dollar white-collar frauds with a four-month prison term, it seems difficult to answer that question affirmatively.

Our primary concern, however, is with the Constitution, and not with the greatest good for the greatest number. Even if a balancing test determined that the state's interest in maintaining public safety allowed it to execute fleeing and in-progress felons without trial under the due process requirements of the fifth and fourteenth amendments, those executions could still be ruled unconstitutional as either cruel and unusual punishment under the eighth amendment, or a denial of equal protection under the fourteenth amendment.

C. Police Homicide as Cruel and Unusual Punishment

The lack of guidance on the framers' intent in banning cruel and unusual punishment makes that phrase difficult to define precisely.[101] Nonetheless, four criteria for judging whether a given punishment is cruel and unusual can be clearly discerned in *Furman v. Georgia*[102] and its predecessor cases. The criteria are whether the penalty is (1) inherently cruel,[103] (2) disproportionately severe to the offense it punishes,[104] (3) unacceptable to contemporary society,[105] or (4) inflicted arbitrarily.[106] None of the four seems to have been overruled in the death penalty cases since *Furman,* and all but the third are specifically addressed in the opinion of the Court—a consensus the *Furman*

Court lacked—in *Gregg v. Georgia.*[107] Any of the four criteria can make a punishment cruel and unusual. Police homicide satisfies at least three, and on occasion all four criteria.

(1) *Inherent cruelty.* The present Court has consistently held that death is not, per se, an unconstitutional punishment.[108] Previous courts have, however, considered whether particular modes of inflicting death are unconstitutionally cruel.[109] Shooting and electrocution have both withstood challenges, but it is doubtful that any court would uphold death inflicted by a sustained beating after a suspect has been subdued,[110] or by a drowning or a choke-hold.[111] Nonetheless, police have used all three methods to kill suspects in cases that have received widespread attention, and have sometimes received light penalties for doing so. Yet most police homicides do not receive much attention or review.[112] Under the present any-felony rule, prosecutors are on firm ground for declining to prosecute police officers who beat felony suspects to death when the beating is necessary to effect an arrest. Unless such action can be justified by the self-defense doctrine, it would seem to be an inherently cruel and unusual form of punishment.

(2) *Disproportionate severity.* The determination whether a punishment is proportionately severe to the crime it punishes is essentially a moral judgment, not based on objective assessments of the necessity or efficacy of the penalty imposed.[113] When judged in accord with contemporary standards, police homicide is "grossly out of proportion to the severity"[114] of most of the crimes it punishes.[115] As a former Oakland, California, police chief graphically explained when restricting his officers' right to shoot fleeing burglars beyond the state law's limitations:

> Considering that only 7.65 percent of all adult burglars arrested and only .28 percent of all juvenile burglars arrested are eventually incarcerated, it is difficult to resist the conclusion that the use of deadly force to apprehend burglars cannot conceivably be justified. For adults, the police would have to shoot 100 burglars in order to have captured the eight who would have gone to prison. For juveniles, the police would have to shoot

1,000 burglars in order to have captured the three who would have gone to the Youth Authority.[116]

Comparisons to actual punishments typically imposed after trial would probably show that killing a fleeing suspect of any crime, even murder, would impose a more severe punishment without trial than could be expected after conviction. In the case of murder, treason, and rape, a state's decision to make available the death penalty for post-trial punishment might mean that pretrial execution would not be disproportionately severe. But murder and rape do not even appear as categories in most studies of police use of deadly force, since they comprise such a small percentage of all crimes punished by police homicide. Under the proportional severity test used for the past century in English law, which embodies social values quite similar to our own, even fleeing murderers could probably not be killed justifiably in order to arrest them once they no longer posed an immediate threat of violence.[117]

When analyzed from a utilitarian perspective, police homicide is as disproportionately severe as it is when evaluated by moral standards as a punishment.[118] Assuming that prevention of escape is the utilitarian goal served by police homicide, the fact that modern apprehension techniques have diminished considerably the importance of immediate capture leaves police homicide disproportionately severe in relation to the utilitarian purposes it might serve. Whether viewed as a punishment or a method of capture, the severity of police homicide is disproportionate to its objective.

(3) *Lack of acceptability in contemporary society.* Although police homicide in arresting serious felons did not shock the conscience[119] of medieval England, the eighth amendment must be interpreted in light of the evolving standards of a maturing society.[120] Three of four available objective indicators,[121] police department administrative policies, scholarly opinion, and mass public protests, show a considerable evolution in the attitudes toward police homicide in recent years. A fourth indicator, legislative authorization, lags behind the others, but that alone does not demonstrate the acceptability of police homicide to

society. Moreover, even the legislative arena has markedly changed its approach toward police homicide over the past decade.

Until quite recently, police department policies were either vague or silent on the use of deadly force,[122] but that is rapidly changing. Since 1977, police policies in Los Angeles, Birmingham, and Houston, among others, have restricted the use of deadly force far beyond the limits of state law. Los Angeles adopted a modified defense-of-life policy after officers shot and killed a naked chemist.[123] Houston reportedly adopted a defense-of-life policy in the wake of the beating and drowning of a young Chicano male.[124] Birmingham adopted a more restrictive policy after a Police Foundation study of seven cities showed Birmingham to have the highest police shooting rate[125]—the public outcry over which lends some support to Justice Marshall's hypothesis that the public is more likely to find a punishment unacceptable when it knows the full facts.[126]

Police policies more restrictive than state law are far from new, however. A 1974 study of the Boston Police Department found that the majority of the large cities surveyed permitted their officers to use deadly force only to apprehend suspects who present a threat of serious injury or death to someone.[127] In 1975 the California Peace Officer's Association and the California Police Chiefs' Association jointly adopted a similar policy.[128] The policy of the Federal Bureau of Investigation since at least 1972 has been "that an agent is not to shoot any person except, when necessary, in self-defense, that is, when he reasonably believes that he or another is in danger of death or grievous bodily harm."[129] The federal Bureau of Narcotics and Dangerous Drugs, which operates one of the most hazardous types of law enforcement programs,[130] adopted a similar policy in 1971.[131]

These policies were preceded by some fifty years of nearly unanimous scholarly criticism of the any-felony rule. Law reviews,[132] professional police publications,[133] and a Presidential commission[134] all lobbied for a change in the rule. A more powerful force for change, however, has been the long series of public protests—often violent—over police use of deadly force

in minority communities. In the 1960s, several race riots were precipitated by police shootings.[136] In the 1970s, police homicides have produced more limited protests with less violence, but with a clear focus on the problem of police homicide. New York, Houston, Los Angeles, Dallas and other cities repeatedly felt such protests throughout the late 1970s.[136] In the Southwest, minority groups even managed to enlist President Carter's concern for the problem,[137] leading to an intensified effort at federal prosecution of police for civil rights violations.[138] Yet as long as the any-felony rule survives, many of the incidents that stir public outrage will remain legal and beyond prosecution.

Although state legislatures appear less vulnerable to such protests than police chiefs and mayors, a steadily growing number of legislatures have nonetheless reflected the apparent change in public sentiment toward police homicide. Since 1973, at least eight states[139] have adopted the Model Penal Code limitations on the use of deadly force to arrest. Minnesota has even required that all police shootings be reported to the state government, in part for monitoring purposes.[140] Taken in conjunction with the developments in police policy, scholarly opinion, and public protests, the state legislative actions are consistent with the general trend toward restricting executions without trial as unacceptable to society.

(4) *Arbitrary infliction.* Relative to the total number of arrests and police-citizen encounters, police homicide is inflicted so rarely and with such arbitrariness as to be wanton and freakish.[141] It can be likened to a virtual lottery system in which there are no safeguards for the capricious selection of criminals for the punishment of death.[142] Even in police departments with comparatively restrictive deadly force policies, the discretion that even those policies allow officers in the use of deadly force is so uncontrolled that people literally "live or die, dependent on the whim of one man."[143] The available evidence strongly suggests that police homicide is inflicted in a trivial number of the cases in which it is legally available, through procedures that give room for the play of racial and other prejudices. Unlike convictions for capital offenses, there are no

records kept of the number of felony suspects whose actions make them legally vulnerable to execution without trial. The fact that the rate of police homicide was only one per 6,822 Part I Index[144] arrests in 1975, however, provides a reasonable inference that the sanction is rarely used even when it is available, since the rate of flight per attempted arrest seems likely to be much larger. Moreover, the extreme rarity of occurrence alone raises a strong inference of arbitrariness.[145]

Despite the progressive policies of many police departments, many other departments still allow their officers total discretion to use their legal power to kill.[146] Even the departments with restrictive policies typically say when officers *may* use their weapons, and not when they *must*. Noninvocation of available legal penalties is the common practice in American policing, as extensive research has shown, and police homicide is no exception.[147] As a Kansas City, Missouri, police officer recently said about the control of firearms discretion in that department (one of the best managed police agencies in the country), "they pretty much leave it up to your own conscience to decide" whether or not to shoot someone when their restrictive policy allows it.[148] Many police officers are punished for using their guns when they should not have, but recent research[149] has found no case in which an officer was punished for not using force when he or she could have.

The inconsistency among police officers in deciding when to use force is further demonstrated by a recent experimental study of twenty-five randomly selected Connecticut police officers who were given identical information about three arrest situations. When asked if they would be likely to use deadly force, their responses were almost evenly split, even though they were all making decisions under Connecticut common law.[150]

In comparison to the vigorous controls on the post-trial death penalty described and approved in *Gregg v. Georgia*,[151] the use of deadly force by police is virtually uncontrolled. The trier of fact, without any information from a record keeper about what the typical police action has been in previous situations similar to an instant case must also determine the sentence. If

decision making without access to that information is an unconstitutionally arbitrary way to impose the death penalty after the careful finding of facts at trial, then surely it must be so without a trial.

D. Police Homicide and Equal Protection

A final argument against the use of deadly force to arrest is that present practices deny equal protection to blacks. The argument is not without its weaker points, for discrimination in the use of deadly force is methodologically difficult to prove. Nonetheless, the extremely disproportionate impact of executions without trial on blacks compels consideration of the argument.

According to official statistics, blacks constituted forty-six percent of the people killed by official police action in 1975,[152] while they only constituted 11.5 percent of the population.[153] The national death rate from police homicide of black males over age ten in a recent ten-year period was nine to ten times higher than the rate for white males.[154] Studies in specific cities have found even greater racial disparities in the rate of police homicides.[155] There have been some attempts to explain the disparity using arrest rates for FBI Part I Index crimes,[156] but that approach has several limitations. First, the power to use deadly force under the common-law rule is not limited to arrests for "index" crimes. Indeed, as the empirical studies[157] show, most police shooting incidents arise out of situations in which the initial criminal offense is clearly not an Index crime. Second, in many police shooting situations there is no offense recorded unless the police intervention precipitates more violence. Many violent family fights, for example, are not reported as crimes,[158] although they are reported if a police officer is assaulted. Third, the evidence of racial discrimination in arrests undermines any use of arrest rates to show an absence of discrimination in police homicide.[159]

Even if arrest rates by race were an appropriate means of showing that the disparity in police homicide rates is not discriminatory, they do not always match the police homicide

rates. In Philadelphia from 1950 to 1960, for example, where eighty-seven percent of the police homicide victims but only twenty-two percent of the city's population were black, only thirty-one percent of the arrest population was black.[160] More recently, a study of the Chicago police found the police homicide rate per 10,000 arrests (for all charges) in 1969-70 to be 1.00 for whites and 2.01 for blacks.[161] Nationally, in 1975 blacks accounted for forty-six percent of the police homicide victims and only thirty-three percent of the Part I FBI Index offense arrests.[162]

The existence of racial discrimination in police homicides can be neither proved nor disproved with the available evidence. Resolution of the issue would require data on the number of blacks and whites who committed acts that made them legally vulnerable to police homicide: assaulting or threatening to assault police or others, fleeing from arrest for felonies, participating in a riot, or engaging in other specifically covered behavior.[163] Short of a mammoth systematic observation study[164] costing millions of dollars, there is no reliable way to obtain such data. A sample of the narrative accounts found in arrest reports, somewhat less expensive, would be the next best measure of legal vulnerability of whites and blacks, but no such study has yet been done.

In the absence of more conclusive evidence, the demonstrably higher rates of police homicide for blacks strongly suggests[165] racial discrimination on a national basis. Although such patterns are quite likely to vary from one city to the next, such a variation would support the argument that present procedures allow police homicide to be administered in a discriminatory fashion.

III. SUMMARY AND CONCLUSION

This analysis of police homicide and the Constitution leads to the conclusion that the present state laws are unconstitutional, not just in the common-law states, but in the Model Penal Code and "forcible felony" states as well.[166] The present laws of every state in the union deny police homicide victims

fifth and fourteenth amendment rights to due process, allow the punishment of death to be imposed in a cruel and unusual fashion, and appear to deny equal protection to blacks. The only constitutional alternative apparent is to remove police homicide from the realm of punishment and confine justification for it to the self-defense doctrine, more properly called a defense-of-life doctrine. In short, the conclusion is that the police throughout the country should adopt the first section of the firearms policy of the Federal Bureau of Investigation.[167]

The defense-of-life policy has the virtue of being both constitutional and highly practical. It is constitutional, first, because it demonstrably does not constitute punishment. Since self-defense is an individual action rather than a state action, it is not subject to evaluation by the *Mendoza* criteria. The right to life is fundamental, and so the right to defend life need not be granted by the State; it is, rather, something the State may not restrict. Police and other citizens may kill under self-defense on the same evidentiary basis—eyewitnessing an immediate threat to life. If police were not granted special powers, police killings in self defense could be distinguished from punishment administered by the state. The adoption of such an approach would signal a return to the English tradition of citizen-police officers, whose only special power is to arrest on probable cause (as citizens could only do during the hue and cry), and a rejection of the Continental tradition of soldier-police that we have unconsciously adopted by giving the police special powers to kill.[168] Police homicide in defense of life is nonpunitive by its very nature. It is inherently preventive. It uses an overt act—such as refusing to drop a gun on demand—as the evidentiary basis for taking preventive action. By preventing the consummation of a violent crime threatened by an overt act, the defense-of-life killing looks toward the offender's behavior in the future. Present police homicide rules all look primarily toward the offender's past behavior, and therefore constitute punishment.

Moreover, the defense-of-life policy is constitutional because it does not violate due process. As a solely individual

action, police killings in defense of life do not deprive citizens of rights on behalf of the state, but merely on behalf of protecting their own rights. Finally, the defense-of-life policy does not constitute cruel and unusual punishment. It is neither inherently cruel, nor disproportionate to the conduct to which it responds, nor unacceptable to society, nor imposed in an arbitrary and capricious manner. The defense-of-life policy would still leave room, hypothetically, for racial discrimination, but it seems most unlikely that police would grant preferential treatment to whites who pose immediate threats to life and limb.

The defense-of-life policy would also be more practical to implement than any of the other attempts to create a policy more restrictive than the common-law doctrine. The Model Penal Code exemplifies the practical problems. As the dissent observed in *Mattis v. Schnarr,*[169] a policy that allows police to kill someone who the officer reasonably believed "would use deadly force against the officers or others if not immediately apprehended" requires too much guessing and analysis for an emergency situation. This language differs sufficiently from the "immediate danger" language of the FBI's policy to include the killing of a fleeing felon merely because he is labeled "armed and dangerous," (as opposed to someone who is actually committing an overt act such as pointing a gun at someone else). The police are not armed with a crystal ball. Predicting that a fleeing felon is likely to kill someone is no more possible than predicting that a paroled felon is likely to kill someone. Such a policy places an undue burden on the police officer. When people commit overt threatening acts, however, there is much less ambiguity.

A self-defense policy avoids the Model Penal Code's problems in allowing police officers to shoot fleeing felons only when they have used or threatened to use deadly force. Professor Perkins argues that this provision of the Code "goes too far" because officers making split-second decisions will find it difficult to evaluate all the details of the suspect's conduct.[170] On the contrary, for precisely that reason the Model Penal Code does not go far enough.

The self-defense policy also avoids the practical problems of allowing officers to shoot fleeing suspects of specified "forcible" felonies, the approach used in ten states. As a former Los Angeles Police Department policy observed, "[it] is not practical to enumerate specific felonies."[171] An informal survey of police officers from three New York state police departments found that none of them could remember the types of felonies which warranted the use of deadly force under New York state law.[172] With a self-defense policy, there is nothing complex to remember, and no need to consider prior events; the officer need only evaluate the information he observes to assess whether someone is committing an overt act signaling an immediate threat to the officer or someone else.

It is not the practicality of the defense-of-life rule that makes it constitutional, however; that is merely a fortunate byproduct. Rights cannot depend on administrative convenience, especially not the right to life. The defense-of-life rule is necessary for the simple reason that anything else constitutes execution without trial, in violation of the Constitution.

Notes

1. The official death records of the National Center for Health Statistics, preserved on tape, show a total of 295 deaths by legal intervention of police for 1976. Independent tests of the death record data, however, reveal that they are rather consistently under-reporting police homicides by about 50%. Sherman & Langworthy, *Measuring Homicide by Police Officers* 70 J. Crim. L. & Criminology 546 (1979). On the number of post-trial death sentences, see U.S. Dep't of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, Capital Punishment, 1976; National Prisoner Statistics Bulletin SD-NPS-CP5 at 3 (1977) [hereinafter cited as Capital Punishment Statistics].

2. Capital Punishment Statistics, *supra* note 1, at 13.

3. Vital Statistics of the United States, 1950-1959 (Annual).

4. *See* note 1 *supra.*

5. Comment, *Deadly Force to Arrest: Triggering Constitutional Review,* 11 Harv. C.R.-C.L. . Rev. 361, 368 (1976); Note, *Justifiable Use*

of Deadly Force by the Police: A Statutory Survey, 12 Wm & Mary L. Rev. 67 (1970). On the common law, see e.g., 2 Hale's P.C., 76-77.

6. Comment, *Policeman's Use of Deadly Force in Illinois,* 48 Chi.-Kent. L. Rev. 252, 252 (1971).

7. The Code provides, in part:

The use of deadly force is not justifiable under this Section unless:

(i) the arrest is for a felony; and

(ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and

(iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(iv) the actor believes that:

(1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Model Penal Code, §3.07(2)(b) (1962).

8. Sherman, *Restricting the License to Kill—Recent Developments in Police Use of Deadly Force,* 14 Crim. L. Bull. 577, 581 (1978).

9. Comment, *supra* note 5, at 365 n. 34.

10. The following table is constructed from four empirical studies of police use of deadly force: (1) a study of the 32 persons killed by Philadelphia police officers in 1950-1960. *See* Robin, *Justifiable Homicides by Police,* 54 J. Crim. L.C. & P.S. 225 (1963), (2) A study of 911 police killings reported in newspapers around the country in 1965-69. *See* Kobler, *Figures (and Perhaps Some Facts) on Police Killings of Civilians in the United States, 1965-1969,* 31 J. Soc. Issues 185 (1975). (3) A study of police department records, producing pooled data for 1973 and 1974 in Birmingham, Alabama; Oakland, California; Portland, Oregon; Kansas City, Missouri; Indianapolis, Indiana; and Washington, D.C., and in Detroit for all of 1973 and part of 1974, on 320 police firearms discharges in which a bullet wounded or killed someone. *See* C. Milton, J. Halleck, J. Lardner, G. Abrecht, Police Use of Deadly Force (1977) [hereinafter cited as C. Milton]. (4) A study of 2,926 incidents in which New York City Police Department officers discharged their weapons, regardless of impact, during 1971-1975. *See* J. Fyfe, Shots Fired: A Typological Examination of New York City Police Firearms Discharges (1978) (unpublished Ph.D. dissertation, School of Criminal Justice, State University of New York at Albany).

Events Preceding Police Use of Deadly Force

Event Type	STUDY FINDINGS*							
	Robin, 1963		Kobler, 1975b		Milton,*et al,* 1977		Fyfe, 1978	
	(N = 32)		(N = 911)		(N = 320)		(N = 2,926)	
	%	Rank	%	Rank	%	Rank	%	Rank
Disturbance Calls Family Quarrels Disturbed Persons Fights Assaults "Man with a gun"	31	(2)	17	(4)	32	(1)	12	(2)
Robbery: In Progress Pursuit of Suspect	28	(3)	20	(3)	21	(2)	31	(1)
Burglary: In Progress Larceny Tampering with Auto Pursuit of Suspects	37	(1)	27	(2)	20	(3)	8	(5)
Traffic Offenses: Pursuits Vehicle Stops	3	(4)	30**	(1)	8	(5)	11	(4)
Officer Personal Business: Dispute Horseplay Accident	?	—	?	—	4	(6.5)	?	—
Stakeout/Decoy	?	—	?	—	4	(6.5)	?	—
Other	0	(5)	6	(5)	11	(4)	14	(3)

*Percentages may not total 100 due to rounding
**Includes other misdemeanors not listed above

11. Of the studies cited in note 10, *supra*, Kobler, at 188, found 50% of those shot by the police to have carried guns at the time and 25% to have been completely unarmed. Milton, at 22, found 45% to have had guns and 43% to have been unarmed. Fyfe, at IV-30, found 54% to have had guns, and 30% to have lacked a gun or a knife. Another study found 53% of the 1969-70 police homicide victims in Chicago to have carried a gun, and 23% to have lacked any weapon. Harding & Fahey, *Killings by Chicago Police, 1969-70: An Empirical Study*, 46 S. Cal. L. Rev. 284, 292-93 (1973).

Kobler, at 165, also found that, measured by a defense-of-life standard, only 40% of the killings would have been justified; the rest were either killings of suspects in flight or to prevent a nonviolent crime. In contrast, Fyfe, at 279, found that 71.5% of the police firearms incidents in his New York sample were reportedly in defense of life, a finding consistent with the tradition of relative restraint in that department. Other cities are quite different. A study of Philadelphia police use of deadly force in 1970-74 found that approximately 45% of those people shot had been fleeing at the time, and in approximately 25% of the incidents the shooting victim was both fleeing and unarmed. A study by the Boston Police Department found that 102 of the 210 targets of Boston police firearms discharges in 1970-73 were fleeing at the time, and 80 of the 102 were unarmed. *See* Mattis v. Schnarr, 547 F. 2d 1007, 1019-20 n. 30 (8th Cir. 1976).

12. *See* 4 W. Blackstone, Commentaries 180 (1800) (citing Von Stiernhook, Treatise on Gothic Law).

13. W. Melville-Lee, A History of Police in England 35 (1901).

14. "Hue and cry," under old English law, refers to the loud outcry with which robbers, burglars, and murders were pursued. All who heard the outcry were obliged to join in pursuit of the felon. *See* 4 W. Blackstone, *supra* note 12, at 293.

15. L. Smith, This Realm of England 1399-1688, at 15 (1966).

16. L. Kennett and J. Anderson, The Gun in America 22 (1975).

17. *Id.* at 23.

18. R. Sherrill, The Saturday Night Special 4 (1973).

19. G. Elton, Policy and Police 4, 5 (1972).

20. L. Kennett & J. Anderson, *supra* note 16, at 151; R. Lane, Policing The City 103-04 (1967); J. Richardson, The New York Police 113 (1970).

21. L. Kennett and J. Anderson, *supra* note 16, at 91.

22. This did not occur without the strenuous objections of some police

commanders who thought the use of revolvers was cowardly. *See* W. Miller, Cops and Bobbies, 51-53 (1977).

23. R. Perkins, Criminal Law 10-11 (2d ed. 1969). As Blackstone noted, "The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them . . . ." 4 W. Blackstone, *supra* note 12, at 98.

24. Comment, *Use of Deadly Force in the Arrest Process,* 31 La. L. Rev. 131, 132-33 (1970); *see* 4 W. Blackstone, *supra* note 23.

25. Furman v. Georgia, 408 U.S. 238, 333-41 (1972) (Marshall, J., concurring).

26. P. Pringle, Hue and Cry 133 (1955).

27. The Professional Thief, by a Professional Thief (E.H. Sutherland, ed.) 112 (1937).

28. *Quoted in* L. Kennett and J. Anderson, *supra* note 15, at 150.

29. *Quoted in* Miller, *supra* note 21, at 146.

30. Storey v. State, 71 Ala. 329, 340 (1882) (involving the theft of a horse).

31. *E.g.,* United States v. Clark, 31 F. 710, 713 (8th Cir. 1887); Reneau v. State, 70 Tenn. 720 (1879).

32. Pearson, *The Right to Kill in Making Arrests,* 28 Mich. L. Rev. 957, 976 (1930).

33. Regina v. McKay [1957] V.R. 560, 572-73 (Smith, J., dissenting); 11 Halsbury's Laws of England §1179 (4th ed. 1976) (emphasis added). The question of deadly force to prevent flight is either implied in this formulation, or so far beyond the pale that the current formulations make no mention of it. *See also* Lanham, *Killing the Fleeing Offender,* 1 Crim. L.J. (Australia) 16, 17-18 (1977).

34. Quoted in Regina v. McKay, [1957] V.R. 560, 572-73 (Smith, J., dissenting).

35. *Id.* at 572.

36. Criminal Law Revision Committee, Seventh Report: Felonies and Misdemeanours 7 (1965); 18 Parliamentary Papers (House of Commons and Command) (1964-65).

37. Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied* 434 U.S. 822 (1977).

38. *Id.* at 1252.

39. *Id.* at 1251.

40. *Id.* at 1252.

41. Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976).

42. Wiley v. Memphis Police Dep't, 548 F.2d 1247, 1252-53 (6th Cir.), *cert. denied* 434 U.S. 822 (1977).

43. *Id.* at 1254.

44. Wiley v. Memphis Police Dep't, 434 U.S. 822 (1977).

45. G. Newman, The Punishment Response 7 (1978).

46. Professor Hart, for example, suggests five defining characteristics of punishment:

(1) It must involve pain or other consequences normally considered unpleasant

(2) It must be for an offense against legal rules

(3) It must be imposed on an actual or supposed offender for his offense

(4) It must be intentionally administered by human beings other than the offender

(5) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

H. Hart, Punishment and Responsibility 4, 5 (1968).

Professor Packer, in contrast, finds that definition insufficiently clear as to the distinction between the purposes and effects of punishment, and proposes a sixth defining characteristic of punishment: "It must be imposed for the dominant purpose of preventing offense against legal rules or of exacting retribution from offenders, or both." H. Packer, The Limits of the Criminal Sanction 21-23, 31 (1969).

47. 99 S. Ct. 1861 (1979).

48. *Id.* at 1873.

49. *Id.* at 1873-74.

50. 372 U.S. 144 (1963).

51. 99 S. Ct. at 1899.

52. *Id.*

53. *Id.* at 1887 (Marshall, J., dissenting).

54. *Id.* at 1873.

55. *Id.* at 1898 (Stevens, J., dissenting); H. Packer, *supra* note 45, at 33.

56. 372 U.S. at 168-69.

57. *Id.* at 169.

58. Furman v. Georgia, 408 U.S., 238, 290 (1972) (Brennan, J., concurring).

59. *Id.* at 286.

60. Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (Stevens, J., concurring).

61. Roe v. Wade, 410 U.S. 113, 157 (1973); Screws v. United States, 325 U.S. 91, 123 (1945); Johnson v. Zerbst, 304 U.S. 458, 463 (1938); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Mattis v. Schnarr, 547 F.2d 1007, 1018 (1976).

62. Quoted in T. Critchley, A History of Police in England and Wales (2d ed. 1972).

63. J. Bellamy, Crime and Public Order in England in the Later Middle Ages 134 (1973).

64. *Cited* in Regina v. McKay, [1957] V.R. 560, 571-72 (Smith, J., dissenting).

65. R. Hunisett, The Medieval Coroner 67 (1961).

66. *Id.* at 49.

67. R. Perkins, *supra* note 23, at 985.

68. Note, *Legalized Murder of a Fleeing Felon,* 15 Va. L. Rev. 582, 583 (1929).

69. Helwig v. United States, 188 U.S. 605 (1902).

70. *Id.* at 612.

71. Child Labor Tax Case, 259 U.S. 20 (1921).

72. United States v. Balint, 258 U.S. 250, 251 (1922).

73. *See e.g.,* R. Perkins, *supra* note 23, at 771.

74. 547 F.2d 1007, 1023 (8th Cir. 1976).

75. J. Gibbs, Crime, Punishment and Deterrence (1975).

76. Professor Waite argued for extending the right to kill to arrest for all offenses in order to deter flight, for otherwise "we say to the criminal, 'You are foolish . . . if you submit to arrest. The officer dare not take the risk of shooting at you. If you can outrun him, outrun him and you are safe . . . .If you are faster than he is you are free and God bless you.' I feel entirely unwilling to give that benediction to the modern criminal." 9 ALI Proceedings 195 (1931), *quoted in* J. Michael & H. Wechsler, Criminal Law and its Administration 81-82 n. 3 (1940).

77. Judge Learned Hand once commented that "It has been constantly supposed here that if you are able to shoot a robber you are

less likely to have a robber. I question that. I challenge it altogether. I don't believe that possibility figures at all in the commission of crime." 35 ALI Proceedings 258-334 (1958), *quoted in* Mattis v. Schnarr, 547 F.2d 1007, 1015 (8th Cir. 1976). While Judge Hand's remarks were directed specifically towards private citizens' rights to defend property, the *Mattis* court observed that he was speaking to the larger problem of justification to use deadly force in general. *Id.* at 1015 n. 17.

78. 528 F.2d 132, 142 (2d Cir. 1975).

79. ALI Proceedings, 186-87, *quoted in* J. Michael and H. Wechsler, *supra* note 76.

80. 99 S. Ct. at 1873.

81. Holloway v. Moser, 193 N.C. 185, 136 S.E. 375, (1927), *quoted in* Pearson, supra note 32, at 964.

82. 99 S. Ct. at 1899 (Stevens, J., dissenting).

83. Storey v. State, 71 Ala. 329, 341 (1882).

84. Regina v. McKay, [1957] V.R. 560.

85. Ingraham v. Wright, 430 U.S. 651, 671-72, n.40 (1977).

86. United States v. Lovett, 328 U.S. 303, 317 (1946).

87. 99 S. Ct. at 1872.

88. Mattis v. Schnarr, 547 F.2d 1007, 1018-19 (8th Cir. 1976).

89. Brown v. United States, 256 U.S. 335(1921).

90. 40 Am. Jur. 2d *Homicide* §§170-71, *quoted in* Mattis v. Schnarr, 547 F.2d 1007, 1015 (1976).

91. Mattis v. Schnarr, 547 F.2d 1007, 1019 (1976).

92. Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing,* 88 Harv. L. Rev. 1510, 1524 (1975).

93. Dworkin, *Taking Rights Seriously, in* Oxford Essays in Jurisprudence 202, 214 (2d Series 1973), *quoted in* Note, *supra* note 92, at 1527 n.76.

94. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

95. Note, *supra* note 92, at 1519.

96. *See* note 61 *supra* and accompanying text.

97. *See* Palko v. Connecticut, 302 U.S. 319, 327 (1937); Comment, *supra* note 5, at 378.

98. Note, *supra* note 92, at 1528-29.

99. Wiley v. Memphis Police Dep't, 548 F.2d 1247, 1251-52 (8th Cir. 1976). *See also* Terry v. Ohio, 392 U.S. 1, 23 (1968).

100. For an example of such a sentence, see the case of nursing home operator Bernard Bergman, reported in N.Y. Times, June 18, 1976, §A, at 1, col. 7.

101. Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan J., concurring).

102. 408 U.S. 238 (1972).

103. Robinson v. California, 370 U.S. 660 (1962); Louisiana v. Resweber, 329 U.S. 459 (1947); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878).

104. Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas J., concurring); O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting).

105. Trop v. Dulles, 356 U.S. 86 (1958).

106. 408 U.S. at 256 (Douglas, J., dissenting).

107. 428 U.S. 153 (1976).

108. *Id.* at 169; *see* Coker v. Georgia, 433 U.S. 584 (1977); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

109. *See* Louisiana v. Resweber, 329 U.S. 459 (1947); Wilkerson v. Utah, 99 U.S. 130 (1878).

110. *See* Screws v. United States, 325 U.S. 91 (1945).

111. *See* Sherman, *The Breakdown of the Police Code of Silence,* 14 Crim. L. Bull. 149, 150-51 (1978) (discussing the Joe Campos Torres beating and drowning case). At least four southern California men died from police choke-holds in one recent year. *See* Cory, *Deadly Force,* Police Magazine, Nov. 1978, at 5, 6.

112. One study found that police homicide cases are typically not referred to a grand jury, and that only three cases in some 1,500 led to police officers being criminally punished. Kobler, *Police Homicide in a Democracy,* 31 J. Soc. Issues 163 (1975). A study of police use of deadly force in 49 Los Angeles county police agencies found that of 18 incidents officially designated as having been in violation of the department's firearms policies, only one was referred for criminal prosecution; only two led to dismissals, two led to suspensions, and 13 (72%) led to either a reprimand or no punishment at all. Uelman, *Varieties of*

Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County, 6 L.A.L. Rev. 1, 40 (1973). A study of police records in six cities found that of the eight percent of shooting incidents judged improper by administrative reviews punishment "generally consisted of a reprimand rather than suspension or termination." Milton, *supra* note 10, at 28.

113. 408 U.S. at 394 (Burger, C.J., dissenting).

114. *Id.* at 393 (Burger, C.J., dissenting).

115. *See* note 10 *supra.*

116. Milton, *supra* note 10, at 46.

117. The justification, however, is up to the jury to determine in light of all the circumstances of a particular case. *See* 11 Halsbury's Laws, *supra* note 33, §1180.

118. *See* 408 U.S. at 279-80 (Brennan, J., concurring).

119. "[The Court], before it reduces a sentence as 'cruel and unusual,' must have reasonably good assurances that the sentence offends the 'common conscience,' " which not even opinion polls can measure. United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir. 1952), *quoted in* Furman v. Georgia, 408 U.S. 238, 360 (1972) (Marshall, J., concurring).

120. Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

121. 408 U.S. at 278 (Brennan, J., concurring).

122. Milton, *supra* note 10, at 45-49.

123. *Gun Rules Tightened,* L.A. Times, Sept. 9, 1977, at 1.

124. Cory, *Police on Trial in Houston,* Police Magazine, July 1978, at 33, 40.

125. *Findings of Police Deadly Force Study Spark Three-Way Controversy in Birmingham,* Law Enf. News, June 21, 1977, at 1, col. 1; Personal Communication with B. R. Myers, Police Chief, Birmingham, Alabama. (November 1978).

126. *See also* Sarat and Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis,* 1976 Wis. L. Rev. 171, 179.

127. Planning and Research Division, Boston Police Department, the use of Deadly Force by Boston Police Personnel, (May 3, 1974), *cited in* Mattis v. Schnarr, 547 F.2d 1007, 1016 n.19. *See also* Clance, *Police Tell Firearm Policies,* San Diego Union, Oct. 16, 1975, (nine of ten cities in San Diego County employ a defense-of-life police firearms

policy). *Contra,* Leeds & Lowe, *Survey Finds Few Rules on Police Use of Guns,* Chicago Tribune, Dec. 6, 1977.

128. Baker, *Model Firearms Policy for California Law Enforcement,* 10 J. Cal. L. Enforcement 5 (1975).

129. FBI, Memorandum 31-72 (Nov. 21, 1972), *quoted in* Mattis v. Schnarr, 547 F.2d 1007, 1015 (8th Cir. 1976). Policies more restrictive than state law are also reported in Comment, *The Use of Deadly Force in Arizona by Police Officers,* 1973 L. and Soc. Order 481.

130. In the 40-year history of federal narcotics enforcement, 17 agents have been killed by assault in the line of duty, almost as many as in the FBI which has had at least four times as many agents and a longer history. J. Wilson, The Investigators 48 (1978).

131. Mattis v. Schnarr, 547 F.2d 1007, 1015 (8th Cir. 1976). Even these policies, however, may be ambiguous. The FBI policy reportedly goes on to allow the use of any force necessary to effect an arrest. Personal communication with Dr. Charles Wellford, Office of the United States Attorney General (Dec. 7, 1979).

132. *See, e.g.,* Pearson, *supra* note 32; Safer, *Deadly Weapons in the Hands of Police Officers, On Duty and Off Duty,* 49 J. Urb. L. 565 (1972); Note, *supra* note 68; Note, *supra* note 5; Comment, *supra* note 24; Comment, *supra* note 6; Comment, *supra* note 23. *But see* Miller, *The Law Enforcement Officer's Use of Deadly Force: Two Approaches,* 8 Am. Crim. L.Q. 27 (1969).

133. *See, e.g., Police Policy on the Use of Firearms,* The Police Chief, July 1967, at 16.

134. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 189-90 (1967).

135. For example, such riots occurred in San Francisco, St. Louis and Los Angeles in 1966. *See id.* at 189.

136. *Killings of Chicanos by Police Protested,* N.Y. Times, Oct. 12, 1977, §A, at 17 col. 1; *Houston Quiet After Violence Hospitalizes Over 12,* N.Y. Times, May 9, 1978, at 22 col. 1; *2,000 Assail Police at Black Rally As Off-Duty Officers Meet Nearby,* N.Y. Times, July 17, 1978, §B, at 3, col. 1; *Los Angeles Police Scored on Shooting,* N.Y. Times, Aug. 15, 1977, at 13 col. 1.

137. Gilman, *In Washington, A New Zeal for Prosecuting Police,* Police Magazine, Nov. 1978, at 15, 18.

138. *Id.* Measured by the number of cases in which the victim died, however, Justice Department prosecutions of police officers have actually declined under the Carter administration. From 1970 through

1976, the average number of federal civil rights prosecutions for police homicide was four per year; in 1977, and 1978 it was only two per year. Personal communication from Daniel F. Rinzel, Civil Rights Division, U.S. Department of Justice (November 30, 1978).

139. *See* Minn. Stat. §609.066 (1976); Comment, *supra* note 5, at 368-69.

140. Minn. Stat. §626-553 (1976).

141. Furman v. Georgia, 408 U.S. 238, 310 (Stewart, J., concurring).

142. *Id.* at 293 (Brennan, J., concurring).

143. *Id.* at 253 (Douglas, J., concurring).

144. Computed from National Center for Health Statistics, Public Health Service, Department of Health, Education and Welfare, Vital Statistics of the United States 1975 II *Mortality* Part A 1-168; FBI, Crime in the United States 1975-1979. Using the unofficial estimated number of police homicides, the rate was one per 3,411 Part I Index arrests.

145. Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional,* 83 Harv. L. Rev. 1773, 1790 (1970), *quoted in* Furman v. Georgia, 408 U.S. 238, 249 (1972) (Douglas, J., concurring).

146. Until 1968, one large southwestern department employed the following policy on the use of a firearm, quoted in its entirety: "Never take me out in anger; never put me back in disgrace." Milton, *supra* note 10, at 47. Other "policies" have included "Leave the gun in the holster until you intend to use it," and "It is left to the discretion of each individual officer when and how to shoot." *Id.* at 47-48.

147. K. Davis, Police Discretion (1975); National Institute of Law Enforcement and Criminal Justice, Police Discretion: A Selected Bibliography (1978); Black, *The Social Organization of Arrest,* 23 Stan. L. Rev. 1087 (1971); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Law Visibility Decisions in the Administration of Justice,* 69 Yale L.J. 543 (1960).

148. Personal interview (January, 1979).

149. The Project on Homicide by Police Officers, Criminal Justice Research Center, State University of New York at Albany, has studied this area.

150. G. Hayden, Police Discretion in the Use of Deadly Force: An Empirical Study of Information Usage in Deadly Force Decision Making (1979) (unpublished paper, University of New Haven).

151. 428 U.S. 153 (1976).

152. National Center for Health Statistics, *supra* note 144. The total figure for all minority group members is probably somewhat higher, but no official statistics for other nonwhites are reported.

153. Bureau of the Census, Department of Commerce, Statistical Abstract of the United States 25 (1976).

154. P. Takagi, *A Garrison State in a "Democratic" Society,* in Police Community Relations 358 (A Cohn & E. Viano eds.).

155. *See* note 10 *supra.*

156. *E.g.,* Milton, *supra* note 10, at 19; Burnham, *3 of 5 Slain by Police Here are Black, Same as the Arrest Rate,* N.Y. Times, Aug. 26, 1973, at 50, col. 3. *See also The Management of Police Killings,* Crime & Soc. Just., Fall-Winter 1977, at 34; Goldkamp, *Minorities as Victims of Police Shootings: Interpretations of Racial Disproportionality and Police Use of Deadly Force,* 1 Just. Sys. J. 169 (1977).

157. *See* note 5 *supra* and accompanying text.

158. Parnas, *The Police Response to the Domestic Disturbance,* 1967 Wis. L. Rev. 914.

159. *See* Black, *supra* note 147. The fact that the greater likelihood of police to arrest black suspects can be largely attributed to (a) the greater tendency of blacks to be antagonistic to the police and (b) the greater tendency of black complainants—who do almost all of the accusing of black suspects during street encounters with the police—to demand an arrest does not remove discrimination in a legal sense. Neither suspect's attitudes nor a complainant's preference constitute proper grounds for enforcement decisions. *Id.* at 1097-1107.

160. Robin, *supra* note 10.

161. R. Knoohuizen, R. Fahey, & D. Palmer, The Police and Their Use of Fatal Force in Chicago 21 (1972) (unpublished study).

162. National Center for Health Statistics, *supra* note 144; FBI, *supra* note 144.

163. Comment, *supra* note 5.

164. *See, e.g.,* A. J. Reiss, the Police and the Public (1971); Reiss, *Systematic Observation of Natural Social Phenomena,* in Sociological Methodology 3-33 (H. Costner, ed. 1971). Since police only draw their weapons once in every hundred citizen encounters (and patrol cars in many large cities average no more than ten encounters in eight hours), it could typically require two weeks of observation in order to capture one drawing of a weapon. *See* Cruse & Rubin, *Determinants of Police Behavior,* in Project Report to National Institute of Law Enforcement 194 (1972).

165. Other equal protection arguments can be made in addition to those concerning race. *See* Comment, *supra* note 5, at 375-80.

166. For a survey of the differing state approaches, see materials cited in note 5 *supra.*

167. *See* notes 129 & 131 *supra* and accompanying text.

168. *See generally* B. Chapman, Police State (1970); R. Fosdick, European Police Systems 17-20 (1915); Bayley, *The Police and Political Development in Europe* in The Formation of National States in Western Europe 328-79 (C. Tilly, ed. 1975).

169. *See* Mattis v. Schnarr, 547 F.2d 1007, 1023 (8th Cir. 1976) (Gibson, C.J., dissenting).

170. Perkins, *supra* note 23, at 986.

171. Milton, *supra* note 10, at 48.

172. This survey was conducted by the Project on Homicide by Police Officers, Criminal Justice Research Center, State University of New York at Albany.

CHAPTER 5

MINORITIES AS VICTIMS OF POLICE SHOOTINGS: INTERPRETATIONS OF RACIAL DISPROPORTIONALITY AND POLICE USE OF DEADLY FORCE*

JOHN S. GOLDKAMP

The power to take life exists not only at the final stage of the criminal process where the state may execute prisoners under sentence of death but also at the earliest stage where deadly force may be used by police in the apprehension of suspected lawbreakers. The controversy surrounding the use of capital punishment continues to this day, but what distinguishes a death sentence from the taking of life by police deadly force is the availability of due process safeguards. Although the use of deadly force by police is often defined by statute and restricted by departmental policy,[1] it remains a decision guided mainly by the judgment of individual officers in pressure situations.

For more than a decade studies have shown that racial minorities—principally black Americans—number disproportionately among persons killed by police through the use of deadly force.[2] In 1972 the Supreme Court found that the death

*I would like to express my appreciation to Professor Hans Toch and Michael Hindelang for permission to cite unpublished manuscripts in this article.

SOURCE "Minorities as Victims of Police Shootings: Interpretations of Racial Disproportionality and Police Use of Deadly Force," *Justice System Journal* (Winter, 1976) 2:169-183.

penalty discriminated against minorities and considered this a justification for its suspension.[3] Yet findings of racial disproportionality in killings by police have not warranted similar attention.

A useful first step in consideration of racial disproportionality and police killing is examination of how these death rates are presently viewed. How the "problem" is defined and understood has ramifications for the formulation of future social policy; especially as it pertains to law enforcement. The present discussion is primarily concerned with interpretation of the phenomenon of racial disproportionality in civilian death rates resulting from the use of deadly force by police. Consideration of the most common interpretations is important because they are inexorably linked to beliefs about race and crime which cannot help but influence social policy in criminal justice decision-making.

Some writers suggest that the disproportionately high death rates of minorities at the hands of the police can be explained by the disproportionately high arrest rates of minorities for crimes of violence,[4] or by assumptions concerning the suspect's responsibility for his/her own death in violent police-suspect interactions.[5] Others see disproportionate minority deaths as resulting from both irresponsible use of deadly force by a small minority of police officers and differential administration of law enforcement toward minority citizenry (which in effect produces disproportionately high arrest and death rates for minorities in general). Kobler[6] and Knoohuizen, Fahey, and Palmer[7] stress the possibility that police misconduct may play a considerable role in generating these civilian deaths. Takagi ascribes disproportionality to the simple fact that "police have one trigger finger for whites and another for blacks."[8]

In the analysis that follows, explanations of minority death rates are aligned with either of two schools of thought. The first school encompasses a broad range of writings that address themselves to the policing of minority groups—from strong rhetoric that speaks in terms of the "racist machinery of policing,"[9] to hypotheses of criminologists who ponder the possible

effects of prejudice or discrimination.[10] The second school of thought typically relates disproportionately high minority death rates to high arrest rates for crimes of violence and seeks to explain the violent propensities of racial minorities.

In subsequent sections, these two positions or belief perspectives will be elaborated by presenting the ideas of a number of writers whose views these positions embody.[11] After discerning how disproportionality in minority death rates is viewed, the perspectives will be discussed in terms of their plausibility—by consulting some recent data and/or posing alternative theorization.[12] Finally, the question of whether the two positions go far enough in explaining the high death rates of racial minorities in situations where deadly force is used must be addressed.

POSITION 1: DISPROPORTIONALITY—A QUASI-LABELING VIEW

As is typical of most of the writers who deal with racial disproportionality, Forslund acknowledges the higher arrest rates of blacks for crimes of violence. In fact, he cites arrest rates for rape and homicide (from *UCR*, 1967), which are 12 and 17 times higher for blacks than for whites. However, it is his interpretation of these rates which aligns him with the first school of thought:

> When comparing the crime rates of whites and Negroes in the U.S., the answer to the question is complicated by the possibility that *prejudice* and *discrimination* may at least subtly, if not blatantly, affect the Negro's crime rates . . .
> . . . For example, as a consequence of decades of discrimination the Negro, to a greater extent than the white, is concentrated in the lower socioeconomic strata of American society. If the agents of criminal justice act more quickly toward those at the bottom of the socioeconomic heirarchy than toward those at the top, and there is some evidence to suggest that this is the case, then the Negro's crime rate would be affected by his disproportionate concentration among the bottom strata of society.[13]

Forslund suggests that black arrest rates for violent crimes may be substantially inflated due to some mechanism which encourages law enforcement to apply itself more rigorously against individuals associated with the "bottom strata of society." Clark stresses a similar theme when he remarks that "the lowest status of minorities (including the Irish and Italian Americans of the earlier twentieth century) always have higher street crime rates."[14] Disproportionately high arrest rates, he implies, are in part the result of the mobilization of law enforcement in such a manner that more arrests are produced from settings whose residents are characterized as among the lowest socioeconomic strata.

In a standard criminology text, Sutherland and Cressey take much the same position when they state that "the procedures used in the administration of criminal justice are biased against minority groups, especially blacks" and argue that any crime rate index (such as arrests) will exaggerate the amount of black crime.[15] Geis claims that "arrest statistics do not tell us very much about the criminal activity among minority groups," and further characterizes them as "misleading" and "subject to misinterpretation."[16]

Writers grouped under the first perspective, it becomes clear, characterize arrest statistics for minorities as distorted and of minimal value since they are generated by differential deployment of law enforcement against lower status racial minorities. Such statistics are not seen as true indicators of minority crime. On these grounds, Position 1 incorporates the view that the disproportionate death rates expressed by racial minorities are also artifacts of differential policing, and not because of the greater criminality of minorities.

A number of perspectives exist which attempt to explain how differential policing develops. One writer, Swett, relates differential policing of minorities to the ethnocentrism of the police officers by arguing that an individual who enters police work has a certain status-quo linked (middle-class) view of society—which he affirms by choosing a law enforcement career. When the citizenry he serves deviates culturally from his

middle-class, ethnocentric orientation, the officer is more likely to become suspicious of behavior and is more likely to intercede in the affairs of citizens. In this way, more arrests are likely to be generated by police officers who operate in lower socioeconomic status areas, because it is there the greatest cultural differences will be perceived. Arrest statistics, which are generated as a result, create stereotypes that reinforce the officer's view of racial minorities as more criminal.[17] Since police/citizen interaction will be more frequent and more hostile, racial minorities will find themselves involved more frequently in violent interactions with police where deadly force will be more readily deployed.

When taken together as one school of thought, these views represent an approach to disproportionate arrest and death rates which amounts to an invocation of labeling theory; that is, racial minorities are labeled by majority society as highly crime producing. These minorites are segregated or contained by one means or another, singled out as specially deserving of extra-substantial attention from law enforcement agencies, more frequently considered dangerous, and consequently more frequently subdued by means of deadly police force. From this point of view, arrest rates and death rates in police shootings can be seen as outcomes of this labeling process. A logical extension of this view of disproportionality pictures the police as labelers actively and consciously participating in the oppression of minorities.[18]

POSITION II: DISPROPORTIONATE RATES DUE TO DISPROPORTIONATE PARTICIPATION BY RACIAL MINORITIES IN CRIMES OF VIOLENCE

The second school of thought represented here can be characterized in a manner quite different from the quasi-labeling perspective of Position I. To begin with, this second position holds that a disproportionate number of minority "suspects" are killed by police because a disproportionate number of minority group members are arrested for violent crimes. Position II advocates do not dismiss the disproportionate arrest rates of

minorities for crimes of violence, but instead consider them to be good reflections of minority participation in violent crimes; in fact, arrest rates are pointed to as indications that minority members are actually involved in the crimes to a disproportionate degree. From the point of view of this position, prejudice and discrimination are not considered significant factors in the generation of disproportionate arrest figures.[19]

In addition, not only does Position II assume that racial minorites are disproportionately participating in crimes as offenders, it further assumes that by learning about actors in violent encounters more will be learned about the possible sources of racial disproportionality in violent crime rates. In contrast to the labeling stance of Position I, Position II imputes an essentially active role to racial minorities in bringing about high crime rates resulting in high death rates where confrontations with police occur.

Wolfgang and Ferracuti provide the principal thrust for this position. While they do not address the question of police killings of minorities, they do interest themselves in the disproportionate arrest rates of minorities for crimes of violence by assuming that these rates reflect an *actual* disproportionate participation by minorities in violent crimes. They thus attempt to explain this disproportionate participation in terms of subcultural differences which characterize minorities. For example, they explicitly delcare the following:

> Statistics on homicide and other assaultive crimes in the U.S. consistently show that Negroes have rates between four to ten times higher than whites. Aside from a critique of official arrest statistics that raises serious questions about the amount of Negro crime, there is no real evidence to deny the greater involvement that Negroes have in assaultive crimes . . . .
> There is reason to agree, however, that whatever may be the learned responses and social conditions contributing to criminality, persons *visibly identified and socially labeled as Negroes* in the U.S. appear to *possess them* in considerably higher proportions than do persons labeled white. *Our subculture of violence thesis would therefore expect to find a large spread to the*

learning of, resort to, and criminal display of violence values among minority groups such as Negroes.[20]

It was in large part while attempting to explain the disproportionate arrest rates of blacks and other minorities for crimes of violence that Wolfgang and Ferracuti were led to conceptualize the existence of "subcultures of violence." From the perspective of this theory, subcultures are found to exist—mainly in the ghettoes, mainly among blacks—that are characterized by the presence of norms which differ considerably from the "larger society" to the extent that assaultiveness is not seriously discouraged, but is even permitted as normal. In these subcultures, violence may not be uncommon in certain situations, may be expected, and in fact may even be called for.[21] By means of this view, consequently, racial disproportionality in arrest rates for violent crimes is made considerably easier to comprehend: one finds in the higher violent crime rates for blacks the expression of "subcultural themes." Violence for blacks is more "normal" than it is for whites.

In sum, Wolfgang and Ferracuti's contribution to Position II's perspective is two-fold: blacks are relatively different from and more violent than whites. Whites, as members of "the larger society" are not "different," and are less violent. Consequently, one would expect that the "agents of the larger society" (the police) will be confronting violent blacks—and other minorities (as subcultural theory is extended to include Hispanic populations) much more frequently than they will be confronting violent members of the white population. In this sense, the subculture of violence theory is essentially racial, at least as applied to the United States. Through it, disproportionate arrest rates are interpreted, and disproportionate probabilities that blacks will be involved in fatality-producing police-minority encounters can be predicted.

Another major contribution to the Position II perspective—which explains disproportionate rates by disproportionate participation in violent criminal acts—is found in some of the work of Toch. As a student of violent interpersonal interactions, "violence-prone" individuals, and police violence in particular.

Toch's approach resembles that of Wolfgang and Ferracuti in the sense that he accepts the disproportionality in crime rates as actual and seeks to explain the actors who tend to become disproportionately involved in violence. Toch exhibits the thinking characteristic of the Position II perspective, for example, in a passage which discusses police killings of minorities:

> . . . [A] disproportionate number of civilians involved in police violence are non-white . . . . Nationally, 60 percent of persons shot by officers are non-white. In New York City, where blacks make up about 19 percent of the populations, they account for 59 percent of fatal police victims. In Detroit, only one of the various persons killed by STRESS was white . . . .
>
> . . . [D]istributions of known offenses and of arrests show ethnic disproportions similar to those of the violence data. In New York, for example, during the period corresponding to the 59 percent police victims figure, 62 percent of the persons arrested for violent crimes were black.[22]

It should be emphasized that Toch approaches the racial disproportionality issue only incidentally, through a larger concern with violent interactions, "violence prone" individuals, and police violence. Race—or "ethnicity" as it is referred to by Toch—is more of a complicating factor, to be considered only after understanding some of the other ingredients which seem to characterize interactions which become violent.

In Toch's scheme, violence-prone individuals contribute disproportionately to the total of all violent interpersonal incidents. This is partly because, in Toch's words:

> The violence-prone person invites violence-prone interactions with other people. These interactions follow a pattern, in that they arise under repeatedly occurring circumstances, and in that they serve equivalent ends.[23]

In another passage from *Violent Men*, he suggests that:

> . . . two types of orientations are especially likely to produce violence: one of these is that of the person who sees other people as tools designed to serve his needs; the second is that of the individual who feels vulnerable

> to manipulation. These two perspectives, when we examine them more closely, become faces of the same coin; both rest on the premise that human relationships are power-centered, one-way affairs; both involve efforts at self-assertion with a desperate feverish quality that suggests self-doubt.[24]

Toch's understanding of violence-prone individuals and the themes that influence their involvement in violent incidents can be seen to merge rather easily with the subculture of violence concept propounded by Wolfgang and Ferracuti. It appears logical to Toch that violence-prone themes might be prevalent in certain segments of society, while not in others. For instance, Toch points to the "well-known machismo syndrome" which he relates to the mother-dominated family configuration of Mexican slums—and which he associates with the result that males in these segments are prone to asserting their masculinity.[25] Moreover, it is clear that, like Wolfgang and Ferracuti, Toch sees a definite role for the subculture of violence:

> Whatever the origins of the subculture of violence, it exists in the form of values, beliefs, and attitudes held by its members. These may relate to all manner of situations, and may prescribe appropriate conduct for them. Violence-proneness is restricted to the select minority within the subculture who have assimilated its violence-prone teachings and who live by them.[26]

Toch's use of the subculture of violence, however, is qualified; and with it, he moves beyond Wolfgang and Ferracuti's preoccupation with violent "suspects" or criminals. His study of violence-prone individuals has included violence-prone police officers as well as violence-prone offenders. He has extended the subcultural concept to include police subcultural themes. Thus, violence-prone individuals—who are characterized as sharing essentially similar problems of self-assertion in the face of self-doubt differ mostly in the way that their personalities intersect with their respective group norms. In other words, blacks in encounters with white police may be playing out certain themes in relation to black subcultural norms, while white

police officers may be dealing with similar feelings in the context of norms prevalent in the police subculture.[27] By considering the intersection of personality needs, insecurity and self-doubt with subcultural themes, Toch sees an opportunity for understanding the inclinations of both actors (potentially, at least) in police-minority confrontations.[28]

Thus, against the background of these two general themes—actors attempting to assert themselves in the face of self-doubt and the availability of certain violence-prone group norms—Toch explains the disproportionate death rates of minorities at the hands of the police. As noted earlier, in line with Position II thinking, his explanation centers on the disproportionate arrest rates of minorities for crimes of violence. While Toch stresses the similarity of minority and police subcultures, his emphasis on their similarity noticeably withdraws when disproportionate arrest and death rates are concerned. It is clear that he would not extend the concept of police violence-proneness to explain either of the high minority rates in question. The question that is not answered, then, is: What mechanism is it that attracts police and minorities to interact with each other to the extent that the death rates in question are the end product?

Toch clearly contends that minority death data are not "transferable into inferences about discrimination."[29] Consequently, it can be assumed that he would not consider racism—as implicitly charged by Position I—a possible explanation. Race (or "ethnicity" as it is alluded to by Toch) only enters the violence equation incidentally: "ethnicity is a contributing variable to violence, because a disproportionate number of civilians involved in police violence are non-white."[30] That is, race enters the police violence picture, quite simply, because more minority group members are actually engaging in more violent crime.[31]

From Toch's analysis, it is possible to understand why police-minority confrontations might be especially violent-prone and embittered. However, in a contradictory fashion, Toch subsequently lays his elaborate analysis aside when approaching minority fatalities and takes the position that more minorities

are killed by police because more minorities are involved in violence—and that neither prejudice nor discrimination figures in. This is the essence of the Position II perspective.

Finally, as if to underline this subcultural difference, or at least to dismiss the possibility of reading racism or discrimination into the explanation of racial disproportionality, Toch seeks to bolster his argument by noting that black officers are as a group disproportionately responsible for fatalities resulting from the police use of deadly force—fatalities where minorities are the most frequent victims.[32] The *New York Times* study (to which he makes reference) showed that while only one of 250 white officers killed suspects and one of 58 Hispanic officers killed suspects, as many as one of 38 black officers killed suspects.[33] The validity of Toch's argument, perhaps a logical outgrowth of the subculture of violence theory, will be examined in a subsequent section.

Overall, the Position II perspective differs from the Position I perspective by the manner in which it assigns a very active role to one or both of the participants in police-minority violent encounters. Wolfgang and Ferracuti have theorized that subcultural themes may be influential in producing disproportionate arrest rates for blacks and other minorities for crimes of violence. It follows from their reasoning that blacks commit more crimes of violence, and will therefore be more frequently involved in violent confrontations with police. Toch has extended consideration of violence-proneness to encompass personal themes which intersect with subcultural norms—for both minority groups and police alike. Yet his use of arrest statistics to explain death rates for victims of police violence tends to associate violence-proneness disproportionately with minority actors.

ARE THESE POSITIONS PLAUSIBLE?

Both positions—the quasi-labeling perspective of Position I and the violent racial minority stance of Position II—make assertions that deserve empirical testing. Comprehensive data on incidents where deadly force has been deployed by police are

not currently available nor easily obtained. However, for the purposes of this discussion, three of the more important points of contention will be examined in light of recent victim survey data or in light of alternative support or theorization.

Point A: The Meaning of Arrest Rates

Perhaps the most striking point of contention between the two positions centers around the question: Are disproportionate arrest rates manufactured by some mechanism of control which is differentially directed at minorities, or are they reasonable reflections of disproportionate participation by minorities in crimes of violence?

Recent data from a victimization survey made available by the National Crime Panel and reported by Hindelang provide an opportunity to examine this question from a source other than official statistics.[34] It is especially noteworthy that considerable discrepancies were found to exist between the amount of crime reported to interviewers by victims and the amount of crime officially reported to the police and reflected in official statistics. For various reasons, considerably less crime was reported to authorities than was experienced by victims among the persons interviewed.[35]

In addition to the hope that the victim survey could provide a more accurate picture of the amount and kind of crime occurring in American society, another hope was that a great deal more might be learned about the characteristics of criminal victimization. One particular variable, which bears directly on the present point, recorded the race of the offenders involved in personal victimizations as perceived by the victims.[36]

Perhaps the simplest victimization category relevant to the present discussion of disproportionality and crimes of violence is "assaultive violence without theft." This victimization category includes rape, aggravated and simple assault where theft was not also involved.) When data in this category are examined, it is learned that 45 percent of the offenders (an aggregate all-Impact City figure) were perceived to be black/others.[37] Only about 35 percent of the aggregate population for the cities

surveyed was composed of black/others. When each of the cities were examined separately, the finding of moderately disproportionate participation by minorities in violent offenses appeared to be upheld.

Yet, in addition, it should also be noted that blacks were found to be much more disproportionately responsible for theft-related personal victimizations. In these victimizations, nearly three quarters of all offenders were perceived to be black/others—in sharper contrast to their actual representation in the total population, or 35 percent.[38]

These general victimization findings would appear to weaken considerably the claims advanced by Position I which interpret disproportionality as entirely "manufactured" by arrest policy, rather than as reflecting actual minority participation in crime. Concomitantly, some support would seem to be garnered for the Position II stance which relates the disproportionately high arrest rates of blacks for crimes of violence to actual disproportionate involvement by blacks in violent acts. Black/others are seen to be somewhat disproportionately involved in assaultive victimizations by the victims themselves; however, black/others are considerably more disproportionately involved in personal theft victimizations.

Point B: The Race and Socioeconomic Status of the Offender

A second point involves the role of race and the role of socioeconomic status in relation to high arrest rates for violent crimes, a relationship which underpins the arguments of both positions when they address the issue of high minority death rates at the hands of the police.

Position I would argue that both high arrest rates and high death rates are correlates of low socioeconomic status—to the extent that law enforcement is differentially directed toward the lowest income groups in contemporary American society. Since blacks are considerably overrepresented among these strata of society, blacks are disproportionately affected by law

enforcement policy. The Position I argument becomes less simple to characterize on this issue because of the diverse views which were grouped together in forming it. (For example, certain adherents of this position would insist that the relationship between low socioeconomic status, race and differential policing cannot be adequately explored without considering how racial minorities came to be overrepresented among the lowest income groups.) Nonetheless, Position I proponents would essentially agree that the high arrest rates and high death rates of minority suspects testify to the degree to which differential policing is operative.

Position II would not dispute the general relationship between high crime rates, low socioeconomic status, and race. On the contrary, Position II theorists would readily concede that subcultures of violence characteristically find roots in low income areas. However, Position II theorists might wish to contend that, while low socioeconomic status might be an antecedent of subcultural norms, the facts are that subcultures exist among racial minorities and racial minorities participate disproportionately in violent crimes.

Resolution of this point of contention through victimization data is not so clear. One finding which addresses the question of differential policing and race, and differential policing and socioeconomic status, is the following: The survey found that on the whole the most highly victimized segments of society (for any type of personal victimization) were families whose incomes were less than $7,500 annually.[39] Those persons whose incomes fell below $3,000 annually were especially frequently victimized both by violence- and theft-related victimization—regardless of race.

From these findings, Position II theorists would find fuel to argue that what is called "differential policing" (by Position I) may well be an honest attempt to provide adequate police protection to the lowest income groups—since these strata experience the most victimization. Unfortunately, what these data cannot demonstrate is the extent to which lower income blacks and lower income whites (as the groups which are most highly victimized) receive varying amounts of police attention.

Since data pertaining to the socioeconomic status of perceived offenders are unfortunately not available, no new determinations concerning the role of race and socioeconomic status of offenders can be made here. It is not possible to ascertain whether or not poor whites might not also be overrepresented among perceived offenders. Thus, in this way the question raised, but not resolved, is: Would it be just as fruitful to discuss economic disproportionality as racial disproportionality?

If, based on the findings presented under Point A above ("The Meaning of Arrest Rates"), Position I theorists were to concede that a great deal of minority participation in offense activity was real, they might then insist on characterizing minority involvement in violence as stemming from economic subcultural themes, rather than the essentially racial subcultural themes which are ascribed to minority participation in crime by Position II. This economic approach would be intended to subsume minority death rates in police shootings, as well as minority arrest rates.

Implied in this line of investigation would be an examination of victims of police violence for socioeconomic status, in addition to race. At the same time, it would be interesting to learn what proportion of non-minority police victims are very low socioeconomic status whites: Do poor whites also become disproportionately involved in crimes of violence when compared to their share of the total white population?

Point C: Prejudice and Discrimination

Is it a logical necessity that discrimination or prejudice be ruled out as considerations in police violence because black officers (like black offenders) appear to participate disproportionately in violent incidents and are in fact disproportionately responsible for the deaths of alleged minority suspects?

Alternative interpretations have been suggested to explain statistics which purport to demonstrate disproportionate use of deadly force by black officers. For example, a former New York police commissioner, Donald Cawley, offered the following interpretation in an interview:

> . . . the reason a larger number of black policemen were involved in fatal incidents was that a larger proportion of black policemen were assigned to dangerous jobs such as serving as detective and undercover agents and working in precincts with the highest crime rates.[40]

Thus it is questionable whether simple statistics showing higher black officer involvement in suspect fatalities can be so easily read in terms of racial propensities toward violence. Other variables, such as differential assignment to hazardous duty, may well contribute to the high rates of participation that characterize black officers. It is especially questionable when these statistics are used to dismiss the argument that the disproportionate number of minority deaths might be linked to policies of differential enforcement, discrimination, the dispensing of "summary justice," or other charges involving racism. Differential assignment of blacks to dangerous police duty in no way precludes the criticism that policing may be unfairly deployed against racial minorities, thus generating higher arrest and death rates. On the contrary, some would see differential assignment of black officers to dangerous duty as one component of an overall racist policing policy.

Even without differential assignment, however, there are other interpretations which might be made to explain why black officers might become more frequently involved in violent incidents with minority suspects—interpretations that do not preclude the existence of a discriminatory or racist policing mechanism. These particular interpretations would describe the dilemma of the black officer who is caught between the minority status which he is seeking to escape and the police culture which he is seeking to join.

One such interpretation is offered by Swett:

> Observational experience indicates that as a result of selection procedures, upward social mobility, the enculturation aspects of police training, and internalization of the police culture's value system, such officers identify more with the police culture than with their ethnic minority culture. At the same time the position of the ethnic minority officer within the police culture is in some respects marginal.

> . . . In consequence, the ethnic minority officer displays a greater degree of suspicion of the culturally different, particularly members of his own ethnic group, than the non-minority officer. Whereas suspicion of the non-minority officer is reciprocated by a culturally different minority so that he is regarded as the enemy, the greater suspicion of the ethnic minority officer is reciprocated to a greater degree by his own ethnic group, so that he is not only considered an enemy but also a traitor. This often impairs his effectiveness in dealing with members of his own group.[41]

What Swett describes is not very different from what Bettelheim described in his discussion of life in a concentration camp, where the individual identities of particular members of the oppressed group become so entangled with the identity of the oppressor/aggressor to that they begin to emulate the oppressor/aggressor to the extent of participating in their own oppression and the oppression of their group.[42] Thus, seen in this light, the fact that black officers participate to a disproportionate extent in the killing of minority suspects does not necessarily mean that one may dismiss the Position I charges which at least imply a role for racism in accounting for the disproportionate number of minority "suspect" deaths. In this regard, whether black police officers kill more or less frequently is beside the point.

SUMMARY AND CONCLUSIONS: DO THESE POSITIONS OFFER ENOUGH OF AN EXPLANATION?

This discussion began by attempting to examine two perspectives which are frequently invoked when racial disproportionality is being interpreted—either in the realm of police killings or in the realm of arrest rates for crimes of violence. The first perspective, characterized as a quasi-labeling stance, linked the disproportionately high death rates of minority suspects to the impact of some differential policing mechanism which seemed to be operating in American society. The second perspective linked disproportionate minority death rates to disproportionate minority arrest rates for crimes of violence. Ar-

rest rates were assumed to reflect disproportionate actual participation by minorities in violence, and were thereby used to explain why minorities might be found to a disproportionate extent among fatalities resulting from violent encounters with the police. Higher actual participation in violent incidents by minorities was related to some differences which were apparently linked with minority status (principally race or ethnicity).

Have these positions explained enough about racial disproportionality? Perhaps not. In effect, more questions seem to be raised than can be easily answered by these positions.

A look at recent victimization (and census)[13] data revealed that disproportionate minority arrests did appear to reflect a disproportionate actual participation by minorities in crimes of violence to a moderate degree—based on the victim's perception of the race of the offender. Position I's quasi-labeling, differential enforcement theory is not greatly supported.

An additional finding showed that the lowest income groups (regardless of race) were the most highly victimized segments of society. Although this finding might serve as a rationale for providing greater police protection for lower income persons in general—that is, a form of differential policing—it is not ascertainable from these data whether such differential policing actually exists, or whether the degree of such policing differs among white and black low income groups. Nor is it possible to surmise whether poor whites might also be generating a disproportionate share of offenders. If this last possibility were discovered to be true to some extent, then the race-linked theorizations of Position II would prove inadequate.

Further, even if disproportionate participation by minorities in violent crimes is granted, is it entirely sufficient to assume, as Position II implicitly does, that "pure risk" can explain the greater death rate of minorities? That is, merely because minorities are seen to be involved more frequently in violent crimes than whites, is it logical to assume that minorities will appear among victims of police shootings much more frequently than whites? Without a comparative analysis of violent interactions between police and "suspects" (white and

black) to determine when, how frequently, and for whom deadly force is invoked as a response by police, it is difficult to feel confident merely assuming that higher offense and arrest rates automatically extrapolate into higher death rates.

In addition, even though minorities do appear in fact to participate somewhat disproportionately in crimes of violence, they participate much more disproportionately in theft-related personal victimizations (economic rather than violent crime). This is an attribute of disproportionality which has not been addressed by either of the positions outlined above.

The utility of this article lies in the presentation and clarification of two views of racially disproportionate death rates resulting from the use of deadly force by police. Contemporary discussion of these death rates is rare. When discussion occurs, as in the two "belief perspectives" above, it is inadequate. Elaboration of these perspectives may be useful since they reflect current thinking about race and crime in general, and represent views most likely to influence formulation of social policy in this area of criminal justice.

Analysis of racial disproportionality in police-shooting fatalities in even the simplest terms has been lacking—with the result that criminal justice agencies may feel free to adopt either belief perspective without basing their decisions on empirical evidence. Consequently, depending on which view of racial disproportionality is favored, different approaches might be freely adopted in such areas as the deployment of police manpower in minority neighborhoods, the role of minority officers, or in establishing a policy toward incidents where the use of deadly force by officers had resulted in fatalities. Certainly, racial disproportionality in deaths resulting from police use of deadly force deserves the kind of careful consideration given race in the Supreme Court's deliberation on capital punishment.

Notes

1. For a comprehensive discussion of the restrictions on the use of deadly force at arrest and the constitutional questions at issue, see

Comment, "Deadly Force to Arrest: Triggering Constitutional Review," 11 *Harvard Civil Rights—Civil Liberties Law Review* 361-389 (1976).

2. Findings of racial disproportionality in civilian deaths by deadly force are by now commonplace. On August 26, 1973, for example, the *New York Times* reported that about 60 percent of all such deaths recorded between 1970 and 1972 in New York City were black citizens. Kenneth Clark reported *(New York Times,* September 18, 1974) that three-quarters of all victims of police shootings between 1970 and 1973 were members of minority groups; about half were black and one quarter were of Hispanic ethnicity, in sharp contrast to their actual share in the local population.

Takagi reviewed civilian deaths resulting from police use of force in California and reported that the incidence rate of such deaths increased by two and one-half between 1962 and 1969 and that these rates have remained constantly nine times higher for blacks than for whites over the last 18 years (Paul Takagi, "A Garrison State in a 'Democratic' Society," *Crime and Social Justice,* p. 29 [Summer, 1974].) Kobler reports national statistics reflect disproportionality for the years 1952 to 1969. Although blacks generally comprise about 50 percent of all victims in Kobler's data, it should be noted that blacks in 1970 comprised only from 12 to 14 percent of the nation's population. (Arthur L. Kobler, "Police Homicide in a Democracy." 31 *Journal of Social Issues,* 163 [1975] at p. 165.) A detailed analysis of deadly force is found in Brief for Appellant at Appendix A. *Wiley v. Memphis Police Department* (1975), noted in Comment, "Deadly Force to Arrest: Triggering Constitutional Review," note 1 *supra.*

A decade earlier Robin investigated civilian deaths resulting from police force in Philadelphia which occurred between 1960 and 1970 and found that nearly 90 percent of those killed were black—whereas the black community during this time accounted for only about 22 percent of the total local population. (Gerald Robin, "Justifiable Homicide by Police Officers," 54 *Journal of Criminal Law, Criminology, and Police Science* 225 [1963] at pp. 226-27.) At the same time, Robin reviewed statistics concerning police killings of civilians in eight other American cities (Akron, Chicago, Kansas City, Miami, Buffalo, Philadelphia, Boston, and Milwaukee) and found black victims included among the dead more frequently than whites at ratios which ranged from 6 to 1 (in Akron) to 30 to 1 (in Milwaukee).

3. *Furman v. Georgia,* 408 U.S. 238 (1972).

4. See Hans Toch's unpublished manuscript on police and prison violence (1976), and the *New York Times,* August 26,1973. Often the news media serve as the principal sources of statistics and descriptions

of incidents involving police killings of civilians. In general, whether from academic journals or from press releases, the information in this area is rather incomplete and of questionable reliability. The intent of this paper is not to review the methodology or to compare the findings of different studies—there is wide agreement that minorities serve disproportionately as victims of the use of deadly force by police. What is of interest here is the logic that pervades the various explanations of the disporportionate death rates of minorities whether that logic is exhibited in academic journals or in the news media.

5. Robin, note 2 *supra.*

6. Kobler, note 2 *supra.*

7. Ralph Knoohuizen, Richard P. Fahey and Deborah J. Palmer, "The Police and Their Use of Fatal Force in Chicago," Chicago Law Enforcement Group, 1972.

8. Takagi, note 1 *supra,* p. 30.

9. Angela Y. Davis, *If They Come in the Morning* (New York: New American Library, 1971).

10. Morris A. Forslund, "A Comparison of Negro and White Crime Rates," in Charles E. Reasons and Jack L. Kuykendall (eds.), *Race, Crime, and Society,* (Pacific Palisades, Calif.: Goodyear, 1972), pp. 96-102.

11. The treatment of these writers and their interpretations of racial disproportionality is meant to be illustrative, not exhaustive.

12. The data used in the present analysis were not designed to address the issue of racial disproportionality and police shootings. However, they do allow for a preliminary assessment of the soundness of some of the points raised by the two positions.

13. Forslund, note 10 *supra,* p. 100. Emphasis added.

14. Kenneth Clark, as quoted in the *New York Times,* September 18, 1974.

15. Edwin H. Sutherland and Donald R. Cressey, *Criminology* (New York: Lippincott, 1970), p. 133. In explaining racial disproportionality in American prison populations, Charles Reasons and Russell Kaplan (in "Tear Down the Walls? Some Functions of Prisons," *Crime and Delinquency,* October, 1975, at pp. 369-70) state: "Cultural bias operating in law enforcement and the courts produces a prison population that is largely non-white and poor."

16. Gilbert Geis, "Statistics Concerning Race and Crime," *Crime and Delinquency,* (April 1965), pp. 144-149. Geis advocates discontinuing

the use of race categories in crime statistics, based on a fear that criminal justice agencies would manipulate what he considered very questionable figures for their own benefit and to the detriment of minority groups.

17. Daniel Swett, "Cultural Bias in the American Legal System," in Reasons and Kuykendall, *Race, Crime and Society,* note 10 *supra,* pp. 38-40.

18. Reasons and Kuykendall, for example, suggest that "police have become committed to repressing change and have developed a political philosophy to support their position" (in *Race, Crime, and Society,* note 10 *supra,* pp. 142-43). This, in effect, is not a far cry from a more radical characterization which would trace racial disproportionality to a social policy of racial and economic genocide which is transmitted by the present configuration of power and implemented through its policing apparatus. (See Bettina Aptheker, "The Social Functions of Prison in the U.S.," in Davis, note 9 *supra,* pp. 51-56.)

19. Two studies report findings which lend support to this Position II feature; both find little support for the prejudice argument. In separate observational studies on police interactions with citizens and on arrests of juveniles, the following conclusions were drawn: (a) "There is a general paucity of evidence of discriminatory or prejudicial behavior on the part of police officers in face-to-face encounters with Negroes" (Donald J. Black and Albert J. Reiss, "Patterns of Behavior in Police and Citizen Transactions," in Reasons and Kuykendall, note 10 *supra,* p. 203); and (b) where serious offenses were concerned (including such violent crimes as robbery, homicide, rape and aggravated assault), police discretion in effecting arrest was not influenced by personal demeanor or social class characteristics. (Irvin Piliavin, and Scott Briar, "Police Encounters with Juveniles," in Donald Cressey and David Ward (eds.), *Delinquency, Crime, and Social Process* [New York: Harper and Row, 1969], p. 159.)

20. Marvin E. Wolfgang and France Ferracuti, *The Subculture of Violence* (New York: Tavistock Publication, 1967), p. 265. Emphasis added.

21. *Ibid.,* pp. 158-65.

22. Toch, note 4 *supra,* ch. 2, p. 6.

23. Hans Toch, *Violent Men* (Chicago: Aldine, 1969), p. 255.

24. *Ibid.,* p. 183.

25. *Ibid.,* p. 190.

26. *Ibid.,* p. 191.

27. Toch points to similarities between blacks and the police as two minorities faced with uncertainty:

> Militant spokesmen for the ghetto are prone to characterize the police as an invading army representing the white establishment. This characterization is ironic because the police, far from being agents of the majority, are a minority themselves. The objective situations of blacks and police are in many ways similar. The police inhabit a ghetto of their own, and they are doomed to segregation. They have little hope of man-to-man communication with civilians, who—even if favorably disposed to law enforcement—tend to be nervous and self-conscious in encounters with officers.

Quoted from Hans Toch, "Cops and Blacks: Warring Minorities," in Gerald Leinwand (ed.), *The Police* (New York: Pocket Books, 1972), pp. 196-97.

28. This does not mean to imply that both actors will always be equally responsible for the denouement of violent interactions. While violent interactions are interpersonal situations involving at least two parties, the presence of one violence-prone individual may be enough to explain the excalation into violent outcomes.

29. Toch, note 4 *supra,* ch. 2, p. 6.

30. *Ibid.*

31. It is true that Toch's analysis of police-minority violence extends further than is described here; for example, he sees a particular role for "fear" as it interacts with the ethnicity of the participants in police violence to produce "polarization on a very large scale," *Ibid.,* p. 2.

32. *Ibid.,* p. 6.

33. *New York Times,* August 26, 1973.

34. Michael J. Hindelang, *Criminal Victimization in Eight American Cities* (LEAA Draft Document, 1974). In this survey, representative probability samples of approximately 10,000 households were selected for study in eight Impact Cities (Atlanta, Baltimore, Cleveland, Dallas, Denver, Newark, Portland, and St. Louis). Respondents 14 years of age and older were asked to report on those criminal victimizations affecting the entire household within the preceding 12-month period.

35. Concerning reasons for non-reporting, Hindelang reported the following:

> For each category of victimization, the belief on the part of the individual that nothing could be done about the victimization was the reason most frequently given, followed by the belief that the victimization was not sufficiently important to report.

See Hindelang, note 34 *supra,* p. 386.

36. The question of the extent to which racial perceptions might be inaccurate has been raised, but even when allowances are made for possible misperceptions, general findings concerning disproportionality remain substantially unaffected.

37. Hindelang, note 34 *supra,* Table 3:21.

38. *Ibid.*

39. *Ibid.,* Table 3:7.

40. *New York Times,* August 26, 1974.

41. Swett, note 17 *supra,* pp. 39-40.

42. Bruno Bettelheim, "Individual and Mass Behavior in Extreme Situations," in Harold Proshanksy and Bernard Seidenberg (eds.), *Basic Studies in Social Psychology* (New York: Holt, Rinehart and Winston, 1965).

43. The following are examples of socioeconomic indicators which characterized black populations according to the 1970 Census: Black families earned median annual incomes which average about $3,500 less than all families in the total population; 25 percent of all black families earned incomes below $3,000 annually—compared to only 12 percent of all American families (including blacks); blacks owned considerably less of their own housing than did all families; blacks lived in considerably more crowded housing conditions; fewer blacks on the average completed high school than the general populations as a whole; blacks were considerably more unemployed; more blacks worked in menial occupations. (From U.S. Bureau of the Census, *Statistical Abstract of the U.S.,* 1972; *County and City Data Book,* 1972; 1970 *Census Tracts; General Social and Economic Characteristics,* 1972.)

CHAPTER 6

POLICE SHOOTINGS AT MINORITIES: THE CASE OF LOS ANGELES

MARSHALL W. MEYER

The purpose of this article is to present basic data on the involvement of minorities in Los Angeles Police Department shooting incidents from 1974 to 1979. Few reliable statistics concerning shootings at minorities now exist, although several studies of the subject are now underway. As a consequence, there has been little reasoned discussion of the numerous issues arising in connection with minority involvement in police shootings.

The data in this article were originally released by the Los Angeles Board of Police Commissioners in Part IV of their "Report of the Board of Police Commissioners Concerning the Shooting of Eulia Love and the Use of Deadly Force" for which the author served as the commission's consultant. Any opinions or conclusions not stated in the Police Commission's Report are solely those of the author and do not necessarily reflect the views of the Los Angeles Board of Police Commissioners or of the Los Angeles Police Department. The cooperation of Chief Daryl F. Gates and of numerous staff officers of the Los Angeles Police Department throughout the course of this study is gratefully acknowledged as are the comments and suggestions made by the commission and the department.

SOURCE: "Police Shootings at Minorities: The Case of Los Angeles," *The Annals of the American Academy of Political and Social Science* (November, 1980), 452:98-110. Reprinted with permission of the American Academy of Political and Social Science and the author.

Another purpose of this article is to illustrate the limitations of statistics on police shootings. The data presented in the following pages show the involvement of blacks—but not of Hispanics—in Los Angeles Police Department shooting incidents to have been different in most respects from that of whites. Many questions are raised by this pattern, but no definitive explanation is provided by the data. Why this is so will be discussed in the concluding section.

The data used in this article describe shooting incidents in which Los Angeles police officers discharged firearms from 1 January 1974 to 31 December 1979. The analysis relies entirely upon the Los Angeles Police Department's accounts of shootings presented in original investigative reports of shooting incidents and other departmental documents. These investigations of shootings are quite lengthy and detailed, perhaps more so than in any other U.S. police agency. No attempt has been made to reconcile these departmental records of shootings with other accounts, such as those in the press or in court records, and no independent investigation of shooting incidents was made at the time of the incidents or in connection with the preparation of this article.

Most of the text and all the tables in this article describe Los Angeles Police Department officer-involved shooting incidents in the 1974-78 interval. The text also makes reference to shooting incidents occurring in 1979. The data are drawn from files maintained by the Staff Research Section of the Personnel and Training Bureau of the Los Angeles Police Department, supplemented by information obtained from departmental personnel files and records of the Robbery-Homicide Division of Detective Headquarters Bureau. Of the 913 incidents of shooting occurring from 1974 through 1978, all but one, the Symbionese Liberation Army (SLA) shoot-out of May, 1974, are included in our data files.[1]

Two data files were constructed based on information made available by the department. Records in the first, the "suspect" file, describe the person—or object, if any—shot at. The date and location of each shooting, a description of the person or

object shot at, the suspect's action prior to the shooting, weapons, if any, possessed and/or used by the suspect, shots fired by the Los Angeles Police officers, and the results of the shooting review process are indicated for each person or object shot at. Shootings of bystanders, hostages, animals, and accidental discharges and other non-accidental shootings are included in the suspect file, but are excluded from the present analysis.[2] One entry is made in the suspect file for each person or object shot at in an incident. There are 984 entries in the suspect file due to the involvement of more than one civilian in some shooting incidents, 605 of whom are suspects, that is, persons believed by officers to have committed or to be engaged in criminal acts. The second data file is our "officer" file. Records in this file contain information on each Los Angeles Police officer involved in a shooting in the 1974-78 interval. Up to six shootings are coded for each officer.[3] The location of the shooting incident, the officer's assignment, shots fired, and the outcome of review of each shooting are described in the officer file. Some 1,070 officers discharged their weapons in the shooting incidents reviewed for this study, excluding the SLA shoot-out.

One hundred forty-six officer-involved shooting incidents occurring in 1979 have also been reviewed in connection with this analysis, but have not been entered into our data files. Certain data concerning 1979 shooting incidents, 101 of which involved suspects, are presented in narrative discussion. The 1979 shooting incidents are not included in statistical tables since investigations, reviews, and final adjudications of a number of the 1979 Los Angeles Police officer-involved shootings were not completed in time to be included in this study.

Most of the items or variables used in this study are taken directly from departmental accounts of shooting incidents. Shooting investigations are quite detailed and include a chronological narrative of events preceding the shooting, a listing of weapons used and shots discharged, listings of evidence and witnesses, and descriptions of the suspect—including his or her race or descent—gunshot wounds sustained, and the scene of the shooting incident. Reports of shooting review boards are

attached to departmental investigations and state the classification of the shooting—in policy, in policy but below departmental standards, out of policy, or accidental—and the recommended corrective or disciplinary action, if any. Shooting review reports also include explanatory comments.

All but one of the items used in this study are taken directly and unambiguously from Los Angeles Police Department shooting investigations and shooting review board reports. The department does not routinely classify the actions of suspects shot at in tactical situations, but classification of suspects' actions precipitating shootings was deemed necessary for purposes of this study and was done for all shooting incidents involving suspects occurring from 1974-78, except for the SLA shoot-out. Seven categories were used to classify suspects' actions prior to shooting incidents, based on the chronological narrative of events preceding shootings. Using a weapon, whether a gun, knife, automobile used for purposes of assault, or any other potentially lethal or injurious object, is one such category. Threatening the use of but not actually using a weapon, whether by pointing or aiming it or by indicating verbally that a weapon would be used, is a second category. Displaying a weapon while not threatening its use, either verbally or otherwise, is a third category. Assaulting an officer or civilian where no weapon is used, threatened, or displayed is a fourth category. Appearing to reach for a weapon when no weapon is actually used, threatened, or displayed, and there is no assault, is a fifth category.[4] Disobeying an officer's order, usually an order to freeze or halt, when no weapon is used, threatened, or displayed, and there is no assault, in the sixth category. A seventh category is other actions precipitating shootings and includes accidental discharges at suspects.

In almost all instances, the suspect's act precipitating a shooting incident is the final act that caused the officer to fire, that is, that act but for which the shooting would not have taken place. The exceptions are those occasional instances in which two or more potentially precipitating acts occurred within a very short period of time, for example, firing a weapon

and then disobeying a command to freeze, in which case only the higher classification or most life-endangering act of the suspect is the one coded. The categories of disobeying officers' commands and of appearing to reach for weapons are thus extremely restrictive and include only cases in which no more threatening action of the suspect occurred within the period immediately preceding the shooting.

The categories used to describe suspects' weapons are straightforward, but the reader should note that the unarmed category is quite restrictive. A suspect is considered to have been unarmed only if he did not use a weapon, including a vehicle for purposes of assault, and if he is found after the shooting incident not to have possessed a weapon. In other words, a suspect who did not use, threaten, or display a weapon but is ultimately found to have been in possession of one is classified as being armed.

One further introductory comment is required. Police firearms discharges in Los Angeles decreased over the 1974-79 interval, especially those kinds of incidents specifically restricted by a new shooting policy that took effect in late 1977. Numbers of shooting incidents, suspects shot at, suspects shot (hit), suspects shot fatally, and shots fired per incident fell substantially during this period. Shootings precipitated by suspects disobeying officers' orders to halt or making furtive gestures as if reaching for weapons and shootings at unarmed suspects declined even more dramatically.[5] The declines of shootings of all types, and especially of incidents requiring the most careful review and evaluation, should be kept in mind in interpreting data on minority involvement in Los Angeles Police Department shootings.

LOS ANGELES POLICE SHOOTINGS INVOLVING MINORITIES

Numbers of Shootings

A large number of blacks compared with Hispanics and whites have been involved in police shootings in Los Angeles

(Table 1). Of the 584 suspects shot at from 1974-78 whose race or descent is known, 321 (55 percent) were black, 126 (22 percent) were Hispanic, 131 (22 percent) were white, and 6 (1 percent) were of other nonwhite origins. The race or descent of 21 suspects shot at from 1974-78 is unknown. In 1979, however, of 101 suspects shot at whose race or descent is known, 46 (45 percent) were black, 32 (32 percent) were Hispanic, and 23 (23 percent) were white. The race or descent of one suspect shot at in 1979 is not known.

The proportion of black suspects involved in Los Angeles Police Department shooting incidents appears to have changed little over the decade prior to 1979. During a three and a half year period from 1968 to 1971, 57 percent of suspects shot at by Los Angeles officers were black.[6] This proportion differs insignificantly from the proportion of suspects shot at who were black—55 percent—from 1974-78.

From 1974-78, blacks accounted for 36 percent of all arrests and 46 percent of Part I—of FBI Index crime—arrests[7] in Los Angeles. From 1974 to 1978, blacks were reported to have committed 44 percent of all attacks and 42 percent of assaults with deadly weapons upon Los Angeles Police officers. Fifty-five percent of the suspects shot at, 53 percent of those actually hit, and 50 percent of suspects shot fatally by Los Angeles Police officers in this period were black. In 1979, blacks accounted for 36 percent of all arrests and 44 percent of Part I arrests and were charged with 38 percent of all attacks and 41 percent of assaults with deadly weapons upon Los Angeles Police officers. Forty-five percent of the suspects shot at, 50 percent of those actually hit, and 62 percent—8 of 13 suspects—shot fatally by Los Angeles Police officers in 1979 were black.

From 1974 through 1978, Hispanics accounted for 27 percent of all arrests and 24 percent of Part I—of FBI Index crime—arrests in Los Angeles. From 1974 to 1978, Hispanics were reported to have committed 24 percent of attacks and 25 percent of assaults with deadly weapons upon Los Angeles Police officers. Twenty-two percent of the suspects shot at, 22 percent of those actually hit, and 16 percent of suspects shot

TABLE 1 POPULATION, ARRESTS, ATTACKS ON OFFICERS, ADWs* UPON OFFICERS AND SUSPECTS SHOT AT, HIT, AND SHOT FATALLY BY RACE OR DESCENT (IN PERCENT)

	1977 Popula-tion†	1974-78 Total Arrests	1974-78 Part I Arrests	1974-78 Attacks On Officers	1974-78 ADW's Upon Officers	1974-78 Suspects Shot at	1974-78 Suspects Hit	1974-78 Suspects Shot Fatally
Black	18	36	46	44	42	55	53	50
Hispanic	24	27	24	24	25	22	22	16
White	52	35	28	28	26	22	23	33
Other nonwhite	6	2	2	4	7	1	2	1
	100	100	100	100	100	100	100	100
Number (not in percent)		1,267,299	219,224	5976	2360	584	307	128

* ADW = Assaults with deadly weapon.

† Population on percentages are based on results of a 1977 sample survey conducted by the Los Angeles Community Development Department and reported in "Population, Employment, and Housing Survey, 1977," volume III.

fatally by Los Angeles Police officers in the period were Hispanic. In 1979, Hispanics accounted for 31 percent of all arrests and 30 percent of Part I arrests and were charged with 32 percent of all attacks and 34 percent of assaults with deadly weapons upon Los Angeles Police officers. Thirty-one percent of the suspects shot at, 33 percent of those actually hit, and 15 percent of those—2 of 13 suspects—shot fatally by Los Angeles Police officers in 1979 were Hispanic.

Departmental records do not indicate the race or descent of assailants involved in shootings of officers from 1974-78. However, a total of 19 officers who discharged their weapons were shot—that is, hit—by suspects' bullets from 1974-78. Thirty-seven percent—seven—of the suspects involved in these shootings were black, 37 percent—seven—were Hispanic, and 26 percent—five—were white. From 1974 through 1978, five Los Angeles Police officers were shot fatally. Four blacks and one Hispanic were apprehended in connection with these shootings; the descent of the person responsible for one of the officer fatalities is unknown.

A higher percentage of shootings by police officers than of reported violent crimes has taken place in preponderantly black communities in Los Angeles. From 1974-78, 26 percent of homicides, forcible rapes, and robberies occurring in Los Angeles took place in the Southwest, Seventy-seventh Street, and Southeast Divisions of the Los Angeles Police Department. Thirty-three percent of police shooting incidents involving suspects within the city limits of Los Angeles occurred in these three divisions, as did 31 percent of shootings in which a suspect was hit and 34 percent of fatal shootings of suspects by the Los Angeles Police Department.[8]

Circumstances of Shootings

A greater proportion of shootings at blacks than at Hispanics and whites followed suspects' disobeying officers' orders to

halt and suspects' appearing to reach for weapons. Table 2 shows that from 1974-78, 15 percent of shooting incidents involving blacks were preceded by suspects' disobeying an officer's order to halt, and 12 percent were preceded by suspects' appearing to reach for weapons. Nine percent of Hispanic suspects were shot at after disobeying orders to halt and six percent after appearing to reach for weapons; the corresponding proportions for whites were nine percent following disobeying orders to halt and nine percent after appearing to reach for weapons. The proportion of black suspects shot at after displaying, threatening to use, or actually using a weapon was 66 percent, whereas 74 percent of Hispanics and 76 percent of white suspects were shot at under these circumstances.

A greater proportion of blacks than of Hispanics or whites shot at by the Los Angeles Police Department from 1974-78 were ultimately determined to have been unarmed. A somewhat higher percentage of blacks than of Hispanics or whites were carrying guns when they were shot at, but a lower percentage of blacks than of Hispanics and whites had other weapons, such as knives, blunt instruments, and so forth. Table 3 shows that of blacks involved in shooting incidents with the Los Angeles Police Department, 28 percent in fact possessed no weapon when they were shot at. Twenty-two percent of Hispanics and 20 percent of whites were ultimately determined to be unarmed. Fifty-four percent of blacks shot at possessed guns compared with 48 percent of Hispanics and 49 percent of whites; 18 percent of blacks, 30 percent of Hispanics, and 31 percent of whites had other weapons.

Changes from 1977 to 1978, which reduced shootings at suspects disobeying officers' orders to halt or appearing to reach for weapons—where there was no assault and no use, display, or threat of a weapon—and of unarmed suspects, diminished the frequency with which blacks and Hispanics were involved in these kinds of shootings. Thus eight—of 57—shootings at blacks in 1978 were precipitated by disobeying officers' orders or by appearing to reach for weapons compared with an average of 19.75 such shootings per year from 1974-77.

TABLE 2 SUSPECTS' ACTIONS PRECIPITATING SHOOTINGS, BY RACE OR DESCENT, 1974-78 (IN PERCENT)

	Black	Hispanic	White
Using weapon	22	23	28
Threatening use of weapon	39	45	43
Displaying weapon	5	6	5
Assaulting officer or civilian	5	9	6
Appearing to reach for weapon*	12	6	9
Disobeying command to halt*	15	9	9
Other precipitating action, including accidental shootings at suspects	1	3	1
	100	100	101
Number (not in percent)	321	126	131

* Disobeying command to halt or appearing to reach for weapon were coded only if no assault took place and there was no use, threat, or display of a weapon in the period immediately preceding the shooting. Assault was coded only if there was no use, threat, or display of a weapon. For each person shot at, only one precipitating event was coded—the most life endangering.

TABLE 3 SUSPECTS' WEAPONS, BY RACE OR DESCENT, 1974-78 (PERCENTAGES)

	Black	Hispanic	White
No weapon	28	22	20
Gun	54	48	49
Other weapon, including automobile	18	30	31
	100	100	100
Number (not in percent)	321	126	131

Eleven blacks shot at in 1978 were found to be unarmed compared with an average of 20 from 1974-77. In 1978, one Hispanic—of 20—was shot at following disobeying orders to halt or by appearing to reach for a weapon—compared with an average of 4.5 from 1974-77—and none was armed—compared with the 1974-77 average of 4.5. Two whites—of 20—were also shot at after disobeying orders to halt or appearing to reach for a weapon—compared with an average of 5.5 from 1974-77—and three white suspects were in fact unarmed—compared with 5.75 per year from 1974-77.

No significant difference has existed between blacks and other suspects in the number of shots fired when other circumstances surrounding shooting incidents are controlled, although under some circumstances fewer shots are fired at Hispanics than at others. In shootings precipitated by disobeying an officer, appearing to reach for a weapon, or assault, blacks are fired upon an average of 2.44 times, Hispanics 1.73 times, and whites 2.41 times. The mean number of shots fired when a suspect displayed a weapon, threatened to use it, or actually used it was 4.85 for blacks, and 4.78 for Hispanics, and 4.99 for whites. The mean number of shots fired at blacks found to be unarmed was 2.62, unarmed Hispanics 1.50, and unarmed whites 2.42.

The Shooting Review Process

A brief discussion of the shooting review process is required. The reader is cautioned that the only information about the review process we have is its result: the finding as to whether or not a shooting was in policy, in policy but failed to meet departmental standards, accidental, or out of policy and the action, if any, taken against the involved officers in the 1974-78 interval. An in-policy finding, it should be noted, indicates the department's judgment that the officer reasonably believed himself or others to have been in danger of death or serious bodily injury or that he knew a fleeing suspect to have committed a felony. With the adoption in late 1977 of the current policy restricting shootings at fleeing felons, the officer

was required to know that the suspect had committed a felony involving death or serious bodily injury. We have no information concerning informal discussions among review board members or their interviews with investigators and witnesses that could potentially yield evidence not in the written record, nor do we have information about informal discussions that may have entered into the final classification and the administrative action taken, if any, against the officer. Prior to 28 November 1978, the classification of a shooting and administrative action were under the jurisdiction of the director—assistant chief—Office of Operations. The director—assistant chief—Office of Special Services, had this responsibility for the following year.[9]

When all shooting incidents that involved suspects occurring from 1974-78 are considered, only small differences in results from the shooting review process for blacks compared with Hispanics and whites appear. Eighty-two percent of shooting incidents involving black suspects, 77 percent involving Hispanics, and 80 percent involving whites were determined to be in policy. Seven percent of shootings at black suspects, nine percent of shootings at Hispanics, and 11 percent of shootings at whites were found out of policy. In 85 percent of shootings involving blacks, 80 percent involving Hispanics, and 79 percent involving whites, there was either no administrative action or only training was recommended. For all 1974-78 shooting incidents, there was administrative disapproval in 18 percent of the cases, and in 10 percent of incidents, an involved officer was penalized by loss of days off, suspension, or termination.[10]

While differences in outcomes from all shooting reviews are small, larger percentage differences, which are not statistically significant due to the small number of cases involved, appear between suspects of different descent when suspects' most threatening actions just prior to shootings are taken into account. It was shown previously that a higher percentage of blacks than others are involved in shootings following suspects' disobeying orders to halt or suspects' appearing to reach for weapons when there was no assault and no display, threat, or use of weapon immediately preceding the shooting. These kinds

Overall, the statistical results indicate that shooting incidents involving black suspects have differed in numbers, circumstances, and under some circumstances, in results of the shooting review process from shootings involving others. There has been no difference between blacks and other suspects in the number of shots fired. Few differences have appeared between shooting incidents involving Hispanic suspects and shootings involving whites.

RESEARCH QUESTIONS

Many questions are raised by these data describing the involvement of minorities in Los Angeles Police Department shooting incidents, but none can be answered conclusively from the data presented here. One question concerns whether these statistical patterns are unique to the city of Los Angeles or to the Los Angeles Police Department. Another is how the differences between patterns of shootings involving blacks and shootings involving others are to be explained. A third question concerns why relatively few differences appear between the involvement of Hispanics and of whites in Los Angeles Police Department shooting incidents.

Few data that are presently available permit comparison of Los Angeles Police shootings involving minorities and such shootings elsewhere. Data provided by the Police Foundation show that Los Angeles differs little in the relationship of shootings to Part I arrests from the seven cities included in *Police Use of Deadly Force.*[11] Of the seven cities included in *Police Use of Deadly Force,* the differences between percentages of persons shot who were black and Part I arrestees were higher than in Los Angeles in two cities but lower in five cities. Whereas 46 percent of Part I arrestees and 53 percent of persons shot in Los Angeles from 1974-78 were black, the corresponding proportions for blacks are 83 percent of Part I arrests and 80 percent of shootings in Birmingham; 76 percent of Part I arrests and 76 percent of shootings in Oakland; 27 percent of Part I arrests and 44 percent of shootings in Portland; 61 percent of Part I arrests and 62 percent of shootings in Kansas City; 53 percent of Part I arrests and 64 percent of shootings in

Indianapolis; 94 percent of Part I arrests and 89 percent of shootings in Washington, D.C.; and 83 percent of Part I arrests and 80 percent of shootings in Detroit. Statistics concerning the involvement of Hispanics in police shootings are presently unavailable for other cities, as are data on events precipitating shootings at minority suspects, the frequency with which these suspects were armed, and administrative determinations concerning police shootings involving minorities. In sum, data now available neither show the Los Angeles pattern of shooting incidents involving minorities to be unique nor do they indicate that the same pattern holds nationwide. Much more evidence is clearly needed.

A wholly different question is how one accounts for the numbers and circumstances of shootings involving blacks compared with shootings at other suspects. The empirical results can lead quickly to inferences concerning attitudes and motivations of police officers generally. This could be mistaken, since observers of police behavior, including the most critical, agree that officers believe themselves to be unbiased and evenhanded in extending justice, separating individual attitudes from official conduct.[12] For this reason and in the absence of information concerning individual attitudes and motivations, attention should be directed toward the context or environment in which the Los Angeles Police Department serves, the department's understanding of this environment, and the consequences of both for shootings at minorities. To do this requires a brief excursion into organizational theory.

The link between environments and organizations remains the central focus of organizational theory. However, there is a sharp division in the field between work treating environments as wholly external to organizations and work treating environments as external elements that are perceived or enacted by organizations themselves. This disagreement as to what constitutes organizational environments is much more than a matter of semantics. Many investigators find little correspondence between perceptions of the environment and more objective measures.[13] Furthermore, perceived environmental elements may

predict organizational actions as well as or better than the more objective measures.[14]

This study of Los Angeles Police Department officer-involved shootings yields certain objective as well as perceptual measures of the environment. Data on arrests, attacks on officers, and serious crimes constitute the objective measures. Outcomes of shooting reviews may be taken as measures of the perceived environment since the review process determines whether or not an officer reasonably believed himself or others to have been in danger or to have been confronted by a fleeing felon whose escape would endanger others.

All of these measures of the environment have deficiencies. Arrests, like shootings, are ultimately the result of police officers' decisions and may be due to the same causes as shootings. Reported attacks and assaults with deadly weapons upon officers also reflect to some extent police discretion. Shooting reviews, on the other hand, do not necessarily comport with what officers actually believed at the time of shooting incidents. The measures of the environment are also incomplete. We have no count of the frequency with which situations potentially leading to shootings occur. We know only the frequency of shootings. We do not know how often officers actually confront dangerous fleeing felons, but do not shoot. We do not know how often suspects make furtive gestures appearing to officers as attempts to reach for a weapon. We know only how often these events are followed by shooting incidents. And we do not know the frequency with which officers believe themselves or others to be in imminent danger. Again, we know only how often this has been the case in shooting incidents.

Despite deficiencies in the environmental measures, the data at hand are sufficient to illustrate how profoundly different conclusions may result from the use of different measures of the environment. If one compares patterns of shooting incidents with objective measures—arrest, attack, and crime rates—then one would conclude that blacks have been disproportionately involved in Los Angeles Police Department shooting incidents, especially those shooting incidents precipitated

by suspects' disobeying officers and appearing to reach for weapons, as well as those incidents involving unarmed suspects. But if one instead compares shooting incidents with measures of how the environment is perceived—the department's judgment as to whether or not the officer reasonably believed himself or others to have been in imminent danger or confronting a dangerous fleeing felon—then one would conclude exactly the opposite, namely, that no disproportion exists between shooting incidents involving blacks and shootings involving others and that large numbers of whites and Hispanics are involved in those shooting incidents precipitated by disobeying officers' orders or by appearing to reach for weapons as well as those incidents involving unarmed suspects.

The lesson to be drawn from this exercise is clear. Concretely, it has been shown that depending upon whether one gauges the environment of police work using objective measures of arrests, attacks, and dangerous crimes as opposed to the perceived measures of reasonableness of an officer's sense of endangerment, one could conclude either that too many blacks have been shot at by Los Angeles police officers or that too many whites and Hispanics have been shot at under some circumstances. A discrepancy exists, then, between the level of endangerment indicated by the best objective indicators that we could find and the department's judgments concerning the degree of danger present when officers confront suspects of different race or descent. Our objective indicators may be faulty, but so may be the department's perceptions. More generally, it has been shown that entirely opposite inferences may be drawn when perceptual measures of the environment are used in place of objective measures, and vice versa. How one gauges the environment, then, may be consequential for statistical results as well as for implications drawn on the basis of them. A compelling need for complete and reliable measures of the environment of police work is indicated.

Finally, the absence of substantial differences between shootings at Hispanic suspects and shootings at whites in Los Angeles also requires exploration. It is of some importance to

know whether large numbers of minorities as opposed to large numbers of blacks have been involved in police shootings in the United States. If Los Angeles is representative of most U.S. cities, then one would conclude the latter to be the case. The need for reliable national data on police firearms discharges is again indicated. At the same time, explanation of the similar involvement of Hispanics and whites in Los Angeles Police shooting incidents would be facilitated were there better measures of the environment than those now available. Substantial research on police use of firearms as well as of other forms of force remains to be done.

Notes

1. The SLA shoot-out was excluded from our computer files because it would have distorted grossly certain shooting statistics. More than 5,000 rounds—plus 83 tear gas canisters—were fired by Los Angeles Police officers in the SLA incident, more rounds than the total fired in the remaining 912 officer-involved shootings analyzed here.

2. Bystanders and hostages include persons shot at whom officers mistook for suspects when in fact a suspect was present or nearby, as well as persons hit unintentionally by officers' shots aimed at suspects. Accidental discharges include all incidents ruled accidental by shooting review boards, except for those occurring in tactical situations in which officers may have had cause to fire deliberately. Other nonaccidental shootings include shots fired at cars and at street lamps and warning shots.

3. No officer was involved in more than six shooting incidents in the 1974-78 period.

4. Appearing to reach for a weapon is often called "furtive movement" in departmental investigations and reports.

5. For example, 26 persons were shot fatally by the Los Angeles Police Department in 1974, 30 in 1975, 30 in 1976, 33 in 1977, 20 in 1978, and 14 in 1979. The number of suspects shot at following their disobeying an officer's command to halt or appearing to reach for a weapon was 36 in 1974, 39 in 1975, 39 in 1976, 32 in 1977, and 11 in 1978. Of all suspects shot at, 39 were ultimately determined to have been unarmed in 1974, 34 in 1975, 34 in 1976, 32 in 1977, but only 14 in 1978. The decline in Los Angeles Police shootings from 1974 through 1979 is reported in detail in Part IV of "The Report of the Board of Police Commissioners" and will be the subject of a separate article.

6. Descriptive data concerning 695 shooting incidents were included as part of the "Enactment Development Plan" for the DEFT shooting simulator, which is now in operation. Whether the 695 incidents include all shootings in the 42-month period covered is not stated clearly. Data for Hispanics were not included in this document.

7. Part I offenses include violent and some nonviolent crimes: murder, forcible rape, robbery, aggravated assault, burglary, larceny, theft, and auto theft.

8. A similar comparison cannot be made for the Hispanic community since the one preponderantly Hispanic police division in Los Angeles, Hollenbeck, is small and accounts for only three percent of homicides, forcible rapes, and robberies in the city.

9. In 1979, direct responsibility was transferred to the Board of Police Commissioners and the Chief of Police.

10. These data also speak to the adequacy of the categories used to evaluate shootings. Whereas less than 9 percent of shootings were judged out of policy, 18 percent resulted in some form of administrative disapproval. In other words, there were a fair number of shootings that were out of policy but were disapproved, or put somewhat differently, not out of policy but not approved.

11. Catherine H. Milton et al., *Police Use of Deadly Force* (Washington, D.C.: Police Foundation, 1977).

12. Jerome H. Skolnick, *Justice Without Trial* (New York: John Wiley & Sons, 1966), ch. 4.

13. Henry Tosi et al., "On the Measurement of the Environment: An Assessment of the Lawrence and Lorsch Environmental Sub-Scale," *Administrative Science Quarterly* 18:27-36 (1973); H. Kirk Downey et al., "Environmental Uncertainty: The Construct and Its Application," *Administrative Science Quarterly* 20:613-29 (1975).

14. Cf. Paul R. Lawrence and Jay W. Lorsch, *Organization and Environment* (Cambridge, Mass.: Harvard University Press, 1967) with Tosi et al.

CHAPTER 7

RACE AND EXTREME POLICE-CITIZEN VIOLENCE

JAMES J. FYFE

The disproportionate representation of blacks among the clientele of the criminal justice system is a recurrent theme in the literature (Wolfgang, 1964: 51). Research into police firearms use (e.g., Clark, 1974: Milton et al. 1977) reports that minority disproportionality is also an explosive issue. Goldkamp (1976: 183), however, accurately notes that the present paucity of analysis of this phenomenon leaves criminal justice agencies free to adopt either of two empirically unsubstantiated "belief perspectives."

Goldkamp briefly defines those "belief perspectives" as follows:

> Some writers suggest that the disproportionately high death rate of minorities at the hands of the police can best be explained by the disproportionately high arrest rate for crimes of violence, or by assumptions concerning the suspect's responsibility for his/her own death in violent police-suspect interactions. Others see disproportionate minority deaths as resulting from both irresponsible use of deadly force by a small minority of police officers and differential administration of law enforcement toward minority citizenry (which in effect produces disproportionately high arrest and death rates for minorities in general). Kobler and Knoohuizen,

SOURCE: Reprinted from "Race and Extreme Police-Citizen Violence" by James J. Fyfe in R. L. McNeely and Carl E. Pope (eds.) *Race, Crime, and Criminal Justice,* Beverly Hills, Calif.: Sage Publications, 1981. By permission of the publisher.

> Fahey and Palmer stress the possibility that police misconduct may play a considerable role in generating civilian deaths. Takagi ascribes disproportionality to the simple fact that "police have one trigger finger for whites and another for blacks" [1976: 169].

Harding and Fahey, whose position seems to straddle both perspectives, suggest that police misconduct is involved in shooting deaths. Conversely, they also state that the use of deadly force by police "is not an independent aspect of the race problem." They write that:

> Police conduct is a dependent aspect of general patterns of criminal behavior, patterns that are significantly influenced by broader considerations of, for example, age, class, and affluence (The) (v)ictimization of those shot is directly related to contacts of the sort in which firearms are most frequently used by criminals [1973: 310].

RACE AND EXTREME POLICE-CITIZEN VIOLENCE: TWO HYPOTHESES

Harding and Fahey suggest, therefore, that racial disproportionality among police shooting victims may be related to racial variations among other indices of violence. To some degree, this assertion is supported by the work of Kania and Mackey (1977), who found that such variations among fatal police shooting rates across the 50 states were closely related to variations in reported violent crime and criminal homicide rates. Because of our access to data on extreme police-citizen violence in New York City, these prior efforts also suggested two hypotheses which became the focus of this article.

First, on the theory that police shootings are a corollary of the frequency of contacts which present the opportunity for such violence, we postulated that:

> H1: Blacks and Hispanics would be overrepresented among police shooting opponents in relation to their representation in the New York City population but there would be less disproportion by race taking into account the racial representation of arrests for violent crime.

Second, to test the assumption that police shootings are related to other indices of extreme violence among the races:

> H2: Black and Hispanic overrepresentation among police shooting opponents in New York City would be reduced by taking into account the racial representation in reported murders and nonnegligent manslaughters.

DATA SOURCES

Our major data source for these analyses consisted of New York City Police Department records of all incidents in which officers reported discharging weapons and/or being subjects of "serious assault" (e.g., assault with deadly weapon and/or which resulted in officer death or serious injury) during the years 1971-1975. These data included "Firearms Discharge/ Assault Reports" (FDAR's) filed by 4904 officers, of whom 3827 reported discharging firearms in 2926 separate "shooting incidents." Since not all these involved shooting at other human beings, we excluded from analysis such events as shootings to destroy animals, warning shots, and officer suicides. Because of the relatively low number of female opponents included in our data and because they were often involved in non-line of duty shootings (Fyfe, 1978: 145-149), we also excluded them from analysis. Conversely, because our detailed examination of the data had convinced us that the frequency of police use of firearms as a means of deadly force is best measured in terms of officer decisions to point and fire at other human beings, we included for analysis all such incidents, without regard to their consequences: with rare exception, missed shots, woundings, and fatalities are only chance variations of equally grave decisions.

While we considered this shooting data base nearly ideal for our purposes,[1] we found that available U.S. Census Bureau figures were less informative. New York City base population figures provided by the census define only two major racial groups, "White," which includes "Mexican, Puerto Rican, or a response suggesting Indo-European stock" (U.S. Department of Commerce, 1973: B34, App7-8) and "Negro." This inclusion

of Puerto Ricans and other Hispanics into the "White" category is not a major limitation insofar as measurement of shooting opponent racial disproportion is concerned, however, since New York City also develops its own population racial distributions.

More surprisingly, we also found—with one exception—that the New York City Police Department does not compile racial statistics of arrestees.[2] In the absence of this ideal data source, we decided to employ two surrogate scales of comparison. For our analysis of H1, we elected to use Burnham's sample of the races of 700 persons arrested for murder, nonnegligent manslaughter, robbery, forcible rape, and felonious assault in New York City (1973: 50).[3] Because we were similarly precluded from using homicide arrestee data in our examination of H2, we decided to employ information on the race of homicide victims. Here, since many studies show that homicides tend to be intraracial crimes, it might not be unreasonable to consider the victim index as a crude proxy for the perpetrator index.

H1: ANALYSIS

Given these limitations, our data do indicate that Blacks and Hispanics are disproportionately represented among those New York City police shooting opponents whose race is recorded. Table 1 demonstrates that Whites, who comprise 64.1% of New York City's population total, represent only 17.5% of its shooting opponents. Blacks, conversely, are overrepresented among shooting opponents in almost exactly the reverse ratio: 60.2% of shooting opponents and 20.5% of total city population are Black. Hispanics, who number 15.4% of city population, represent 22.3% of shooting opponents.

Using the racial composition of the general population of the city as expected frequencies, we derived a chi-square for these distributions which is significant at the .001 level. Similarly, our obtained Cramer's v (.49)[4] suggests a rather high association between race and the likelihood of being shot at by

New York City police. The first part of this hypothesis is therefore confirmed.

Turning now to a model (Table 2) which utilized the ethnic distribution of felony arrests for violent crimes (Burnham's data) to generate expected numbers of shooting opponents by ethnicity, it may be seen that there is a fairly close fit. Although the chi-square is still significant, the v value is now only .09, or much smaller than the v value of .49 reported for Table 1. While Whites remain slightly underrepresented among shooting opponents, Blacks are also underrepresented. Only Hispanics are overrepresented. Some caution must be observed about the finer distinctions in view of the limitations of data on ethnic classifications.

TABLE 1 RACIAL DISTRIBUTION OF NEW YORK CITY POLICE SHOOTING OPPONENTS, AND NEW YORK CITY POPULATION JANUARY 1, 1971-DECEMBER 31, 1975

	Shooting Opponents[a]		*New York City Population*	
White	17.5%	(549)	64.1%	(5076022)
Black	60.2	(1889)	20.5	(1621583)
Hispanic	22.3	(701)	15.4	(1216557)
TOTALS	100.0	(3139)	100.0	(7914162)

chi-square = 1488.40

p = .001

v = .49

[a] Excludes "Other" racial categories because of low statistical significance. Ten shooting opponents were identified as members of "Other" racial groups.

[b] Calculated from: New York City Police Department, Chief of Field Services, *Summary of Precinct Populations, 1973.*

TABLE 2 RACIAL DISTRIBUTION OF NEW YORK CITY POLICE SHOOTING OPPONENTS, AND PERSONS ARRESTED FOR FELONIES AGAINST THE PERSON JANUARY 1, 1971-DECEMBER 31, 1975.

	Shooting Opponents	*Felony Arrests*[a]
White	17.5%	22.2%
Black	60.2	62.4
Hispanic	22.3	15.4
TOTALS	100.0	100.0

chi-square = 12.82

p = .01

v = .09

[a] Calculated from a sample of 700 persons arrested for murder, nonnegligent manslaughter, robbery, felonious assault and forcible rape in New York City, 1971. Source: David Burnham, "3 of 5 Slain by Police Here are Black, Same as Arrest Rate," *The New York Times*, August 26, 1973, 50.

H2: ANALYSIS

Using our murder and nonnegligent manslaughter victim racial distributions to generate expected frequencies of shooting opponents by race (Table 3), we find that there is a fairly close fit. Again Cramer's v is only .09, which suggests that there is a close parallel between the racial distributions of homicide victims and police shooting opponents.

TABLE 3 RACIAL DISTRIBUTION OF NEW YORK CITY POLICE SHOOTING OPPONENTS, JANUARY 1, 1971-DECEMBER 31, 1975 AND VICTIMS OF MURDER AND NON-NEGLIGENT MANSLAUGHTER,[a] JANUARY 1, 1971-DECEMBER 31, 1975.

	Shooting Opponents	*Homicide Victims*
White	17.5% (549)	22.5% (1069)
Black	60.2 (1889)	51.0 (2419)
Hispanic	22.3 (701)	26.5 (1259)
Totals	100.0 (3139)	100.0 (4747)

chi-square = 54.68

p = .001

v = .09

[a] Source: New York City Police Department, Homicide Analysis Unit, *Annual Report,* 1976

TABLE 4 AGE CHARACTERISTICS OF NEW YORK CITY MALE POPULATION BY ETHNIC GROUP

	Black	*Puerto Rican*	*White*
Median Male Age	23.1	19.4	33.3
Percentage of Male Population Under 18	42.0	45.6	27.6

SOURCE: U.S. Department of Commerce, *Characteristics of the Population,* Part 34 NY Section 1, March 1973 U.S. Government Printing Office, pp. 34-108, 34-432.

FURTHER COMMENTS

Even if both the relationships shown in Tables 2 and 3 were demonstrated by more comprehensive arrest and victim data, they would not prove that the disproportionate involvement of Blacks and Hispanics in shooting incidents is related to their disproportionate involvement as violent crime arrestees and homicide victims.

Most specifically, we would still be left with the possibility that both relationships are spurious and merely reflections of varying degrees of risk due to differential age distributions and/or differential enforcement and police deployment practices. It is still possible that the races are differentially represented among shooting opponents because more Blacks and Hispanics fall into the age groups most frequently involved in these incidents. Alternatively, it is still possible that Blacks and Hispanics are disproportionately represented among shooting opponents because police do have "one trigger finger for Whites and another for minorities." Table 4, which summarized the age characteristics of New York City's male Whites, Blacks, and Puerto Ricans (the city's major Hispanic subpopulation), confirms the existence of differential age distributions among these groups. As Table 4 indicates, New York City's White males are generally considerably older (median age = 33.3 years) than either its male Blacks (median age = 23.1 years) or its male Puerto Ricans (median age = 19.4 years).

To determine whether similar age discrepancies existed among the shooting opponents included in our data, we cross-tabulated opponent race and age. The results of this analysis are presented in Table 5 and demonstrate that the age distributions of shooting opponents vary little among races, a finding that runs counter to those of Jenkins and Faison (1974) and Kobler (1975). Indeed, our obtained levels of p (.99) and v (.03) indicate that these three age distributions are so close as to be nearly indistinguishable.

Table 5 also suggests that confrontation with armed police is largely an activity of the young.[5] More than half (1093) of the 2149 opponents whose race and age are included in our data set

TABLE 5 NEW YORK CITY POLICE SHOOTING INCIDENT OPPONENT RACE BY AGE, JANUARY 1, 1971-DECEMBER 31, 1975

Opponent Race	*Opponent Age*									*Totals*
	Under 16	*16,17*	*18,19*	*20,21*	*22,23*	*24,25*	*26,27*	*28,29*	*30+*	
White	3.2% (13)	10.6% (43)	15.0% (62)	14.5% (59)	10.6% (43)	11.3% (46)	4.9% (20)	7.2% (29)	22.7% (92)	18.9% (407)
Black	3.6 (44)	8.7 (107)	12.8 (185)	13.7 (169)	12.5 (155)	12.7 (158)	7.5 (93)	5.8 (72)	22.7 (280)	57.6 (1236)
Hispanic	2.0 (10)	11.1 (56)	10.5 (53)	13.1 (66)	10.7 (54)	11.1 (56)	7.9 (40)	5.9 (30)	27.7 (140)	23.5 (505)
Totals	3.1 (67)	9.6 (206)	12.7 (273)	13.7 (294)	11.7 (252)	12.1 (260)	7.1 (153)	6.1 (131)	23.9 (512)	100.0 (2148)

chi-square = 3.866

p = .99

v = .03

are less than 24 years old. Older opponents are not entirely excluded, however, since almost one-quarter (23.9%) of the group are 30 or more years old.[6]

TABLE 6 NEW YORK CITY MALE SHOOTING OPPONENT RATE PER 10,000 POPULATION, BY AGE AND RACE,[a] JANUARY 1, 1971-DECEMBER 31, 1975

Age	*White/Hispanic*	*Black*
15-19	10.04	38.82
20-24	11.40	67.38
25-29	7.62	43.06
30-34	6.02	21.92
35-39	3.88	15.02
40-44	1.77	9.24
45-49	.98	4.54
50 +	.16	1.86
Totals	3.95	24.20

[a] Excludes opponents under fifteen years of age (White/Hispanic n = 9; Black n = 17).

Table 6 presents the frequency of shooting opponents per 10,000 population aggregated by Census Bureau age and race subgroups. Examination of Table 6 reveals that White/Hispanic and Black age distributions are very similar. For both race groupings, those 20 to 24 years old are most frequently involved in shootings; subsequently the rates steadily decline for each age subgroup, reaching the lowest levels among those 50 or more years old. The only major discrepancy in age trends occurs for the 15-to-19-year age group; the White/Hispanic male rate is only slightly less than that of the 20-to-24-year group, while for Blacks the rate of 15-to-19-year-olds is substantially lower than for 20-to-24-year-olds.

Equally as striking as the general similarities in age patterns are the great numeric discrepancies in rates. Specifically, we find that Black males are six times more likely to have been

involved in police shooting incidents (24.20 per 10,000 population) than are male White/Hispanics (3.95 per 10,000). Indeed, the overall Black male rate (24.20) is more than twice as large as the highest White/Hispanic male rate (11.40). The general discrepancy ratio holds in each and every age group and is strongest within the 20-29 year range.

RACIAL DISPROPORTION

To this point, our investigation has shown that the variable of race is linked to the likelihood of being a police shooting opponent; in a similar fashion, this risk factor is apparently linked to arrest rates for violent felonies. The possibility remains that the great numeric disproportion of minorities among both arrestees and shooting opponents is a function of differential police enforcement or deployment practices.

Since most prior literature which addresses racial disproportion among opponents (e.g., Goldkamp, 1976; Harding and Fahey, 1973; Robin, 1963; Jenkins and Faison, 1974) examines only fatal shootings, we commenced our investigation with an analysis of incident consequences in terms of opponent injury. Table 7 provides a crosstabulation of reported shooting opponent race by injury and demonstrates that these consequences vary little among the races. Regardless of race, approximately 3 in 5 opponents suffer no injury, 1 in 5 is wounded, 1 in 10 is killed, and 1 in 10 escapes after the police have shot at him with unknown effect. Once an officer decides to employ his "trigger finger," the race of his opponent apparently matters little in terms of the effect of police shots. Blacks escape with unknown injuries approximately twice as often (16.6%) as Whites (7.9%) or Hispanics (9.8%), but our obtained chi-square ($p = .50$) indicates that even this variance is likely to be a result of chance.

This lack of variance "within" confrontations, obviously, does not address numeric disproportionality. Stated most simply, we can observe little difference among the races once they become involved in conflict situations. We have not, however,

touched on the issue of why so many minority opponents become involved in these incidents in the first instance.

TABLE 7 NEW YORK CITY POLICE SHOOTING OPPONENT RACE BY INJURY JANUARY 1, 1971-DECEMBER 31, 1975[a]

Opponent Race	*Opponent Injury*				
	None	*Wounded*	*Killed*	*Unknown*[b]	*Totals*
White	61.8%	21.0%	9.2%	7.9%	17.6%
	(335)	(114)	(50)	(43)	(542)
Black	53.4	21.0	9.1	16.6	60.0
	(983)	(386)	(168)	(305)	(1842)
Hispanic	56.0	22.2	12.1	9.8	22.3
	(384)	(152)	(83)	(67)	(686)
Totals	55.4	21.2	9.8	13.5	100.0[c]
	(1702)	(652)	(301)	(415)	(3072)

chi-square = 5.45

p = .50

v = .03

[a] Excludes cases in which opponent race not reported; excludes 4 suicides (1 White, 2 Black, 1 Hispanic).

[b] Not apprehended opponents at whom shots were fired with unknown effect.

[c] Percentage subcells may not total 100.0 due to rounding.

To examine this question, we attempted to determine whether there existed significant variation among the types of shooting incidents in which different races became involved. We hypothesized that if we found high frequencies of incidents in which police shot at unarmed Blacks or Hispanics, it would suggest that police did, indeed, have "different trigger fingers" for minorities. Conversely, we felt that significant differences among the races in the precipitating event types and the degree of danger confronting police might help to explain the disproportion of minority opponents.

To simplify this process and clarify its results, we decided to employ the race of each incident's "primary opponent."[7] This resulted in very little loss of accuracy since incidents involving multiple opponents are overwhelmingly intraracial events.[8] Further, since our operative definition of "primary opponent" translated into either the only opponent or the one posing the greatest threat to police (e.g., the most combative, most heavily armed), we concluded that it was this person's conduct upon which police reaction (or overreaction) would be principally based. Thus, a shooting precipitated by a robbery involving one Black suspect armed with a gun and a White one armed with a knife becomes a "Black opponent" incident.

Our first measure of variance in shooting incident types among the races involved an investigation of the events which precipitated police shooting. As Table 8 and its chi-square significance level (.00001) reveal, there is considerable variance here. Perhaps most striking is the great frequency with which police confront Blacks at robberies. Indeed, nearly half (45.8%) of the incidents involving Blacks were reportedly initiated by robberies. This is a rate nearly twice that of Whites and Hispanics (23.4% and 26.3%, respectively) and represents a raw frequency (495 incidents) greater than the total of all incidents involving either Whites (354) or Hispanics (429). We see, in fact, that robberies involving Black primary opponents comprise 26.6% of all the incidents included in Table 8.

Table 8 also demonstrates that Whites are disproportionately more frequently counted among those who confront police at burglaries (12.4% versus 6.4% and 9.1% for Blacks and Hispanics, respectively). In addition, perhaps because of the general relationship between race and social status, the percentages of "Car Stop" incidents involving Blacks (11.3%) and Hispanics (8.4%) are far smaller than those of Whites (19.5%). Similarly, the percentage of "Other" incidents, which often include offduty disputes and the like, is greater for Whites (10.5%) and Hispanics (9.3%) than for Blacks (4.0%). Conversely, Whites are less frequently involved in generally proactive "Investigative Suspicious Person"—or "Stop and

Question"—incidents than are Blacks and Hispanics (7.3% versus 11.0% and 16.6%, respectively). Finally, Table 8 reveals considerable difference in the frequencies of "Respond to Disturbance" incidents: 15.6% for Hispanics, 10.2% for Whites, and 9.0% for Blacks.

A measure of the threat of officer safety at these incidents is provided by Table 9, which crosstabulates primary-opponent race with weapon type. Here again, it can be seen that striking differences exist among the races, with the chi-square proving significant to .0001. Approximately half of Black and Hispanic opponents (52.9%) and 48.0%) were armed with handguns. Nearly half (47.2%) of all incidents included in Table 9 were police confrontations with Hispanic or Blacks armed with handguns, rifles, machine guns, or shotguns; White handgun, rifle, machine gun, or shotgun incidents account for 6.9% of all incidents. Conversely, we find that Whites are more frequently involved in incidents involving no weapon or no assault on police (15.5%) than are Blacks (7.8%) or Hispanics (5.1%). Whites are also overrepresented in incidents involving the use of vehicles (16.1% versus 6.1% for Blacks, 6.3% for Hispanics) or physical force (9.4% versus 4.2% and 5.1%) as means of assaulting police. Hispanics use knives against police considerably more often (21.3%) than do Whites (13.3%) or Blacks (14.1%). Given that most police are killed or seriously injured by guns or knife wounds, therefore, we would tentatively conclude that Blacks and Hispanics are more often involved—both proportionately and in terms of sheer numbers—in incidents that present greater potential danger to police than are Whites.

That potential danger does not necessarily translate into real negative consequences in terms of officer injury is indicated by Table 10, which provides a crosstabulation of FDAR incident primary-opponent race by degree of officer injury (excluding non-line of duty injuries, which are not relevant to this analysis). Here, although the nature and seriousness of nonfatal injuries are not specified and, in fact, vary considerably, it can be seen that proportionately more officers are injured in encounters with Whites (22.8%) or Hispanics (18.0%). Proportionately more officers are killed in the line-of-duty by Blacks

TABLE 8 NEW YORK CITY POLICE SHOOTING PRIMARY OPPONENT RACE BY PRECIPITATING EVENT, JANUARY 1, 1971-DECEMBER 31, 1975

Primary Opponent Race	*Respond to Disturbance*	*Burglary*	*Robbery*	*Attempt other Arrests*	*Handling Prisoner*	*Investigating Suspicious Persons*	*Ambush*	*Mentally Deranged*	*Auto Pursuit/ Stop*	*Assault on Officer*	*Other*	*Totals*
White	10.2%	12.4%	23.4%	4.2%	0.8%	7.3%	0.3%	2.5%	19.5%	8.8%	10.5%	19.0%
	(36)	(44)	(83)	(15)	(3)	(26)	(1)	(9)	(69)	(31)	(37)	(354)
Black	9.0	6.4	45.8	3.1	1.6	11.0	0.9	1.5	11.3	5.4	4.0	58.0
	(97)	(69)	(495)	(34)	(17)	(119)	(10)	(16)	(122)	(58)	(43)	(1080)
Hispanic	15.6	9.1	26.3	4.9	1.2	16.6	0.9	2.1	8.4	5.6	9.3	23.0
	(67)	(39)	(113)	(21)	(5)	(71)	(4)	(9)	(36)	(24)	(40)	(429)
Totals	10.7	8.2	37.1	3.8	1.3	11.6	0.8	1.8	12.2	6.1	6.4	100.0
	(200)	(152)	(691)	(70)	(25)	(216)	(15)	(34)	(227)	(113)	(120)	(1863)

Not ascertained = 15

Chi-square = 151.88078

p = .00001

v = .20

TABLE 9 NEW YORK CITY POLICE SHOOTING PRIMARY OPPONENT RACE BY WEAPON, JANUARY 1, 1971-DECEMBER 31, 1975

Primary Opponent Race	*Type of Weapon*								
	None	*Handgun*	*Rifle/ Machine Gun*	*Shotgun*	*Knife/ Cutting Instrument*	*Vehicle*	*Physical Force*	*Other*	*Total*
White	15.5%	32.1%	1.4%	1.9%	13.3%	16.1%	9.4%	10.2%	19.2%
	(56)	(116)	(5)	(7)	(48)	(58)	(34)	(37)	(361)
Black	7.8	52.9	1.3	6.3	14.1	6.1	4.2	7.4	57.8
	(85)	(574)	(14)	(68)	(153)	(66)	(46)	(80)	(1086)
Hispanic	5.1	48.0	2.6	3.1	21.3	6.3	5.1	8.4	22.9
	(22)	(207)	(11)	(14)	(92)	(27)	(22)	(36)	(431)
Totals	8.7	47.8	1.6	4.7	15.6	8.0	5.4	8.1	100.0[a]
	(163)	(897)	(30)	(89)	(293)	(151)	(102)	(153)	(1878)

chi-square = 131.62032

p = .00001

v = .19

[a] Subcell percentages may not total 100.0 due to rounding.

TABLE 10 NEW YORK CITY POLICE FIREARMS DISCHARGE/ASSAULT INCIDENT PRIMARY OPPONENT RACE BY OFFICER INJURY,[a] JANUARY 1, 1971-DECEMBER 31, 1975

Primary Opponent Race	*Officer Injury*			
	None	*Injured*	*Killed*	*Totals*
White	76.4%	22.8%	.8%	17.5%
	(402)	(120)	(4)	(526)
Black	82.2	16.6	1.2	59.6
	(1471)	(297)	(21)	(1789)
Hispanic	81.3	18.0	.7	22.8
	(557)	(123)	(5)	(685)
Totals	81.0	18.0	1.0	100.0[b]
	(2430)	(540)	(30)	(3000)

chi-square = 1.84

p = .80

v = .02

[a] Includes only officers wounded or killed in the line of duty.

[b] Subcell percentages may not total 100.0 due to rounding.

(1.2%) than by Whites (.8%) or by Hispanics (.7%).[9] Although Table 10's chi-square indicates that differences among these distributions are not significant (p = .80) it is also important to note that 55% of the line-of-duty officer injuries and deaths occur with Black opponents.

SOME CONCLUSIONS

In summarizing this research within the context of prior literature and the limits of our data, we are led to two major conclusions. First, Harding and Fahey's assertion that minority disproportion among police shooting opponents is related to differential age distributions among the races is, in New York

City at least, inaccurate. Our data demonstrate that, while police shooting opponents are generally young and a greater proportion of the Black population is young, Black males in all age groups are considerably more liable to become police shooting opponents than are their White/Hispanics contemporaries.

Our second conclusion deals with whether that greater liability is associated with greater Black participation in activities most likely to lead to justifiable extreme police-citizen violence or with "the simple fact the 'police have one trigger figure for whites and another for blacks.'" Here we are led to choose Goldkamp's "Belief Perspective II": Our data indicate that Blacks make up a disproportionate share of shooting opponents reportedly armed with guns and a disproportionate share of those reportedly engaged in robberies when police intervened. If one accepts both the accuracy of these reports and the premise that opponents armed with guns generally present the greatest and most immediate danger to police, there is little to support the contention that Blacks are shot disproportionately in relatively trivial and nonthreatening situations. A more conclusive answer to the question would require the calculation of shooting rates for specific arrest situations by race. As was indicated earlier, the lack of race information on arrests precludes this analysis.

Although our research has not conclusively confirmed Goldkamp's Belief Perspective II, it has reduced to two the assumptions upon which one might base acceptance of the "police misconduct" and "different trigger finger" hypotheses implicit in his alternate theory. First, of course, one might not accept the accuracy of the reports of Black/gun incidents which account for most of our data set's Black opponent disproportion. The sheer number of those shootings (656 are shown on Table 9), however, is so large as to suggest that the argument that "irresponsible use of deadly force by a small number of police officers" accounts for disproportionate minority deaths is ill-founded.

Second, one might accept the accuracy of these reports, but properly note that we have not demonstrated that New York

police do not refrain from shooting at Whites in situations comparable to those in which they do shoot at Blacks. Since most of the Black opponents in our data set were reportedly armed with guns, the assumption based on this observation requires its proponents to argue that police generally regard Blacks with guns as more threatening than Whites with guns. Our own logic and experience, however, suggest that police responses to such situations are based not upon opponent race, but rather upon opponent weapon.

Finally, we must qualify our acceptance of Goldkamp's Belief Perspective II. There is nothing in these analyses to support the contention that the disproportion of Blacks among New York City police shooting opponents is reflective of police misconduct or racial discrimination; but the limitations of our data have prevented us from examining the degree to which that disproportion is associated with the generally lower socioeconomic position of Blacks. Differences among the shooting types which characterize the races (e.g., the high incidence of Black participation in shootings precipitated by robberies, which are most frequent in blighted inner city areas and the high incidence of shootings involving Whites and vehicles, often preceded by car thefts, which are most frequently in middle and working class areas), however, suggest that this association may be strong.

Were we to conduct further research based upon data which included information about opponent socioeconomic status, we would hypothesize that Harding and Fahey's assessment of the role of class and affluence in shooting opponent racial disproportion would be confirmed. Were we successful, our research would strongly indicate that Black shooting opponent disproportion is neither a consequence of "overreaction" by individual police officers nor of some racially varying predispositions toward violent crime. Conversely, it would point up the continuing existence of *An American Dilemma* described so well by Myrdal (1944) a generation ago; Blacks are the mode among New York's police shooting opponents because they are also the mode among the lower socioeconomic groups which

most frequently participate in the types of activity likely to precipitate extreme police-citizen violence.

Notes

1. Our reservations here involve the accuracy and degree of detail provided in the shooting incident reports filed by individual officers. Because we attempted to limit our analyses to variables reasonably immune to reporting bias (and often supported by witness statements), we regarded the question of the veracity of the data we did possess as one of minor importance. We were more troubled by the impact on our research of the data we did not possess: 1058 (25.1%) of the data set's shooting opponents were not identified by race. We did not find any evidence that this information was deliberately withheld from reports in order to prevent or avoid any sensitive racial issues. This is so for several reasons. First, the "Firearms Discharge/Assault Report" forms which served as our primary data source include no caption requesting "opponent race," so that it appears only on reports filed by officers who volunteered it. These forms, originally designed to collect information for training purposes, have more recently been supplemented by more complete narrative reports. As a result, the annual percentage of missing opponent race data declined from nearly 40% in 1971 to 5.4% in 1975. Second, despite this regular decrease in missing data, annual known opponent racial distributions have remained relatively constant over the period studied. Third, the percentage of missing opponent race data is relatively evenly distributed across the city's police precincts, regardless of the racial characteristics of their total populations (which one might reasonably expect to impact upon the characteristics of their shooting opponents). Fourth, our opponent data suggests that many of these opponents were never seen by the officers involved: More than 9 of 10 "unknowns" (90.6%) suffered no injury (72.6%) or escaped their confrontation with unknown injuries (18.0%). Further, our opponent arrest data reveal that 397 (37.5%) of opponents whose race is classified as unknown were not apprehended by police: In many cases, these individuals were merely shadowy figures encountered on dimly lit streets or rooftops.

2. Except for homicides, the department began compiling these statistics only in 1976. The department's Homicide Analysis Section began systematically recording the race of those arrested for homicide in 1973. We elected not to use these data in our analyses because they do not describe the experience for the full five years of our study and because they do not identify homicide perpetrators who are not apprehended.

3. Burnham's sample is not random, but consists of 700 consecutive arrestees.

4. See Loether and McTavish who describe Cramer's v as follows:

Cramer's v is, so to speak, a properly normed measure of association for bivariate distributions of nominal variables, it is "margin free" in that the number or distribution of cases in row or column totals does not influence its value, nor is it influenced by the number of categories of either variable . . . Cramer's v . . . can only be thought of as a magnitude on a scale between zero and 1.0; the bigger the number, the stronger the association. It can *not* be interpreted, for example, as the percentage of variation in one variable explained by the other, nor can it be interpreted as the proportions of predictive error which may be reduced by prior knowledge of one of the variables [1974: 197-198].

5. By aggregating our opponent age data into eight values to conform with those reported on New York City Police arrest data, we also found that the age distributions of shooting opponents and violent felony arrestees closely parralleled each other (v = .09).

6. The decision to create this open-ended age grouping (which includes individuals up to 79 years old) was made to simplify presentation and discussion of opponent age. The frequencies of single-year values drop off dramatically after this point.

7. We defined the "primary opponent" as the only opponent or, in incidents involving more than one opponent, as the most heavily armed and/or most aggressive and/or most seriously injured.

8. Intraracial events accounted for 94.4% of the multiple-opponent shootings in which opponent race was reported.

9. These differences would shrink if four alleged politically motivated "Black Liberation Army" assassinations were considered apart from other officer deaths perpetrated by Blacks.

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CHAPTER 8

A GARRISON STATE IN A "DEMOCRATIC" SOCIETY

PAUL TAKAGI

This paper reports on a study of police officers killed in the line of duty and civilians killed by the police. The study was originated in 1971 in reaction to news reporting on the several mass media outlets at the local and national levels, which focused on FBI statistics indicating police officers were being "assassinated" at an alarming rate. A police reporter for an educational television station alarmed viewers with a report that 125 law enforcement officers had been killed in 1971, an increase of almost two and one-half times over 1963 when only 55 police officers were killed in all of that year. Police killings of citizens, however, were reported as isolated events. Although the death of civilians at the hands of police occurred from time to time, no news analyst attempted to show this as a national phenomenon.

Sorel (1950) said people use words in selective ways to create alarm. When a police officer kills a citizen, the official language is "deadly force," suggesting to the audience that the use of force was legitimate. But when a police officer is killed, it is characterized as "violence," and therefore, illegitimate. In this way, news, reporting the killing of police officers in 1971, conjured the idea that the apparent increase in the killing of police officers was unprecedented. It was seen as an attack

SOURCE: "A Garrison State in a 'Democratic' Society," *Crime and Social Justice: A Journal of Radical Criminology* (Spring-Summer, 1974) 5:27-33.

caused in part by the rising political militancy among revolutionary groups, and by the increasing race consciousness among people of color venting their frustrations by attacking a visible symbol of authority. This interpretation was entertained by officials at the highest levels. President Nixon, in April of 1971, called upon police officials; and as subsequent events revealed, other representatives from para-military organizations also met to deal with the "problem."

The approach by officials was to consider the problem one of defense, and to search for the best technical means and policies to protect their view of a "democratic" society. It was viewed as a military problem, and the fortification of the police under increased LEAA funding and direction became a national policy (Goulden, 1970).

One hundred and twenty-five police officers died while on duty during 1971; the actual rate of death, however, did not increase because of the greater number of police officers who were on duty during the same year. Even if the number of police personnel has increased two and one-half times since 1963, the rate of death among police officers should not change. This is not said in an attempt to minimize the statistics that concern the officials. One could argue that the rate of police deaths should decrease. The point is to look at all the statistics, including previous studies that actually show the killing of police officers occurs at a relatively stable rate (Bristow, 1963; Robin, 1963; and Cardarelli, 1968).

The source of data is the FBI's own reports, which show an increase in the number of police officers killed, from 55 in 1963 to 125 in 1971, along with an increase of over 50 percent in the numbers of full-time authorized police personnel. The data presented in Chart 1 show that the rate of such homicides, while fluctuating from year to year, does not result in a trend either up or down over the period. The rate did peak nationally in 1967 with 29.9 deaths per 100,000 law enforcement officers. This includes all ranks from patrolmen to higher officials and federal agents. Since patrolmen bear the greatest risk of being killed in the line of duty, they may feel that FBI reports should be more detailed to accurately reflect the hazards they face.

Reports to the FBI on the numbers of police officers on duty and the numbers killed may not give a complete picture, since the agency has been only gradually achieving uniform reporting. Indeed, the number of reporting agencies increased since 1963. California, however, has had fairly complete and uniform reporting throughout the period, and the death rates among California police are available for the whole decade since 1960. They, too, show a peak in 1967, a year in which 12 officers were killed. That did not set a trend, however, as the rate decreased in the next two years.

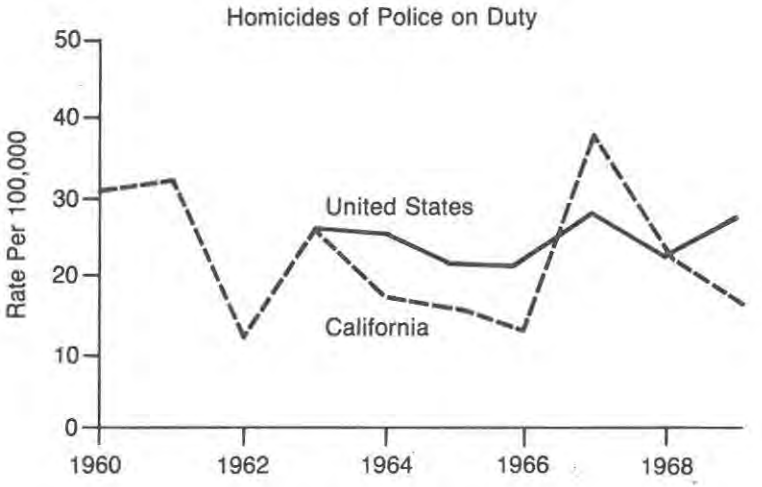

CHART 1

For the 86 officers who were killed in California from 1960 through 1970, the police apprehended 117 suspects of whom 55 percent were white, 25 percent Black, and 19 percent Mexican-American. (This is the same percentage distribution of ethnic/racial groups in California's prison population.) At the time of this writing, 65 of the 117 suspects were convicted of either murder or manslaughter, and 7 cases were still pending in court. W. H. Hutchins, Assistant Chief of the California Bureau

of Criminal Statistics, noted in a paper delivered to the California Homicide Investigators' Conference on March 5, 1971 that the great majority of homicidal deaths among police officers occurred in situations where robberies were in progress or where robbers were fleeing arrest. But, noted Hutchins, "the ambushing of officers, which has been relatively rare in the past, accounted for 25 percent of peace officers killed in 1970" (Hutchins, 1971).

Mr. Hutchins is not entirely correct when he reports that the majority of police officers killed were in situations involving armed robberies. An earlier report by his Bureau of Criminal Statistics indicates: " . . . 63 percent of these officers died while conducting routine investigations, responding to disturbance calls and taking people into custody . . . " (Beattie, 1968:5). A special study on the deaths of 39 California police officers (1960 through 1966) shows 35 of the 39 died of gunshot wounds, in some instances by their own guns (ibid.: 11-14).

> Klass, Richard J., 25-year-old patrolman, Daly City Police Department, killed May 6, 1966. Shot with his own gun by an escapee with whom he was struggling.
>
> LeFebvre, Richard R., 23-year-old patrolman, Long Beach Police Department, killed August 15, 1965 at 8:00 P.M. Died at the scene of a riot when a shotgun in the hands of a brother officer discharged during a struggle.
>
> Ludlow, Donald E., a 26-year-old deputy sheriff, Los Angeles County, killed August 13, 1965 at 9:00 P.M. Shot to death when brother officers' gun went off during struggle at riot scene.
>
> Ross, Charles M., a 31-year-old patrolman, Richmond Police Department, killed February 9, 1964 at 1:00 A.M. Shot with his own gun while struggling with two drunks.

The four cases above were classified as homicides. To distinguish accidental death from homicide appears to require considerable judgment among those compiling crime statistics, and it

is important to understand that these judgment classifications are included in the annual FBI reports on homicides of police officers.

It was noted earlier that the killing of police officers peaked in 1967 with 29.9 deaths per 100,000 law enforcement officers. Does this mean that law enforcement work is one of extreme peril? Robin (1963) argues otherwise:

> . . . there is reason to maintain that the popular conception of the dangerous nature of police work has been exaggerated. Each occupation has its own hazards. The main difference between police work and other occupations is that in the former there is a calculated risk . . . while other occupational hazards are accidental and injuries usually self-inflicting (ibid.: 230).

Robin adjusts the death rate among police officers to include the accidental deaths (mostly from vehicular accidents), and compares the death rate among the major occupational groups. It is apparent that the occupational risks in law enforcement are less dangerous than those in the several major industries. Mining with 93.6 deaths per 100,000 employees is almost three times riskier than law enforcement, while construction work is two and one-half times more dangerous, and agriculture and transportation show considerably higher rates of death than does law enforcement. Robin correctly concludes that the data do not support the general belief that law enforcement work is a highly dangerous enterprise.

TABLE 1 OCCUPATIONAL FATALITIES PER 100,000 EMPLOYEES 1955

Occupation	*Fatality Rate per 100,000*
Mining	93.58
Construction Industry	75.81
Agriculture	54.97
Transportation	44.08
Law Enforcement	32.76
Public Utilities	14.98
Finance, Gov., Service	14.18
Manufacturing	12.08
Trade	10.25

Table adapted from Robin (ibid.: Table 6).

II.

The other side of the coin is police homicides of citizens. This aspect of police-citizen interaction has received little attention except in the work of Robin (ibid.) and Knoohuizen, et al. (1972). For example, the prestigious President's *Task Force Report* on the police (1967) devotes not one line to this issue.

What is generally not known by the public, and either unknown or certainly not publicized by the police and other officials, is the alarming increase in the rate of deaths of male citizens caused by, in the official terminology, "legal intervention of police." These are the cases recorded on the death certificates as "justifiable homicide" by police intervention. After disappearing onto computer tapes, these reappear as statistics in the annually published official volumes of "Vital Statistics in the United States." Here they can be found under "Cause of Death, Code Number 984," where they have attracted very little attention.

The deaths of male civilians ages ten years and over caused by police intervention gradually increased in rate, especially from 1962 to 1968, the latest year in which nationwide statistics were available at the time of this writing (see Chart 2). More dramatic is the trend in civilian deaths caused by California police, where the rate increased two and one-half times between 1962 and 1969. This increase cannot be attributed simply to an increase in the proportion of young adults in the population, among whom a larger share of these deaths occur, because each annual rate is age-adjusted to the age-profile of the population in 1960. There is an increase in the rate of homicides by police, regardless of the changes in that age profile.

Why should such a trend go unnoticed? The crime rate has, of course, increased at the same time, and this, it might be argued, indicates that more males put themselves in situations where they risk a police bullet. This is the argument that the victim alone is responsible. But that is too simple an explanation: an increase in such dangerous situations has not led to an increased jeopardy of police lives, for, as we have seen, their homicide rate did not increase over the same period.

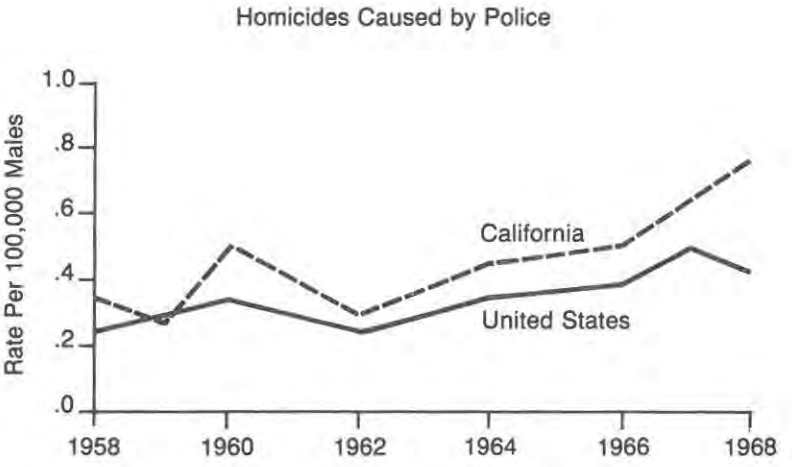

CHART 2

The charts show police to be victims of homicides at an annual rate of about 25 per hundred thousand police, while citizens are victims of killings at the hands of police at a rate of 0.5 per 100,000 males ages ten and over, on the national level, and a rate of about 0.8 in California. This huge difference of 30 to 50-fold cannot be taken literally, because the civilian rate is based upon all males over age 9 even though most of them don't have the slightest chance of confronting a policeman in a desperate situation of anyone's making. There simply is no other population base to use in computing that rate. The point, however, is inescapable: the rate of death did not change for law enforcement officers during a period when it changed critically for male citizens.

III.

Black men have been killed by police at a rate some nine to ten times higher than white men. From that same obscure, but published source in our nation's capital, come the disheartening statistics. Between 1960 and 1968, police killed 1,188 Black

males and 1,253 white males in a population in which about ten percent are Black. The rates of homicides due to police intervention increased over the years for both whites and Blacks, but remained consistently at least nine times higher for Blacks for the past 18 years (see Chart 3).

That proportionately more Blacks are killed by police will come as no surprise to most people, certainly to no police officials. The remarkably big difference should be surprising, however. After all, the crime rate, even if we rely upon measurement by the arrest rate, is higher for Blacks than for whites. But that does not explain the killing of Black men. In 1964, arrests of Black males were 28 percent of total arrests, as reported by 3,940 agencies the FBI, while Black deaths were 51 percent of the total number killed by police. In 1968 the statistics were essentially the same.

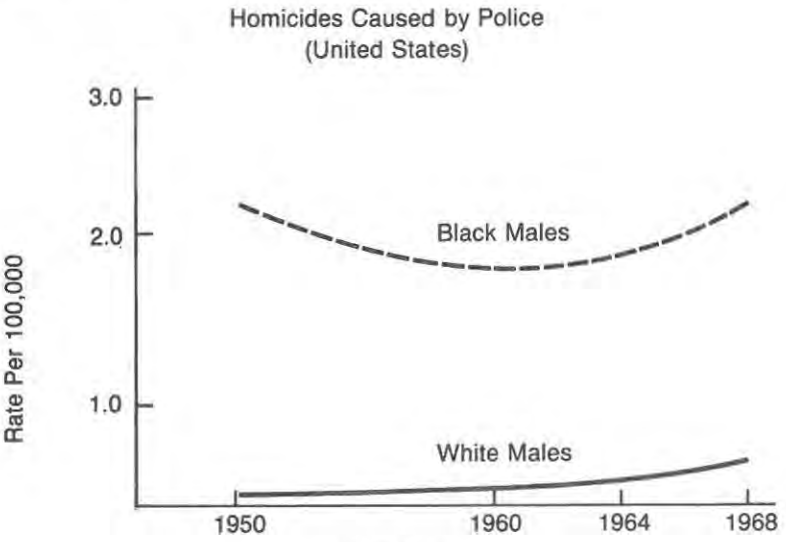

CHART 3.

It might be argued that Blacks have a higher arrest rate for the seven major crimes: homicide, rape, robbery, aggravated assault, burglary, theft, and auto theft; and that arrests for

these crimes will correlate better with deaths by legal intervention of police. In 1968, Black males accounted for 36 percent of arrests for the major crimes; four years earlier, in 1964, Black arrests were less than 30 percent during a year when they suffered 51 percent of the deaths from police guns. Besides, it is not certain that the major crimes are a more accurate index of how frequently Blacks and whites commit crimes. Further, the threshold of suspicion is lower when a policeman encounters a Black man, thus the arrest rate is biased against Blacks. No matter how it is viewed, the death rate of Blacks is far out of proportion to the situations that might justify it.

Black people don't need these statistics to tell them what has been happening. The news gets around the neighborhood when someone is killed by the police. It is part of a history. But white people, especially policy-makers, don't live in those neighborhoods, and it is important that *they* explore the statistics further.

Take the age groups where "desperate" criminals are much less likely to be found, the very young and the very old. Male homicides by police during 1964-1968 were:

TABLE 2

	Number of Deaths		*Rate Per Million/Yearly*	
	White	*Black*	*White*	*Black*
Ages 10-14	5	11	0.12	1.75
Ages 65+	5	14	0.14	4.76

In proportion to population, Black youngsters and old men have been killed by police at a rate 15 to 30 times greater than that for whites of the same age. It is the actual experiences behind statistics like these that suggest that police have one trigger finger for whites and another for Blacks. The latest statistics, those for 1968, give no reason for altering that belief.

Whereas our analysis covered national data on police killings of private citizens, Robin (1963:229), utilizing the same

data for the years 1950 through 1960, examined the rates of Black and white victims by selected cities. In absolute numbers, Chicago police accounted for 54.6 percent of the 350 police slayings of citizens in the eight cities; the mean actual rate, however, was highest for Miami, with Chicago second. The two cities with the lowest police "justifiable homicide" rate, Boston and Milwaukee, killed Blacks in proportion to whites at a ratio of 25 to 29 times higher.

TABLE 3 RATES OF BLACK AND WHITE DECEDENTS, BY CITY

City	Black per 1,000,000	White per 1,000,000	Black:White Ratio
Akron	16.1	2.7	5.8 to 1
Chicago	16.1	2.1	7.4 to 1
Kansas City, Mo.	17.0	2.2	7.5 to 1
Miami	24.4	2.7	8.8 to 1
Buffalo	7.1	.5	12.2 to 1
Philadelphia	5.4	.2	21.9 to 1
Boston	3.2	.1	25.2 to 1
Milwaukee	13.5	.4	29.5 to 1

A more detailed analysis of police killing of private citizens was conducted by Robin for the city of Philadelphia. He reports:

> Thirty of the 32 cases (28 were Black victims) were disposed of by the medical examiner, who at the inquest exonerated the officers involved in the killings on the grounds that death was due to justifiable homicide. In the two remaining cases the officers were held for the grand jury, indicted, tried by a jury, and found not guilty (ibid.:226).

Black citizens have long argued that the police are committing genocide on Black people, and there is increasing evidence that these killings are indeed murder, and that real justice is rarely if ever carried out in this process. Knoohuizen, et al. (1972) conducted a study of Chicago police killing of citizens, and provided further credence to the claim that police are murdering

Black citizens. In their report, Knoohuizen and associates examined the incidents as reported by the police, the reports of the coroner's office, and testimony or statements by credible eyewitnesses. In Table 15 they summarized their findings from which we extracted three cases.

> Case 1. The victim was Linda Anderson. Police action resulting in her death was ruled justifiable homicide because, according to police reports, she was killed accidentally during attempt to gain entrance to her apartment by shooting the lock off the door. The partner of the officer, and independent witnesses, corroborated the police officer's version. An independent investigation revealed that the officer used a shotgun standing four feet from the door, did not warn the occupant of impending shot, and missed the lock completely.
>
> Case 2. The victim was Raymond Jones. Police action was ruled excusable because police officers did not strike the deceased and were only using the amount of force necessary to bring the suspect under arrest. Seven of 9 officers involved in the incident testified and confirmed each other's story. The report of the Coroner's pathologist, however, revealed that Mr. Jones was age 31 and in good health. He was also unarmed. The use of excessive force was implied when 9 police officers cannot subdue a suspect without causing his death.
>
> Case 3. The victim was Charles Cox. The police report did not offer a justification or an excuse claiming the victim died from drug overdose rather than use of police force. Further reports from the police indicate blood analysis revealed some drugs in the victim's body. One of the arresting officers and one of the officers in charge of the lock-up both testified that the victim appeared all right when in their charge. A pathologist testified on the basis of his examination of the body that Cox died of blows to the head.

Knoohuizen and associates conclude from their analysis that in 28 of the 76 cases in which civilians were killed at the hands of the Chicago police, there was substantial evidence of police misconduct; and in 10 of the 76 cases, there was substantial evidence of criminal liability for manslaughter or murder (ibid.: 61).

Despite grand jury findings in those instances where police officers are held criminally liable, the courts have been reluctant to proceed with prosecution. All too often, such matters are thrown out of court or juries return the verdict of not guilty. For example, Superior Court Judge Ross G. Tharp of San Diego County dismissed involuntary manslaughter charges against a California Highway patrolman indicted in the fatal shooting of an unarmed 16-year-old boy. According to police reports, Roland R. Thomas was shot by Officer Nelander following a high speed chase in an allegedly stolen car. The car ran off the road, and Thomas appeared to reach toward his pocket at which point the officer fired his gun. In dismissing the case, Judge Tharp observed: "I think the officer deserves a commendation for doing his duty rather than standing trial."

The only recent cases in which police officers were held accountable for killing civilians were shown on a recent TV program (Owen Marshall, ABC, Saturday, March 2, 1974), in addition to the highly publicized case in Texas were a 12-year-old Mexican-American youngster was shot while under custody in a police car. The circumstances in the latter case were so gross that a dismissal was out of the question. The court, however, sentenced the officer to a prison term of 5 years in a state where sentences of 1,000 years for lesser crimes are not uncommon.

IV.

Authorities have been trying to combat what they view to be a rash of attacks on police, to the neglect of all the data that bear on the problem—a problem in which other lives are involved. The problem has existed all along; at least since 1950, and there is reason to believe for decades before that, Black people have been killed by the police at a tragically disproportionate rate, beyond the bounds of anything that would justify it.

Open warfare between the police and the citizenry might be one of the outcomes. Two recent attacks upon police station

houses, one by a bomb and the other by shotgun wielding assailants resulting in the death of two police officers, are indicative. In the latter killing, the gunman thrust a shotgun through the speaking hole of a bullet proof glass shield separating the desk sergeant from the public. Portions of the police station house were protected by cyclone fencing. The wall of isolation surrounding the police is not only social and psychological, but physical, and the breaking down of these walls was considered by the National Crime Commission to be the single most important priority. Yet the federal government in appropriating billions of dollars for the Law Enforcement Assistance Administration program earmarked the funds primarily for the fortification of the police, thereby contributing to their isolation.

Currently, the concept of citizen participation is being stressed by the LEAA. The support the police get from some citizens' groups actually increases the isolation of police from minority communities. In Oakland, California, such a group, called Citizens for Law and Order, has a program of needling judges for their "soft" handling of criminal cases, firing broadsides at the press, television and radio, and appearing before local governmental bodies to promote support for the police and more "discipline" in schools. Programs like these are based on the belief that increasing the penalty for crime, increasing the powers of the police, and invoking police coercion of the citizenry will result in law and order.

Other citizens' groups have encouraged the introduction of reforms. People have worked on a variety of schemes such as Civilian Review Boards, psychological testing and screening of police candidates, human relations training, police community relations, racially integrated patrol units, and efforts to increase the hiring of Black and other minority officers. To the extent that they work to improve only the "image" of police, they fail because the problems go much deeper. And to a major extent they fail because policemen, most of them willingly and others unknowingly, are used as the front line to maintain the social injustices inherent in other institutions and branches of government.

Perhaps the only immediate solution at this time is to disarm the police. Observers have noted that provinces in Australia where the police are unarmed have a much lower rate of attacks upon the police, compared to neighboring provinces where the police are armed, and the corollary observation, a lower rate of police misconduct.

Disarming the police in the United States will undoubtedly lower the rate of police killings of civilians; it does not, however, get at the causes of police misconduct, particularly toward black people. The findings that Blacks are killed by the police at a disproportionate ratio in cities like Milwaukee and Boston, and the attitudes of officials like San Diego County's Superior Court Judge Tharp, require a more fundamental understanding of the meaning of policing in contemporary America.

V.

In distinguishing social justice from distributive justice, the former would not have been obtained, if, for example, Officer Lelander had been tried and convicted for the killing of a 16-year-old alleged auto thief; that would have been distributive justice, because it would have symbolized the fact that the police would not have received special treatment from the courts. Instead, the question that must be asked is why the police officer resorted to deadly force involving an alleged theft. To put it differently, why was the value of an automobile placed above the value of a human life? Judge Tharp's comments in dismissing the case provide a partial answer: "For doing his duty," the duty being to enforce the laws having to do with the property rights of an automobile owner. The critical issue here is that the auto theft laws and for that matter most of the laws in American society essentially legitimize a productive system where human labor is systematically expropriated. Examine for a moment the social significance of an automobile; it involves an array of corporate systems that expropriate the labor of people that go into manufacturing its parts, the labor for its

assembly, the labor involved in extricating and processing the fuel that propels it, the labor of constructing the roads on which it runs, etc. The fiction of ownership exacts further capital by banking institutions that mortgage the commodity, and automobile insurance required by laws that extorts additional capital. The built-in obsolescence, or more precisely, the depreciation of the commodity, occurs when the muscle, the sweat, and human potential have been completely capitalized. These are the elements embodied in an automobile. It is no longer merely a commodity value, but represents a social value.

The automobile is a commodity created by varied types of wage labor. And as noted by men with ideas as far apart as those of Adam Smith and Karl Marx, the wealth of nations originate in the efforts of labor. But Marx added that wealth based on production of these commodities is accrued through the expropriation of labor power; and thus, the concept of private property based on this form of wealth is in essence the theft of the value-creating power of labor. The criminal laws, the system of coercion and punishment, exist to promote and to protect the consequences of a system based on this form of property.

The rights of liberty, equality, and security are not elements to be exchanged for the right of property acquired by the exploitation of wage labor; nor should they be expressed in relative terms, that is, greater or less than property rights. One person's life and liberty is the same as the next person's. But in a society that equates private property with human rights, they become inevitably reduced to standards and consequences that value some lives less than others. The system of coercion and punishment is intimately connected with the inequitable distribution of wealth, and provides the legitimation under the perverted notion that "ours is a government of laws" even to kill in order to maintain social priorities based on private property. This is the meaning of policing in American society.

Why are Black people killed by the police at a rate nine to ten times higher than whites? We can describe the manifestations of racism but cannot adequately explain it. At one level,

we agree with the observation that the existence of racism is highly profitable. The Black urban ghettos, created by America's industries, provided the cheap labor power for the accumulation of some of America's greatest industrial wealth at the turn of the 20th century, and again during World War II. These urban ghettos still provide a highly exploited source of labor. In addition, the ghettos themselves have become a place for exploitation by slum landlords, merchants selling inferior quality goods at higher prices, a justification for higher premium rates on insurance, and the victimizing of people under the credit purchase system. To maintain this situation, the regulatory agencies, including the police, have ignored the codes governing housing, food, health, and usury conditions.

In cities across the country, the infamous ghettos are now deemed to be prime real estate, and the state under the powers of eminent domain claim for finance capitalism the areas for high rise buildings, condominiums, trade complexes, and entertainment centers ostensibly for the "people." Under what has been called urban redevelopment, the police are present to quiet individual and especially organized protest and dissent, and the full powers of the state are employed to evict, to dispossess, and to humiliate.

At another level, the concentration of capital has produced on the one hand, a demand for a *disciplined* labor force and, in order to rationalize its control, to rely increasingly upon administrative laws; on the other hand, it has created a *surplus* labor force that is increasingly controlled by our criminal laws. The use of punishment to control surplus labor is not new, having its roots in early 16th century Europe (Rusche and Kirchheimer, 1968).

Historically, people of color came to the United States not as freepersons, but as slaves, indentured servants, and as contract laborers. They were initially welcomed under these conditions. As these particular systems of exploitation gradually disappeared and the people entered the competitive labor market a variety of devices were employed to continue oppressing them, including imprisonment. In the present period described

by some as the post-industrial age, increasing numbers of people, and especially Black people, find themselves in the ranks of the unemployed, which establishment economists, fixing upon the 5 percent unemployment figure, dismiss as a regular feature of our political economy. Sweezy (1971) disagrees, arguing that the "post-industrial" unemployment figures are the same as that in the Great Depression when one includes defense and defense related employment data. When arrest and prison commitment data on Black people are viewed from this perspective, especially the sudden increase in prison commitments from a stable rate of ten percent up to and during the early period of World War II to almost double that after the war, there is some basis to suspect that the police killing of Black citizens is punishment to control a surplus labor population.

The labor surplus analysis, however, does not explain the sudden increase in police killing of civilians beginning around 1962. Did the Civil Rights movement in housing, education, and employment, and more specifically, the militancy of a Malcolm X, and the liberation movements in Third World nations around the world, re-define the role of the police? Did finance imperialism in the form of multi-national corporations beginning about this time create an un-noticed social dislocation? Why do the police kill civilians at a much higher rate in some cities compared to others, and why do they kill Blacks at a disproportionately higher ratio in cities like Boston and Milwaukee? Why do California police, presumed to be highly professional, kill civilians at a rate 60 percent higher than the nation as a whole? We are not able to answer these questions.

We must, however, pause for a moment, and consider what is happening to us. We know that authorized police personnel in states like California has been increasing at the rate of 5 to 6 percent compared to an annual population increase of less than two and one-half percent. In 1960 there were 22,783 police officers; in 1972 there were 51,909. If the rate of increase continues, California will have at the turn of the 21st century an estimated 180,000 police officers, an equivalent of 10 military divisions. Is it not true that the growth in the instruments of

coercion and punishment is the inevitable consequence of the wealth of a nation that is based upon theft?

America is moving more and more rapidly towards a garrison state, and soon we will not find solace by repeating to ourselves: "Ours is a democratic society."

Notes

The ideas in this section are not original. They come from Fourier, Godwin, Proudhon, Marx, Kropotkin, and others.

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CHAPTER 9

USE OF DEADLY FORCE TO ARREST A FLEEING FELON—A CONSTITUTIONAL CHALLENGE, PART II

J. PAUL BOUTWELL

RESTRICTIONS UPON USE OF DEADLY FORCE THROUGH DEPARTMENT POLICY

A most significant effort toward reform of the common law rule has come through law enforcement administrators. Whether in response to persuasive police commentary,[1] national study commissions[2] or because of tragic incidents in the community,[3] many executives of law enforcement agencies have prepared written policy detailing restrictions on the use of deadly force for purpose of making an arrest. In many instances, the policy is more restrictive than the state statutory standard. This is understandable. The fact that deadly force is legally justified does not mean that it is always wisely utilized. Riots, for example, have been attributed to an officer's legal, but unwise, use of deadly force.[4] The legislature determines the legal use of deadly force; the administrator promotes its wise use.

SOURCE: "Use of Deadly Force to Arrest a Fleeing Felon—A Constitutional Challenge, Part II" *FBI Law Enforcement Bulletin* (October 1977) 46:10:27–31.

Many law enforcement administrators are concerned that if an officer is sued, the department's firearms regulation will be admitted into evidence, and where more restrictive than state law, will create liability where none might otherwise exist. This is not necessarily the case. To begin with, states differ on admissibility of departmental policy. Decisions in California and Florida illustrate the different responses. For example, in a California case, a police officer shot at and killed a fleeing felon. The shooting was a justifiable use of deadly force under state law. The police tactical manual pertaining to the use of firearms, however, justified the use of deadly force only if necessary to save the officer, a citizen, a brother officer, or a prisoner from death or grave bodily harm. The Supreme Court of California held the manual was admissible on the ground that an employee's failure to follow a safety rule promulgated by his employer, regardless of its substance, served as evidence of negligence.[5]

On the other hand, in the State of Florida, at least two district courts of appeal have reached an opposite result. In one case, officers covering a rock concert observed from a rooftop two teenagers trying the doors of a number of vehicles in the parking lot and finally entered a van. The rooftop officers directed officers on the ground to arrest them. As an officer attempted to arrest one of the boys, a struggle ensued and the officer fell to the ground after receiving a blow to the face. The youth ran, and the officer shot the plaintiff in the leg. Florida has codified the common law rule. Over the officer's objection in a civil suit, the court admitted into evidence a departmental order on the use of firearms, which was in effect at the time of the shooting. The order authorized the officers to use firearms to apprehend a fleeing felon, but only when the officer reasonably believes the fleeing person has committed either (1) a violent crime to the person of another, or (2) a crime against property that clearly demonstrates a wanton and reckless disregard for human life. On appeal, the officer contended that the trial court erred in admitting this order. The appeals court agreed. While the departmental regulation may be applicable

for departmental discipline of its own members, the regulation would not affect the standard by which the officer's criminal or civil liability was measured. To admit the public safety order constituted reversible error.[6]

Whether departmental regulations will create liability where none might otherwise exist is more difficult. Americans for Effective Law Enforcement (AELE)[7] makes the following points: (1) Police chiefs and other administrators should not be dissuaded from promulgating safety rules and policy directives due to the threat of civil liability; (2) it is inconsistent with modern management to leave unfettered discretion (as to when an officer may use his firearm) to the lowest ranks—this is not to suggest that any particular restrictive policy is meritorious, only that planning and policymaking should be centralized at the highest administrative levels; and (3) written directives which restrict a police officer's action beyond the requirements of state law should contain an explanation of their intended purpose. Suggested wording is as follows:

> "This directive is for internal use only, and does not enlarge an officer's civil or criminal liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense, with respect to third party claims. Violations of this directive, if proven, can only form the basis of a complaint by this department, and then only in a nonjudicial administrative setting."[8]

The wise administrator, concerned about potential liability problems with regard to the use of deadly force, will discuss this topic with a legal adviser. He certainly wants to know what effect his policy might have on his officers' potential liability. He needs to be clear as to who will pay the civil judgment, if one is awarded, arising out of a deadly force case.[9]

THE INTERPLAY BETWEEN A STATE'S JUSTIFIABLE HOMICIDE STATUTE AND CIVIL LIABILITY

A state legislature defines what constitutes justification for an act otherwise criminal.[10] A state civil court defines what

constitutes privilege for conduct otherwise tortious.[11] Query: Can a state civil court adopt a definition of an officer's privilege in the use of deadly force, that is more restrictive than the state's legislative standard, expressed through its justifiable homicide statute?

The question underscores the distinction between the two areas of the law—criminal and civil. The legislature of the state has the legitimate authority to define crimes and defenses, and generally the civil courts retain the common law authority to define torts and their defenses. So the simply answer to the question is yes; civil courts may adopt a definition of privileged conduct that is more restrictive than the state's justifiable homicide statute. It should be emphasized, however, that most courts have refused to do so.

A recent Minnesota case illustrates the point. Early one morning, an off-duty officer, dressed in civilian clothes but who carried his .38-caliber snub-nose revolver, drove a marked police department "take-home" squad car, which he was authorized to use, to pick up the morning newspaper. On his return, he observed a station wagon traveling at an excessive rate of speed collide with a parked car. Two boys got out, yelled something into the station wagon, and then ran. As the officer stopped his squad car, another person alighted from the driver's side of the wagon and ran. The officer jumped out of the squad car and shouted "Stop, police." As he chased one boy, he repeatedly shouted similar warnings, finally calling out, "Stop, or I'll shoot." The plaintiff ignored the warnings and continued to run. The officer fired a warning shot into the ground, but the plaintiff only ran faster. The officer again yelled, "Stop, or I'll shoot." When this warning failed to produce results, the officer aimed and fired a shot, intending to hit the plaintiff in the lower part of his body. Instead of striking the plaintiff in the legs, the bullet struck the plaintiff in the nape of the neck, permanently crippling him.

In his complaint, the plaintiff alleged defendant's liability on two theories—battery and negligence. The trial court submitted the case to the jury on the theory of negligence alone.

The jury found for the officer. They found also that the plaintiff's negligence was the proximate cause of his own injury. The plaintiff appealed. He argued that it was error for the trial court to leave out the issue of battery. In addition, the plaintiff sought to have the Supreme Court of Minnesota adopt a civil liability standard for privileged conduct, a standard that would be more restrictive than the state's justifiable homicide statute. Minnesota's justifiable homicide statute follows the common law rule.

The Supreme Court of Minnesota held that the trial court had improperly framed the issue in the case in terms of negligence rather than battery and remanded the case for a new trial. The court wrote that while they were not technically bound to follow the statutory formulation of the justifiable homicide statutes, they would nevertheless do so and defer to the legislative policy in defining tort liability. The police officer contemplating the use of force under emergency conditions should not be held to conflicting standards of conduct by the civil and criminal law. The confusion which would be engendered by such a situation can only produce unfair and inequitable results. The Court wrote:

> "It is in the legislative forum that the deterrent effect of the traditional rule may be evaluated and the law-enforcement policies of this state may be fully debated and determined. . . . The legislature, and not this court, is the proper decision maker."[12]

In order for a police officer to raise an affirmative defense of privileged use of his firearm in a suit alleging battery, the officer must bear the burden of proving: (1) That he had probable cause to believe that the person sought to be arrested either committed or was committing a felony, and (2) that he reasonably believed the arrest could not be effected without the use of a firearm.

CONSTITUTIONAL ANALYSIS OF THE USE OF DEADLY FORCE TO ARREST A FLEEING FELON

The most significant development in litigation regarding the common law fleeing felon rule is the federal constitutional

challenge made upon the use of deadly force to arrest a nonviolent, fleeing felon. Such a challenge may be made by a plaintiff seeking either declaratory or injunctive relief.[13] Most frequently, however, the plaintiff merely files a claim under title 42, United States Code, section 1983,[14] alleging the violation of a constitutional right. This legislation was enacted April 20, 1871, with the purpose of providing a remedy for the wrongs allegedly being perpetrated under color of state law. Thus, 1983, as it is often called, creates a right to sue law enforcement officers personally for depriving another of " . . . any right, privileges, or immunities secured by the Constitution and laws . . . ." (of the United States). Such suits may be filed in the U.S. district courts under the provisions of title 28, United States Code, section 1343.

Prior to 1961, it was thought the plaintiff had to exhaust possibilities that local or state remedies would give relief before coming to the federal court. In a 1961 landmark decision, the U.S. Supreme Court established the principle that the right to sue police officers under 1983 was completely independent of any state remedies that might be available. The Court stated, "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." An officer could no longer regard abstention or exhaustion of local remedies as useful in defending an action under 1983.[15]

Thus, a plaintiff may commence a section 1983 action against an officer in federal court, or he may file a civil suit in state court. It is sometimes asked how a state civil lawsuit brought in a state court and arising out of the same set of facts differs from a 1983 suit. Some general observations on the nature of a state law suit are useful before discussing some of the recent 1983 cases.

State Tort Action Distinguished

State civil lawsuits arising out of an officer's use of his firearm are not unusual. A suit may develop from its negligent

use as well as from its intentional use. In the latter case, the distinction between justifiable force and excessive force is important.

Negligence

Probably the most widely recognized duty of a law enforcement officer is that of requiring him to avoid negligence in his work. Our society imposes a duty upon each individual to conduct his affairs in a manner which will avoid subjecting others to an unreasonable risk of harm. This, of course, also applies to law enforcement officers. If his conduct creates a danger recognizable as such by a reasonable officer in like circumstances, he will be held accountable to others injured as a proximate result of his conduct and who have not contributed to their own harm. These general principles are well-known concepts in the law of negligence.

They mean that actions taken by officers in apprehending criminals must not create an unreasonable risk of injury or death to innocent persons. The creation of risk is not in and of itself negligence; however, the law does require a reasonable assessment of harm's likelihood and regards as negligent any act which creates a risk of such magnitude as to outweigh the utility of the act itself.

Under the civil court system, if the police officer owed no duty to the complainant, he will not be penalized even if the plaintiff in fact suffered some injury. An officer will be liable only where it is shown that (1) he was obliged to do or refrain from doing something, and (2) the plaintiff was injured because of the officer's failure to comply with this obligation or duty.

Assume that Officer A shoots at B, a felon fleeing in a congested downtown area, but misses B and hits C, an innocent bystander. C, in a civil suit against Officer A in State court, will allege that Officer A was negligent in the discharge of his firearm. The gist of C's suit is that Officer A has breached his duty to C.

Intentional Torts

Another category of torts is termed intentional torts. In a negligence suit, the officer will not be liable unless he foresaw, or should have anticipated, that his acts or omissions would result in injury to another. An intentional tort is the voluntary doing of an act which to a substantial certainty will injure another. It does not have to be performed negligently to be actionable. Examples of such torts are false arrest and assault and battery. Assume Officer A intentionally shoots and seriously injures B, a fleeing felon. B may bring a civil suit in state court alleging that he has been battered, an intentional tort. The gist of B's action is that Officer A used excessive force in his effort to apprehend him and the use of his firearm was not justified under the circumstances. It is not alleged that Officer A was negligent—he did what he intended to do—namely, shoot B. The essential elements of the tort of battery are intent and contact. Privilege, however, is an affirmative defense to the tort of battery. Usually the officer must bear the burden of proving the essential elements of the defense. A few jurisdictions reach a contrary result, adopting the rule that a police officer's act is presumed lawful.[16] In final analysis, the reasonableness of the force used in making an arrest under all the circumstances is a question of fact for the jury or other trier of fact (such as a judge in a bench trial), and the standard usually expressed is the conduct of ordinary prudent men under existing circumstances. Not a very precise standard to be sure.

Notes

1. Chapman, "Police Policy on the Use of Firearms." *Police Chief,* July 1967, at 16, 26-27. McCreedy & Hague, "Administrative and Legal Aspects of a Policy to Limit the Use of Firearms by Police Officers," 42 *Police Chief,* January 1975, at 48.

2. President's Comm'n. on Law Enforcement and Administration of Justice. Report: The Challenge of Crime in a Free Society 119 (1967); Task Force Report: The Police 189-90 (1967); 1 Nat'l. Comm'n. on Reform of Fed. Crim. Laws, Working Papers 269 (1970).

3. Bart, "Inquest Lightens Tension in Watts," New York Times, May 21, 1966, p. 13, col. 1.

4. The San Francisco riot of 1966 was said to have started after a juvenile was shot and killed while fleeing from a stolen car. Davis, "Calm is Restored in San Francisco," New York Times, Sept. 30, 1966, p. 1, col. 5.

5. *Grudt v. City of Los Angeles,* 468 P. 2d 825 (Cal. 1970).

6. *City of St. Petersburg v. Reed,* 330 So. 2d 25 (Fla. App. 1976). See also, *Chastin v. Civil Service Board of Orlando,* 327 So. 2d 230 (Fla. App. 1976).

7. Americans for Effective Law Enforcement, Inc. (AELE) is a national, not for profit organization whose purpose is to provide a voice for the law-abiding citizens through responsible support for professional law enforcement. As a citizen-supported research and action organization employing three attorneys and three legal assistants, all of whom have law enforcement backgrounds, AELE also publishes the *Legal Liability Reporter,* and the staff has sponsored workshops across the country on civil liability.

8. AELE Legal Defense Manual, "Admissibility of Police Written Directives in Litigation," Brief No. 76-5, p. 14 (October 1976).

9. A.B.A. Standards for Criminal Justice, the Urban Police Function (approved draft, 1973) §5.5, provides: "In order to strengthen the effectiveness of the tort remedy for improper police activities, municipal tort immunity, where it still exists, should be repealed and municipalities should be fully liable for the actions of police who are acting within the scope of their employment as municipal employees."

10. *Justification* is based on a determination that an act is legal because circumstances negate the validity of the normal rules of criminal liability. Such defenses recognize that under such circumstances the value protected by law is eclipsed by a superseding value. Note, *Statutory Reform,* 75 Colum. L. Rev. 914 (1975).

11. *Privilege* in the law of torts is a defense to what might have been an actionable wrong. It excuses such conduct, hence no liability occurs. Comment. 11 Harv. Civ. Rights—Civ. Lib. L. Rev. 361.

12. *Schumann v. McGinn, supra* note 1, at 537. The dissenting opinion of Justice Rogosheske is instructive. He pointed out that the criminal statute distinguishes between the killing of felony and misdemeanor suspects, whereas sound policy dictates that tort law should distinguish between the killing of dangerous and nondangerous criminal suspects: "Surely a police officer should not be imprisoned if he mistakes a nondangerous for a dangerous felony suspect and uses his

firearm against the former. However, *unless he is in violation of specific instructions* (emphasis added) his employer ought to bear financial responsibility for mistakes committed in the line of duty. Viewed in this way, it does not follow, as the majority declares, that under the rule urged a police officer contemplating the use of force under emergency conditions would be held to conflicting standards of conduct by the civil and criminal law. A police officer who makes a mistake and uses deadly force against a nondangerous felon would know unequivocally that he is committing a civil wrong. The legislature and the courts of this state, out of awareness of his difficult job in these emergency circumstances, will not jail him for his mistake, but in no way can that justify granting immunity for a civil wrong . . . . Rather, and hopefully, it would lead all police officers in Minnesota to do what some, if not most, well-trained and experienced police officers already practice, which is to follow the rule that the use of deadly force is not a proper arrest procedure for nondangerous, nonthreatening felons."

13. Generally, the way to challenge the constitutionality of a state statute is to seek injunctive relief under 28 U.S.C. §2281. Upon proper application, a three-judge court will be convened to hear and determine the constitutionality of the challenged statue. See, *Cunningham v. Ellington,* 323 F. Supp. 1072 (W.D. Tenn. 1971).

14. 42 U.S.C. §1963 reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

15. *Monroe v. Pape,* 365 U.S. 167 (1961).

16. *West v. Nantz,* 101 S.W. 2d 673 (Ky. 1937); *Wall v. Zeeb,* 153 N.W. 2d 779 (N.D. 1967); *Modesett v. Emmons,* 292 S.W. 855 (Tex. Com. App. 1927).

CHAPTER 10

POLICE POLICY ON THE USE OF FIREARMS

SAMUEL G. CHAPMAN

The traditional decentralization of governmental organization and authority in the United States has led to the establishment of a vast array of police agencies. As a result, there exists a proliferation of police departments across the nation which has developed autonomously with little conscious design for any uniformity in policies or rules of procedure. Such lack of standard procedures is especially apparent when one surveys regulations purporting to govern the use of firearms in various police agencies throughout the United States.[1]

Whether firearms use policies are written or "oral," the broad variation in comprehensiveness and utility reflects more than the traditional American spirit of individualism and nonconformity. It reflects, in far too many instances, a failure on the part of police administrators to provide adequate guidance for officers faced with situations where they must decide instantaneously whether or not to use their firearms in discharging official responsibilities. This state of affairs is particularly disturbing because it exists at a time when police agencies seek to gain greater public cooperation and respect while organized interest groups of varying political persuasions seem poised to exploit police misjudgment on a scale previously unknown in American law enforcement annals.

SOURCE: Reproduced from *The Police Chief* (July 1967 issue) with the permission of the International Association of Chiefs of Police.

In a democratic society, the manner in which the police officer uses his weapon may be critical to the effectivensss of his organization, for accomplishment of the total police mission is dependent, at least in part, upon the cooperation of a majority of the citizenry. Imprudent or indiscreet use of firearms will arouse public indigation and alienate public support of the police agency.

DISARM THE POLICE?

If, in fact, police use or misuse of firearms in our society constitutes a potential threat to the public support necessary to the accomplishment of the total law enforcement mission, an obvious solution to the problem would be to disarm the American police. Like all simple solutions, however, such a course of action warrants closer examination. But from time to time proposals are offered which call for disarming American police officers. An example of one such proposal, made by a university professor, says in part:

> The use of firearms, restricted in England to only those who absolutely need them in the course of their duties, should be equally restricted in American jurisdictions. By not carrying a gun, the traffic officer, for example, who has more extensive contact with the public than any other policeman, would instill greater confidence in the public and remove a psychological barrier between himself and the public which firearms inevitably produce. Most officers never handle dangerous persons, and therefore, do not need a gun. In fact, it is likely that the carrying of weapons imparts a false sense of pride in police officers and gives them a poor excuse for continuing a lack of education and training.[2]

Three aspects of the professor's statement require response. First, the British police routinely carry no sidearms for reasons other than tradition. They go unarmed because it is very difficult for a British citizen to purchase personal arms, as the professor notes. The police also go unarmed on the premise that being armed would offer inducement for the criminal to arm himself. And they go also unarmed because the need to

bear arms for self-defense seems extremely limited in Britain.

That the British police have little need to bear firearms routinely for self-defense becomes evident when one learns that from January 1, 1946 through September 30, 1966 (almost 21 years) only 19 sworn members have been fatally injured "as a result of having been attacked in a manner intrinsically likely to cause death."[3] Of these victims, 13 succumbed to gunfire, three to stabbing, and three were fatally injured in other fashions.[4] These 19 victims include the three unarmed Metropolitan Police detectives murdered in London on August 12, 1966 in what is called "the worse crime against the [British] police in 56 years."[5]

By way of contrast to the British experience the FBI reports that from January 1, 1946 through September 30, 1966, 1014 American police officers have been murdered in the line of duty.[6]

The British populace in a densely populated, realtively small area is considered more homogeneous and stable in terms of mobility than persons in the mobile, vast American nation. With regard to owning firearms, if a British resident has one, he must carefully control his weapon. Also he does not carry his firearm except for good reason and he must renew his firearm certificate each year. There is no comparable control in the United States. A Home Office official notes:

> . . . possession is restricted to persons who have obtained a certificate from a Chief Constable of Police. Applications for certificates are subject to the most careful consideration and experience leads me to suggest that the number of new certificates issued is relatively low. Certificates have to be renewed annually and here, again, the case for continuance is carefully scrutinized. We do not keep details of the number of new certificates issued each year, but . . . in February 1965, the number of certificates in force in England and Wales totalled 220,496 . . . Most of the certificates issued refer to .22 rifles used for target shooting or vermin destruction. Very few certificates are granted for pistols or revolvers. Where the problem lies is in the number of illegal sales and possession of firearms, . . . we have no reliable statistics about those.[7]

Second, the notion that certain classes of American police personnel need no arms is misleading. For example, during the six-year period between 1960 and 1965, 84 of the 278 American police killed in line of duty were fatally injured while making arrests, including those for traffic violations, or while transporting prisoners. Twenty were killed while off duty but interceding to prevent the commission of crime, and 17 men were killed without warning, the result of a sudden unprovoked attack. Furthermore, almost all uniformed officers assigned to patrol the streets or highways are charged with enforcing traffic regulations consistent with their other multi-form activities.[8] It is almost impossible to separate those whose primary mission is to enforce traffic regulations from those whose duties encompass the full range of uniform patrol activities. Finally, even those personnel who serve in traffic- or highway patrol-oriented assignments face dangerous persons regularly and effect numerous arrests. For example, in 1965, California Highway Patrol field officers captured three of the suspects listed as among the "Ten Most Wanted" by the FBI. This indicates the great danger to which these men are regularly exposed in the course of issuing traffic citations or warnings.[9]

An additional consideration is that on many occasions lives and property are saved because of the judicious use of firearms by law enforcement officers. In other instances the knowledge that officers are armed and trained in the use of lethal weapons has proven sufficient to induce dangerous criminals to surrender or refrain from violence.

Finally, regardless of how often a policeman must resort to his firearm and the degree of hazard which one associates with police service, it is evading the question to conclude that firearms are unimportant or unnecessary solely on the basis of the infrequency of combat situations. Since frequency of combat circumstances cannot be anticipated, it is essential that the officer who has occasion to use his weapon no more than once in 20 years or, happily, never encounters police combat, should be fully informed and aware of the legal and ethical aspects of the police use of firearms.

Perhaps the best summary of reasons why the American police should be armed is, ironically, found in Britain's "Police Journal":

> . . . U.S. authorities are [not] wrong to arm their police. They have, indeed, no alternative: the public is armed, and has a constitutional right to be so, and the incidence of violent crime is such that law-abiding citizens have only too good a case for possessing arms to defend themselves and their families. What it does mean, surely, is that every possible step should be taken in this country to minimize the amount of firearms in private hands and to confine their possession to those who have legitimate cause to own them. It also means that the police and the courts of justice should make unmistakably clear that the criminal use of firearms will result in swift arrest and draconian punishment.[10]

British police experience offers no solid precedent for disarming the American police. It seems clear that this should happen (if at all) only after the American public is disarmed. The American custom of arming police officers is as strongly based on evident need as the British practice to the contrary.

In the meantime, there remains the problem of developing effective policy to govern the use of firearms by American police officers. Unlike many matters of police routine, the use of firearms in a combat situation is an area of concern not only to the police organization but to the community as a whole.

A CONVERGENCE OF INTERESTS

The protection of life, one of several primary police goals, is steadfastly pursued by police personnel throughout the United States. Commendable as the goal may be and laudable as the total police effort designed to achieve it, many police administrators have failed to formulate firearms policies or have published policies which are, upon scrutinizing examination, absurd, weak, or meaningless and in essence do not serve to protect life. The vacuum so created must be filled. Policy, following a gunshot death, is easily rewritten; human life, once

taken, lingers only in photographs, mementos, epitaphs, and newspaper accounts.

The image and reputation of a public organization as well as the life of citizens are not the only factors at stake when the police resort to the use of firearms. The municipality may well find itself a co-defendant in civil actions as a consequence of police firearms use. This fact was amply illustrated by a 1959 New Jersey Appellate Division ruling which asserted that a municipality is liable under civil law when a police officer negligently shoots an innocent citizen, and it is shown that the officer has not received adequate instruction from his department on how and when a firearm may be used.[11]

In addition to serving the best interests of the public, the government, and the police department, an effective firearms policy is of vital interest to the police officer as an individual. The officer who must ultimately reach a decision whether to shoot faces the possibility of lawsuit and lifetime remorse if his decision to shoot proves, in light of subsequent examination, somewhat more faulty than his aim. On the other hand, the decision not to shoot (or faulty marksmanship) may be perceived as holding its own unhappy consequences if he himself is the target of the person he chose not to shoot.

Assaults on police officers are, it seems, becoming more numerous, and constitute a continuing threat to social order. The most convincing evidence is that during the six-year period of 1960 through 1965, 278 American police officers were slain while performing their duty.[12] During this period, 96 percent of all officers murdered were killed by rifles, shotguns, or handguns, with handguns predominating. There were 362 suspects involved in the 279 killings. Of these, 304 were arrested, 43 were killed justifiably by police at the time of or shortly after the incident, 13 committed suicide, one died a natural death, and one drowned before being taken into custody. A review of FBI files reveals that of the 362 persons involved in the fatal incidents, 76 percent had prior records of arrest, and about 181 of these persons had previously been arrested for assaultive types of crimes. More than one of every four suspects was on parole or probation when he murdered the officer.

Non-fatal assaults on police officers continue at a rate which alarms the nation's police. The trend is apparent when considering that in 1960, 9621 were physically assaulted; in 1964, 18,001 were victims of physical assault; and in 1965, 20,523 officers were assaulted, with almost four of every ten attacked suffering personal injury.[13]

The apparent increase in the risk of physical violence suffered by the nation's law enforcement officers argues most effectively for the development of sound policy for police use of firearms. Such statistics suggest that the individual officer is being called upon more frequently to make critical decisions, often under conditions of extreme physical exertion and emotional stress, regarding the use of force in the performance of his duty. In an emergency situation, the officer equipped with a thorough understanding of a realistic and effective policy for the combat use of firearms will be in an advantageous position to react instantly and prudently.

Adequate guidelines for police use of deadly force should be the concern of everyone with an interest in the complex process of law enforcement in modern society. The citizen is interested in his personal safety and that of his family. The governmental unit cannot afford to ignore the possibility of civil suit or the political ramifications of improper police conduct. The law enforcement agency must consider its fundamental goal of the protection of life and the vital nature of its relationships with the public it serves. And finally, the individual police officer is entitled to effective guidance in an area fraught with potential physical danger and civil liability.

THE FIREARMS POLICY MILIEU

In an area of such immediate professional, political, and public concern, it is both proper and timely to consider how comprehensively today's American police officer is trained in the use of his personal weapon, and to what extent his parent police organization has concerned itself with promulgating department-wide policy which concisely, yet clearly, outlines conditions under which he may wisely use his firearm.

Most police departments have recognized and acted upon the need to train their personnel to attain and maintain a certain degree of proficiency in the accurate discharge of the diverse weapons in the police arsenal. The most widely used of these is the revolver. Police training also normally includes at least some instruction on the care and maintenance of the personal sidearm and on basic safety rules both on and off range.

Since police officers are taught how to shoot, it might be assumed that police departments have concomitantly prepared adequate regulations governing the use of firearms, and that police officers are instructed when they may shoot. Actually, research discloses that such is not the case; many departments have never reduced firearms rules or policy to written form. Instead, when to fire is frequently trusted to the judgment or discretion of officers as individuals. Some departments have ignored the issue completely and have never considered articulating such a policy. Finally, some departments function with policies so outdated or unrealistic that they actually have no practical application, and are worthless and often dangerous as guidance to police personnel.[14]

The consequence is that while officers know the mechanics of care and use of their firearms, many have little or no understanding of when the weapon may be employed. This paradox is similar to teaching someone to drive an automobile while neglecting to instruct him on motor vehicle regulations. It might be as logically argued, as it often is in the case of firearms regulations, that the driver's "common sense" coupled with a warning not to crash into anybody unless absolutely necessary would suffice to enable the driver to operate his vehicle at large on the highways.

Some police administrators disclaim the need for written rules and regulations governing the use of firearms on the premise that an oral policy is sufficient to guide the actions of officers under any combination of circumstances. There is, of course, nothing inherently wrong with a comprehensive oral policy that is fully understood and uniformly interpreted by all members of the department. Unfortunately, an oral policy may

prove to be an excuse for the department's failure to examine thoroughly the issues at stake and to provide concrete guidance for its officers. Oral policy too often means no policy at all.

Some police departments which at one time relied exclusively on oral policy have prepared written firearms rules and regulations. However, many written policies prove to be incomplete or confusing, and consequently neither fit the needs of the department, the individual officer, nor the community. Essentially, personnel are left to operate within the vague limits of what constitutes their individual "understanding" of the meaning of departmental policy. For example, for years the only directive regarding firearms of one police agency of more than 100 sworn members in southwestern United States was: "Never take me out in anger; never put me back in disgrace." Until this situation was changed, this department, like many others, simply paid lip service to the issue of police firearms policy formulation; the police administrator, when asked whether his department had a written firearms policy, could respond affirmatively. However, a review of his policy shows it to be as conspicuous by its insufficiency as a garden hose at a three-alarm fire.

Another department of over 60 sworn members in the Rocky Mountain area adopted a policy which limited use of firearms to self-defense and against misdemeanants. All other issues remain undiscussed:

> Except in self-defense, an officer shall not use a deadly weapon or take life to effect arrest for a misdemeanor, whether his purpose is to kill or merely to stop the other's flight. This is true even though the offender cannot be taken otherwise.

One police department of about 100 men in the southern United States devoted almost eight pages of its rules and regulations to a careful description of policies surrounding uniform allowances and specifications. Paradoxically, in the less than one page it devoted to the use of firearms, the department completely failed to present any ground rules which officers should observe in how and when to use their weapons. Officers

of this department were left to operate according to the following ambiguous warning:

> Unnecessary and careless handling of firearms may cause accidents, and the drawing, aiming, or snapping of firearms within Police Headquarters, or in other places, is forbidden.

Other police firearms policies, assembled from several American municipal law enforcement agencies, are contained in their entirety in such statements as:

> Officers shall not immediately fire their gun except as authorized by law.
>
> Leave the gun in the holster until you intend to use it.
>
> Shoot only when absolutely necessary to apprehend a criminal who has committed a major felony.
>
> Never pull a sidearm as a threat, and if it is drawn, be prepared to use same.
>
> It is left to the discretion of each individual officer when and how to shoot.

Such written statements do not represent the entire firearms policy for any police agency. What happens, of course, is that the department has as many firearms policies as it has members, with each "policy" sharing only the meager core furnished by such vague and inadequate official policy as noted above. Some forces (including one very large one) simply instruct their officers to "read the law book" to discover firearms policy. Even if all police officers were required to have a degree in law, a "read the law book" approach invites embarrassment, and consequent lack of compliance.

The net effect of an inadequate written firearms policy, or one which is oral, is to shift the burden of full responsibility for using firearms to the shoulders of the police officer at the level of execution. The field officer carries heavy responsibility without commensurate guidance. The reluctance of a police agency to formulate and publish a comprehensive firearms policy

seems to indicate that police administrators have either failed to understand the importance of such regulations, neglected to consider the multitude of socio-legal factors inherent in police use of deadly force, or have avoided committing themselves in what is perceived as a delicate policy area. Whether through ignorant neglect or conscious avoidance of responsibility, the police administrator who fails to provide his men with an adequate firearms policy is failing to meet his responsibility to his chief executive, his community, and his men. To the extent that the members of a department are more knowledgeable about how to shoot than when to shoot, the police administrator may be charged with a critical management failure that ultimately may lead to an untimely shooting, human tragedy, censure, and suit.

That such charges are made is confirmed in a recent newspaper account:

> The American Civil Liberties Union of Washington has requested an inquiry into Seattle Police Department regulations governing police use of firearms.
>
> David Guren, ACLU executive director, told Mayor J. D. Braman that police directives on the use of weapons are vague and put 'tremendous burdens of interpretation' on individual officers.[15]

THE FORMULATION OF FIREARMS POLICY

The police administrator who undertakes to formulate a firearms policy for his agency quickly confronts several factors which must be acknowledged and faced if his policy is to be both realistic and effective. Such limiting aspects may be classified, respectively as social, legal, operational, departmental, and supervisory.

Social Factors

In theory, legislation constitutes the will of the people. It is a formalized expression of public policy. In a theoretical sense,

then, the police firearms policy could be based exclusively on existing legal structure and legislation. Unfortunately, existing law, because of its complexity and lack of susceptibility to change, often fails to be in exact accord with the desires and opinions of the majority of the public. Thus any attempt to formulate policy in the sensitive area of the police use of firearms must take into account the current state of public opinion in addition to the position of existing law.

Public definitions of "proper" police conduct reflect wide variations geographically. For example, provincialism, in a sense, can influence firearms policy. Reputedly "tough" communities or cities in frontier-like settings may tolerate more aggressive police behavior than the more sedate, sophisticated college town. Variations in police firearms policy may be noted between what New Englanders will accept as compared to persons living in the southwestern United States. "Gunslinger" police officers carrying sidearms with inlaid ivory pistol grips would attract only nominal attention in a few American localities, but in most an officer so armed would bring horror, consternation, and a switchboard deluge at city hall. Communities which are dominated by particular religious groups or whose culture is closely allied with a particular ethnic background may be broadly influenced in a social sense by tradition, heritage, or belief which predisposes one toward the police agency. Such communities would surely reject certain kinds of police conduct.

The police administrator must not be swayed by the demands of vociferous, radical, or extreme elements of the population, but should take into consideration the political and social tenor of his jurisdiction as a whole when preparing a firearms policy. He must take into account the type of regulation the public will approve and support as "right" or "fair" within the framework of the objectives of the police operation. While the law authorizing the police to use deadly force to apprehend or prevent the escape of a felon makes no distinction as to the suspect's age, sex, or specific felony, the administrator can rest assured that the public will make such distinctions and react accordingly if, say, a youth be shot. This sort of consideration is

embodied in the introduction to a firearms policy currently in effect in one midwestern city:

> Our policy provides more stringent requirements than does the law, but our policy is based upon estimation of the degree of protection needed by the people of the City of —— and the kind of action they will support.

Regardless of what may be legally permissible in a community, public opinion must be reflected in the policies of the police agencies which represent them.

Legal Factors

Obviously, a police administrator has no license to contradict the provisions of existing law as he drafts a firearms policy. Yet laws and interpretations of laws vary from jurisdiction to jurisdiction, and, although there are some areas of general agreement on the meaning of the law, there are many areas in which legal practice varies considerably and often rests in a twilight zone of ambiguity. In the formulation of policy, the administrator must not only take advantage of firmly established law, but must recognize the shades of gray as well. State laws governing the use of firearms by police officers will generally be found either under the justifiable homicide provisions of the criminal code[16] or in the form of statutes which deal specifically with the use of deadly force by police officers.[17] Finally, some states regulate the use of deadly force by the police through case law resulting from court interpretations of existing statutes and from judgments stemming from civil actions.[18]

Self Defense. A police officer is clearly justified in using deadly force when it is necessary to save himself, a citizen, or a prisoner from death or grave bodily harm, regardless of the offense for which an arrest is being made. This is also true in the case of overcoming the resistance of a person already in custody who resorts to an assault likely to produce death or grave bodily harm. Even if the arrest is illegal, it has generally been held that an officer may kill in self defense if the arres-

tee's resistance constitutes aggression sufficient to justify the application of the self-defense rule.[19]

An officer, of course, is permitted to use only such force as is necessary to overcome resistance encountered or to protect his person from great bodily harm. He is not permitted to use deadly force to protect himself from assaults which are not likely to have serious results. The self-defense concept applies equally to overcoming attacks by juveniles since an assailant is not necessarily less desperate or dangerous simply because of his youth.

Misdemeanants. An officer may not use deadly force to effect the arrest of a person suspected of being a misdemeanant. This restriction, however, does not infringe upon an officer's right to self-defense should he be attacked by a misdemeanant suspect or prisoner.

The use of firearms in halting a fleeing misdemeanant is unwarranted, regardless of whether the attempted arrest is with or without a warrant. In such cases, the value of human life is considered to supersede the importance of immediate apprehension. In a moral sense, this restriction is justified, even though in some jurisdictions the very act of fleeing constitutes a felony, and an officer may be permitted by law to use all possible force, including firearms, to prevent the escape of any person arrested on a warrant after notice of arrest has been furnished. The Pennsylvania Supreme Court stated the principle clearly:

> . . . where a misdemeanor has been committed and is charged in the warrant, flight from an officer, even after actual capture and custody, there having been no conviction, will not justify the use of a deadly weapon . . . An officer has no right to shoot a person who is merely running away from him without committing any violence, when under arrest or to avoid arrest for misdeamor. He must at least stop short of force which will result in the sacrifice of human life; and a killing in such a case is manslaughter at least.[20]

Felons. Far less susceptible to clear statement are rules governing the use of deadly force against the felon. The rule

that an officer may, if necessary, take the life of a felon in effecting an arrest seems linked to ancient law under which almost all felonies were punishable by death. This was true as recently as 1800.[21] Since 1800, however, various state legislative bodies have given felony status to such non-violent offenses as statutory rape, larceny, sodomy, extortion, perjury, forgery, adultery, bigamy, incest, and pandering, to name a few. In consequence, the traditional concept that an officer may use whatever force is necessary to effect the arrest of a known felon has become complicated.

In most states it is still lawful for the police to risk killing a suspect when necessary to effect his arrest, or to prevent the escape of a person guilty of a felony if no other means of preventing flight is reasonably available. However, the application of this principle has from time to time aroused public resentment to the point where opinion has virtually suspended the policeman's option to use firearms under conditions where the suspect indeed offered no resistance but merely fled.[22]

In response to the statutory broadening of the felony category, many police agencies have arbitrarily classified some felonies as major, atrocious, extreme, dangerous, serious, or heinous to differentiate them from felonies which are less aggressive in character and presumably less offensive to the collective conscience of contemporary American society. Although undoubtedly humanitarian, such arbitrary subclassification has indeed complicated, not simplified, the formulation of police firearms policies. The natural result has been the appearance in some existing firearms policies of such terms as serious, dangerous, and major felonies. These terms usually are not further described or defined, with the result that an officer must apply his own split-second interpretation of the classification in the heat of tense police combat.

The rationale which supports the subclassification of felonies is that society will not tolerate the killing of a person escaping from a crime that would carry a three or four-year sentence or committing the common law offense of fleeing from a police officer punishable by an even lighter sentence. The

appeal of this argument is even further augmented in those states where capital punishment has been abolished entirely.[23] It seems to follow that when many states, even after conviction of murder, do not invoke the death penalty, then police use of firearms should occur only under circumstances which strongly justify force which may have fatal consequences. This principle seems valid whether or not a state has capital punishment.

There is really only one avenue open to the police administrator who is designing a modern, utilitarian, concise firearms use policy. It is to flatly prohibit the use of any fatal force except in self-defense or the defense of a citizen after all other means have failed. Such a policy clears the issue of shooting at fleeing felons, obviates the difficulties involved in arbitrarily subclassifying offenses, and eliminates public clamor over lives being taken for seemingly trivial offenses. Such a position would coincide with the policy which the FBI has adopted, the essence of which is explained by Director J. Edgar Hoover:

> The FBI's policy with respect to the use of firearms in connection with official duties is relatively simple and certainly comes within the moral, ethical and legal framework governing the use of force by a law enforcement officer in performance of duty. We teach our personnel, and the same policy is advocated at firearms schools by our firearm experts, that a law enforcement officer should use only that degree of force necessary to overcome resistance to a legal duty he must perform. In other words, an officer should use his firearm only for self-defense of another. I have long believed that a highly developed skill in the use of firearms by law enforcement [personnel] actually saves lives, and certainly equips the officer to better protect himself and the citizenry of his community against the criminal who follows no legal, moral or ethical code. Many criminals have candidly admitted they offered no resistance to FBI arrest, although armed, because of the FBI's reputation for training its Agents in the proficient use of firearms.[24]

The modern policy permits the use of fatal force only after all other means have failed in those instances when the officer

believes the felon suspect has used or threatened fatal force during his criminal act and if he is not apprehended at once he may seriously injure or kill someone. The American Law Institute proposed the following as guidelines in the General Principles of Justification section of its proposed Model Penal Code:

> (2) *Limitations on the Use of Force*
>
> (b) The use of deadly force is not justifiable under this Section unless:
>
> (iv) the actor believes that:
>
> (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
>
> (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.[25]

If all departments formulated firearms use policies which included the above principles and these policies were judiciously enforced, many of the tragic incidents of the past could have been averted.

A classic example of an officer's dilemma whether or not to use fatal force is the circumstance where an officer comes upon two men who are struggling in a public place. One man, upon seeing the officer, flees, while the other shouts to the officer that the fleeing man has just committed an armed robbery. Does the officer fire? Has he basis for doing so? Does the officer have sufficient facts to justify the use of deadly force? Is it better that the suspect escape? These are some of the issues which flash across the officer's mind in that agonizing moment of decision-making.

Suspicion or flight alone or in combination are an insufficient basis for shooting at a suspect. There must be firmly based knowledge that the suspect has indeed committed a felony, that the offense was serious and aggressive in nature, that every other means to stop flight has been exhausted, and that the suspect, if not apprehended, may seriously injure or kill

someone. Even after the split-second evaluation above, the officer has one more question to answer: "Am I justified in killing?"

Operational Factors

No firearms policy can be formulated to include specific instructions covering every possible operational contingency, but the police officer is certainly entitled to clear guidance in such relatively common operational situations as firing at resisting offenders, shooting at or from moving vehicles, using firearms against juveniles, and firing warning shots.

Resisting Offender. A sound principle to follow when dealing with the resisting offender is that the same amount of deadly force may be used to overcome resistance as is authorized to prevent the flight of the same individual. This principle does not, however, abridge an officer's right to self-defense. Indeed, where significant resistance is encountered, the self-defense rule will take precedence.

At Moving Vehicles. While it is rare that the police are specifically prohibited by statute from firing at moving vehicles, justification for such action may be difficult to find in many instances. This is especially true when officers have no concrete evidence that a felony has been committed. In some instances an officer may know only that the fleeing vehicle has failed to heed a siren, red light, or roadblock, but may have no knowledge of the driver's reason for evading arrest. Granting the sure knowledge of a felony, an officer must consider the safety of the general public. This is especially true in urban areas, regardless of the hour. Also, on occasions hostages have been forced to accompany suspects fleeing in a motor vehicle. Another consideration is that gunfire aimed at a moving vehicle is notoriously inaccurate except in television epics, in class D movies, and in popular detective comic strips. Finally, standard police cartridge loads from a .38 calibre revolver often do not penetrate the metal portions of a motor vehicle but instead ricochet. Consequently, shots fired at vehicles are far more likely to constitute a hazard to public safety than enhance it.

From Moving Vehicles. Even though the crime and circumstances may justify the use of firearms, municipal police administrators have substantial basis for requiring their officers to refrain from firing at fleeing vehicles from pursuing cars or motorcycles. On the other hand, state or county administrators may not flatly prohibit such a practice. They may permit the passenger in a two-man patrol unit to fire from a moving vehicle, if circumstances described earlier warrant such action, provided there is no apparent danger to persons in the area. Such gunfire should occur only when almost abreast of or extremely close to the fleeing and armed criminals. Firing from moving solo motorcycles (unless a second man is in a sidecar) and from one-man motor patrol units should be flatly prohibited.

Juvenile Offenders. There is no legal distinction in the use of deadly force against juveniles as compared to adults. But if a police department adopts the model firearms use policy suggested below as its guidelines, there need to be no distinction drawn between firing at adults or juveniles. This is so because the provisions of the model policy are so demanding that fatal force is justified only when circumstances have deteriorated to such a point that officers or citizens are in immediate serious danger. Under such circumstances, it is not really relevant whether the suspect is adult or juvenile; age (and indeed sex) is a secondary factor.

On the other hand, if a police department does not adopt a firearms use policy as restrictive in nature as that proposed in the model, guidelines must be drawn which specifically address the juvenile issue. The police administrator must be certain that his men fully comprehend the social impact of firing at, wounding, or killing a juvenile.

Firearms may be used against juveniles only under two circumstances: (1) In the necessary defense of a citizen's life, or (2) to preserve the life of an officer or a prisoner. In essence, they are the provisions of the model policy. Under no circumstances can the use of fatal force be justified against persons recognized as or suspected of being below age 18. This places a grave discretionary decision upon the officer because almost 50

percent of all arrests for serious offenses in 1965 were persons under 18 years of age.[26]

Should a department's policy include provisions not as restrictive as those contained in the model, it is essential that an officer is certain he is directing his fire at an adult felony suspect when not shooting in defense of life. Murky weather conditions, darkness, or the positioning of the sun or artificial lights render it all the more difficult for an officer who has had only a fleeting look at a suspect to decide whether the fleeing person is an adult or juvenile. Added clothing in rainy or cold weather may cause a slender youth to assume the general proportions of a middleweight adult. Since police combat often occurs under the most adverse weather conditions and in an environment which itself is "spooky" the officer must feel even more certain that he is justified in using his firearm and that the suspect is an adult. He must under no circumstances fire upon mere suspicion and at persons who run away merely to avoid facing the police.

Warning Shots. Interestingly enough, the 1961 Michigan Firearms Use Study revealed that in some quarters the warning shot has come to be regarded as a sort of "civil right," with both public and criminal element expressing indignation when the custom is bypassed in favor of more immediate action. Whether the warning shot tradition was an outgrowth of poor police marksmanship or "professional" courtesy, the practice has nothing to commend it and should be terminated. This is consistent with the best interests of public safety and the prevention of incidents likely to result in civil or criminal action against an officer or his department.

The officer who fires his weapon when deadly force is not authorized risks wounding or killing an offender or some innocent bystander. Thus, a gun should never be fired over someone's head or into the ground merely to frighten a suspect into submitting to arrest. For every suspect who surrenders upon hearing warning shots there are others who flee that much faster.

A final and compelling basis for prohibiting warning shots is that officers other than the one who fired a warning shot

may easily be decoyed into killing a suspect by believing that the officer's shot was indeed offered to kill, not to warn. When policy is such that brother officers have but one basis to interpret shooting—that there exists strong cause to take life—it is clear that there is no room for warning shots.

Departmental Factors

No matter how comprehensive a firearms policy may be and how carefully it is tailored to be compatible with legal and social requirements, it will be effective only to the extent that it is understood by the police officers who must conform to its provisions and by supervisors who must assure that policy is followed. Without oversimplification, the policy should be reduced to compact terms, free from legal terminology and complicated sentence structure.

The most powerful tool at the disposal of the police administrator in securing department-wide understanding and acceptance of his policies is a comprehensive recruit and regular in-service training program. And the chief who will not tolerate irresponsible display or use of firearms is the key to overseeing such a policy, as are supervisors who are alert to poor police practice.

In the recruit training program the departmental firearms regulations and the reasons behind them should be fully explained. And a few minutes at roll call from time to time can be effectively employed to refresh veteran officers on the proper use of weapons and to air practical firearms problems arising in day-to-day service. Visual training aids depicting combat situations which cause officers to make independent decisions based on policy should be stressed.

There are a host of moral or ethical considerations involved in the use of deadly force. Such issues should be discussed at length with officers undergoing training. The San Diego, California, Police Department's recruit training program is perhaps the nation's best in helping young men and women confront these problems. However, any effort to treat firearms morality *per se* is unlikely to meet with any degree of success. It is easy

enough, for example, to point out that the Bible says, "Thou shalt not kill," but if each officer has not yet accepted this as a guiding principle, it is unlikely that any police training program can firmly implant a sense of right and wrong in the adult officer. In short, a moral sense of right and wrong as a guide to behavior becomes an inherent part of personality long before an individual becomes an adult and a police officer. For this reason, the training program may in part be designed to refresh the individual's sense of right and wrong, but it cannot be expected to seriously modify pre-existing attitudes. The police firearms training program, then, should discuss broad societal and police-oriented implications of existing patterns of morality, and emphasize what the officer is or is not permitted to do by law of the nation and states, ordinances of the community, and the rules of the department.

In any event, morality is a personal matter and the use of firearms is a policy matter. If an officer's personal morality is in harmony with the department's firearms policy, all the better. If not, the officer must be provided with a policy that will act as the conscience of the community to fill any void existing personal conscience. This highlights the importance of control in ensuring that performance at the level of execution is consistent with policy.

Supervisory Factors

The conscientious police administrator will recognize the fact that effective control of firearms policy will require a concert of high calibre, first-line supervision and the development of internal machinery to assure that firearms regulations are obeyed and violations investigated.

The role of positive supervision, basic to implementing any policy, is perhaps even more critical in the control of firearms use regulations. While most police officers will readily accept rules and regulations which are realistic and easily understood, they invariably look to their supervisors for subtle, individual

attitudes toward the formal policies of the organization. The attitude of the supervisor will be reflected either consciously or unconsciously in the behavior of the subordinate. For this reason it is essential that the supervisor understand and fully accept the organization's firearms policy.

Experience has time and again revealed that people respond favorably to positive leadership. It follows that efficient supervision, positive in nature, will inspire compliance with firearms regulations on the part of most officers and will identify those few subordinates who seemingly are unable to comply with firearms directives. Officers who continue to be unwilling or unable to adhere to established policy should be retrained or reassigned to positions where they will be less likely to endanger themselves, the safety of the public, and the reputation of the police agency.

The critical and sensitive nature of the use of firearms by the police demands not only the implementation of a modern firearms policy, accepted by departmental personnel and supervised at all levels of command, but the creation of machinery within the department to insure that such policy is obeyed and that violations are investigated. This control is achieved by a process of review of every incident in which police officers resort to the use of firearms. The Oakland, California, Police Department review process is outstanding.

Departmental regulations should require that an officer report, in writing, every occasion upon which a weapon is discharged outside of authorized range firing. The officer's immediate supervisor should be obliged to investigate the circumstances and report on the facts to the divisional commander. A board of review or inquiry, comprised of departmental command personnel, should be created to investigate both accidental and intentional discharge of firearms. The police legal advisor or a representative from the district attorney's or corporation counsel's office may be invited to assume an advisory role if a case seems to so warrant.

Such a review board should be charged with the dual function of enforcing compliance with firearms regulations and of

identifying areas in which policy revision is required or additional training needed. Administrators should stress the positive aspects of the inquiry board system in order to maximize departmental acceptance and, more important, to insure a continuing flow or field experience which will serve as a basis for future policy formulation.

Having considered the many complex factors involved in the formulation of an effective firearms use policy, the police administrator can translate his conclusions into a written policy that will adequately reflect the policy position of the department and yet remain within the understanding of operational personnel. Drafting this document will be no easy accomplishment, but the preparation of a clear, concise, and comprehensible regulation is critical to the success or failure of the department's policy.

A MODEL FIREARMS USE POLICY

The model firearms policy which fits every possible occurrence is impossible to draft. But one may be written which sets forth fundamental philosophy and purpose regarding the potentially fatal use of force by police. Such a policy may also stand as a carefully devised, practical, understandable, and acceptable guiding force with a suitable control mechanism to assure that the policy is indeed adhered to. The Berkeley, California, Police Department adopted a revised firearms use policy in 1966 which is one of the nation's best. It is similar to the model policy which follows.

The model firearms use policy proposed below includes four major sections: (I) A summary statement of policy, (II) the regulation proper, (III) procedure following a firearms discharge, and (IV) the review mechanism.

The principles contained in Sections I and II are sufficiently universal in nature to be applied to a police agency of any size or location throughout the United States. Sections III and IV, however, may have to be revised so that its language conforms with the size, organization, and rank and title terminology of individual departments.

I. POLICY

The policy of this department is that members shall exhaust every other reasonable means of apprehension before resorting to the use of firearms.

II. REGULATIONS[27]

A. An officer shall not discharge firearms in the performance of his police duties except under the following circumstances and after all other means fail:
   1. In the necessary defense from death or serious injury of another person attacked.
   2. In the necessary defense of himself from death or serious injury when attacked.
   3. To effect an arrest, to prevent an escape, or to recapture an escapee when other means have failed, of a felony suspect when:
      a. The crime for which the arrest is sought involved conduct including the use or threatened use of deadly force; and
      b. There is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed.
   4. To kill a dangerous animal or one that humanity requires its removal from further suffering, and other disposition is impractical.
   5. To give alarm or to call assistance for an important purpose when no other means can be used.
   6. For target practice at an approved range.

B. Firearms shall not be discharged under the following circumstances:
   1. As a warning.

2. At moving or fleeing vehicles unless the circumstances come within the provisions of Section IIA, 1, and 3 of this policy.

C. An officer shall file a written report through established channels to the police chief immediately following the purchase, replacement, loss, or other disposition of a police firearm, and shall list a complete description including the serial number. A report concerning the loss (including theft) of a police firearm shall include all facts surrounding the loss.

III. PROCEDURE TO BE FOLLOWED WHEN FIREARM IS DISCHARGED (Except at an approved range)

A. Notification and report by member involved.
   1. Whenever a member discharges his firearm either (a) accidentally, or (b) in the performance of police duty, he shall verbally notify his on-duty supervisor as soon as time and circumstances permit, but in no event later than the conclusion of his current tour of duty. If a command officer is not on duty in his division at the time of the discharge, the member shall verbally notify the ranking officer on duty at the time.
   2. The member who discharged his firearm shall file a written report of the incident through established channels with the police chief and a carbon copy with the member's superior within 16 hours of the incident.
   3. If the member who discharged his firearm is hospitalized or fatally injured during the tour of duty and incapable of filing the report required in paragraph 2 of this sub-

section, his supervisor is responsible for filing as complete a report as possible pending further departmental investigation.

B. Investigation by a Command Officer.

1. Each discharge of firearms shall be investigated personally by the on-duty command officer of the member involved. If the discharge occurs when there is no command officer on duty in the division to which the member is assigned, the ranking command officer then on duty shall personally conduct the investigation when notified that the discharge of firearms has taken place.
2. After conducting a thorough investigation of the circumstances attending the discharge of firearms, the command officer shall submit a detailed written report of the results of the investigation to the police chief through channels. The report shall also contain the observation and conclusions of the command officer as to whether the discharge was justified and in accordance with this order.

IV. BOARD OF REVIEW

A. Membership of the Board

1. There is established a board of review consisting of the following members, along with others who may be designated by the police chief:
   a. The commanding officer of the patrol division who is designated chairman of the board.
   b. The commanding officer of the training section.
   c. One supervisory officer of the member who discharged the weapon.

B. Meetings of the Board.
A meeting of the board shall be called by the chairman within a reasonable time after the report of a firearms discharge comes to his attention.

C. Authority of the Board.
1. The board is authorized to review the circumstances attending each discharge of firearms by a member of the department, and to recommend to the police chief disciplinary action. The police chief makes the final decision whether disciplinary action is to be taken against the officer, and the nature and extent of the action.

2. The board shall make/or receive recommendations for the modification of the department's firearms use policy and shall make recommendations concerning training necessary for the effective implementation of such policy.

Regardless of the exact format adopted, a department's firearms policy should be written and each member should be furnished a copy. In addition, the administrator may wish to have produced a "brief" of the policy which would extract the essential elements in a condensed form easily handled and carried in the pocket or notebook of officers for periodic reference purposes.

IMPLEMENTATION

Policy-making is an internal matter, a process which springs from within each of America's 40,000 police agencies. The law may dictate, the public may react, and the police department may suggest, but the police administrator must be held ultimately responsible for the formulation and implementation of the firearms policy best suited to the needs of all con-

cerned. The chief also bears responsibility for insuring that policy, once made, is adhered to.

While recognizing that policy formulation is an internal matter, it is equally apparent that the notable range in scope and design found among police firearms use policies throughout the United States is neither efficacious nor desirable. This becomes especially evident when one acknowledges that in principle the 40,000 American police agencies enforce essentially the same laws and may resort to using deadly force under approximately similar conditions and circumstances. One may conclude that it is reasonable as well as timely to encourage the nation's police to adopt a firearms use policy which is essentially uniform in nature.

In its 1967 report to the President, the National Crime Commission recommended:

> A comprehensive regulation should be formulated by every chief administrator to reflect the basic policy that firearms may be used *only* when the officer believes his life or the life of another is in imminent danger, or when other reasonable means of apprehension have failed to prevent the escape of a *felon* suspect whom the officer believes presents a serious danger to others.[28]

The model firearms use policy described earlier includes the policy principles recommended in the National Crime Commission Report. The model policy provisions are humane, yet operationally feasible.

If the Commission recommendation is to be implemented, national and state-level police associations must commit themselves to adopt a model policy statement as contained herein. These associations include many influential groups such as the International Association of Chiefs of Police, the National Sheriffs' Association, the Fraternal Order of Police, and the International Conference of Police Associations, as well as branches of such associations at the state and local level throughout the United States. And several non-police governmental professional associations such as the International City Managers' Association, the National League of Cities, the National Associ-

ation of County Officials, the National Conference of Mayors, and the National District Attorneys Association, to mention only a few, are concerned with the formulation and the implementation of effective firearms policies.

Police professional and governmental organizations, as partners dedicated to fostering broad improvements in law enforcement, may advise, assist, and encourage the police to implement sound principles and policy. The model firearms use policy presented above may be recommended and supported on the basis of its utilitarian and humane nature, concise direction, and internal accountability. The fact that it costs nothing to install, other than the time involved in some careful staff study backed by recruit, and in-service training time, warrants notice. It is timely for police administrators to act.

CONCLUSION

Undeniably, the ultimate decision to shoot or not to shoot rests with each officer as an individual. Consequently, the police administrator must insure that every officer has a clear understanding of what is required, permitted, and forbidden by departmental policy and by the law. This responsibility can only be met by providing each officer with clear, concise, and comprehensive policy guidance and the training and supervision necessary to insure that the department's policy becomes a constituent element of the behavior pattern of every individual concerned.

The very nature of the question of using deadly force in our free society dictates that the issue will continue to be the focus of a wide variety of groups external to the police organization. Effective law enforcement in the United States demands the implementation of uniform, humane, and workable regulations governing the police use of firearms. The complexities of a rapidly changing society will no longer permit the risk of procrastination.

Our large southern police department concludes its firearms training course with the following terse but meaningful laconism which summarizes the intent of this entire exercise:

Quick action is often necessary with no time for deliberations and you must be right. Ask yourself one question before you fire—AM I JUSTIFIED IN KILLING? If you are in doubt, DO NOT FIRE.

Notes

1. There have been two such surveys. The first, completed in 1961, surveyed the 71 police departments serving cities of 10,000 and more population in Michigan. See Samuel G. Chapman and Thompson S. Crockett, ""Gunsight Dilemma: Police Firearms Policy," *Police* 6:40-50, 60-70, March-April and May-June, 1963. Portions of the Chapman-Crockett research are included in this report, originally prepared for the President's Commission on Law Enforcement and Administration of Justice, with permission from the Charles C Thomas Publishing Company, Springfield, Illinois. The other report, "Police Regulations Governing Use of Firearms Survey," was published by the Cincinnati, Ohio Police Division on April 22, 1964, Stanley R. Schrotel, Chief of Police. This survey reported police firearms policies in 45 of the 51 cities in the United States over 250,000 population.

2. Gerhard Falk, "The Police Dilemma in England and America," in *Interdisciplinary Problems in Criminology: Papers of the American Society of Criminology,* 1964 (Columbus, Ohio: Ohio State University), p. 119. Also see: Gerhard Falk, "The Public's Prejudice Against the Police," *American Bar Association Journal,* 50:756 August 1964.

3. Letter to Samuel G. Chapman, Assistant Director of the President's Crime Commission, from B. N. Babbington, Director of the Police Research and Planning Branch, Home Office, London, England (November 17, 1966).

4. *Ibid.* Of the three men fatally injured by means other than being shot or stabbed, one was struck on the head in a chase; another was killed in a melee; and the third was thrown from a moving vehicle and run over by a car travelling in the opposite direction.

5. David Anable, "British Police Peril Stirs Arms Debate," *The Christian Science Monitor,* August 17, 1966, eastern edition, 5:415.

6. Letter to Samuel G. Chapman, Assistant Director of the President's Crime Commission from Jerome Daunt, Chief, Uniform Crime Reporting Section, Federal Bureau of Investigation, (December 20, 1966).

7. Babbington, *loc. cit.*

8. *Crime in the United States, Uniform Crime Reports, 1965* (Washington, D.C.: U.S. Department of Justice, Federal Bureau of Investigation), pp. 33-38. Also see: Allen P. Bristow, "Police Officer Shooting: A Tactical Evaluation," *Journal of Criminal Law, Criminology and Police Science,* 54:93-95, March-April 1963. Professor Bristow's research discloses that in approximately 18 percent of the incidents his evaluation considered, the officers were approaching stopped vehicles, many of which had been halted for routine traffic arrests.

9. Operational Analyses Section, California Highway Patrol, Sacramento, Calif., Bradford M. Crittenden, Commissioner. In addition to non-fatal assaults on its personnel, the CHP has had 15 of its personnel killed by criminal gunfire during the past 30 years. The "Top Ten" program was started on March 14, 1950, by FBI Director J. Edgar Hoover. Relying heavily on cooperation of the nation's press, the success box score shows 215 captures to April 1966. Twenty-seven of these were apprehended in California. See the *FBI Law Enforcement Bulletin,* 35:2-5 and 19, July 1965.

10. "Firearms," *The Police Journal,* 38:108, March 1965. Also see: Quinn Tamm, "Shall Society Disarm Its Police?" *The Police Chief,* 31:7, August 1964, and Tamm, "Dangerous Dreams of Wishful Men," *Police,* 10:31, March-April 1966.

11. McAndrew v. Mularchuk and Keansburg, 33 N.J. 172, 162 A. (2d.) 820, 88 A.L.R. (2d) 1313 (1960). In this decision the victim, a five year old boy, was shot in the back at chest level by the defendant who was a uniformed police officer attempting to apprehend a disputant in a street argument. The judgment was based on the theory that the municipality was negligent in permitting an officer to carry a revolver without having received any training in its use and that the municipality was liable for acts of its employee while he was acting within the scope of his employment. Also see: Judge Bartlett Rummel, "Police Firearms Training: An Inquiry Into the Governmental Duty to Provide Adequate Training," *The National Rifleman,* 3:17-22, August 1963.

12. Source: *Crime in the United States, Uniform Crime Reports, 1965* (Washington, D.C.: U.S. Dept. of Justice, Federal Bureau of Investigation), pp.33-38.

13. *Ibid.,* p. 153.

14. The 1961 Michigan firearms policy survey found that 27 of the 50 police agencies which furnished information had no written policies to govern the police use of firearms. These agencies relied on oral policy or expected officers to use discretion. In the 1964 Cincinnati survey, *op cit.,* three of the 45 largest American cities reported they had no written firearms use policy, and a review of the 42 written policies

discloses some which were carefully prepared and comprehensive in nature and one whose only guidance is to prohibit "warning" shots. Another instructed officers to "exercise the greatest possible caution" when using a firearm, and about 10 urged officers to use "good judgment."

15. *The Oregonian,* December 7, 1966, 18:4.

16. As in Arizona, California, Colorado, Louisiana, Minnesota, New York, Oregon, Texas, and Washington.

17. As in Georgia, Illinois, Indiana, and Massachusetts.

18. As in Florida, Hawaii, Michigan, New Jersey, Ohio, and Pennsylvania.

19. Roy Moreland, *Modern Criminal Procedure* (Indianapolis: Bobbs-Merrill Co., 1959), p. 40; but also see Oscar Leroy Warren and Basil Michael Bilas, *Warren on Homicide,* Vol. 1 (Buffalo, New York: Dennis & Co., 1938), pp. 662-663. Finally, the court in New Jersey v. Koonce, 89 N.J. Super. 169, (1965), said: " . . . Self-help is antisocial in an urbanized society . . . .[It seems to guarantee] escalation into bloodshed. We declare it to be the law of this state that a private citizen may not use force to resist arrest by one he knows or has good reason to believe is an authorized police officer, whether or not the arrest is illegal."

20. Commonwealth v. Loughead, 218 Pa. 429 (1907). The principle was set forth even earlier in Reneau v. Tennessee, 70 Tenn. 720, 721 (1879).

21. Moreland, *op cit.,* p. 29. Also see Lewis E. Lawes, "Capital Punishment," *Encyclopedia of Criminology* (New York: The Philosophical Library, 1949), p. 43.

22. Louisiana is one state which by statute restricts the use of deadly force to self-defense and to the defense of endangered persons. This restriction is imposed by the "justifiable homicide" and "defense of others" sections of the Louisiana Criminal Code, sections 20 and 22.

23. The general trend in American capital punishment seems characterized by abolishment through law or disuse and by legislation to make a sentence of death permissive rather than mandatory. The trend to limit the use of the death penalty began early, in 1794, when Pennsylvania first legislated a category of murder which was not a capital offense but rather a question of degree. Today nine states (Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin) and Puerto Rico have abolished the death penalty. Four other states (New York, North Dakota, Rhode Island, and Vermont) retain it only for a second-time murderer, the slaying of

a police officer, or murder by a "lifer." Only one person was executed in the entire United States in 1966 and only one Federal prisoner has been executed since 1957. In the military services, the Army's last execution was in 1961 and the Navy has not executed anyone since 1842. See: Curtis J. Sitomer, "California Groups Attack Capital Penalty," *The Christian Science Monitor,* April 8, 1967, central edition, 1:3&4.

24. Memorandum from FBI Director J. Edgar Hoover to Attorney General Nicholas DeB. Katzenbach submitted on April 14, 1966.

25. American Law Institute: *Model Penal Code,* Article 3, Section 3.07 (2) (b) (iv) (1 and 2), May 4, 1962.

26. *Crime in the United States. Uniform Crime Reports,* 1965 (Washington, D.C.: U.S. Department of Justice, Federal Bureau of Investigation), p. 114.

27. If a department elects to adopt a policy which permits officers broader license than proposed in the model, than it should include a statement in Section II which says, in essence, that: "An officer shall not fire at persons known to be or suspected of being juveniles (persons less than 18 years of age) except under circumstances which come within the provisions of Section II A, 1, 2, and 3 of this policy."

28. The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society,* (Washington, D.C.: U.S. Government Printing Office, 1967), p. 119.

CHAPTER 11

ADMINISTRATIVE INTERVENTIONS ON POLICE SHOOTING DISCRETION: AN EMPIRICAL EXAMINATION

JAMES J. FYFE

ABSTRACT

In August, 1972, the New York City Police Department promulgated administrative shooting guidelines and shooting incident review procedures far more restrictive than former statutory "defense of life" and "fleeing felon" justifications for police shooting. Using a data base that includes all reported New York City police firearms discharges and serious assaults on police between 1971 and 1975, this article examines the effects of the new guidelines and procedures on shooting frequencies, patterns, and consequences.

Great decreases in "fleeing felon" shootings, "warning shots," and shooting-opponent injuries and deaths were found to be associated with the new rules. This change also appeared to have a favorable effect on line-of-duty officer deaths and serious injuries. The implications of these findings are discussed.

SOURCE: Reprinted from *Journal of Criminal Justice* 7, James J. Fyfe, "Administrative Interventions on Police Shooting Discretion: An Empirical Examination,"

Perhaps the major paradox of the American system of justice is the discretionary latitude it allows many of its police officers in the use of their firearms as a means of "deadly force." While the system—and the society—argue and agonize over the death penalty, police shootings generally draw little attention. It is likely, in fact, that the 1977 execution of Gary Gilmore generated more publicity and debate than did the more than 2,500 police shooting deaths that occurred during the ten-year period between that event and the last previous court-ordered exercise of deadly force (Milton et al., 1977:33).

It is true that police use of deadly force differs dramatically from court-ordered death sentences. Police often use their firearms as the last resort against real and imminent peril; they often have no choice but to shoot. Judges who elect to impose the death penalty, in contrast, usually select it from among a range of alternatives after lengthy deliberation in the safety of their chambers. Despite these differences, it is ironic that the system has devised rigid devices to control and review court-ordered death sentences, but has generally maintained a hands-off policy where police decisions to shoot are concerned. Indeed, the system zealously controls the court's power to take lives on evidence of guilt beyond a reasonable doubt, but frequently gives its police a blank check in deciding whether or not to shoot at those they have probable cause to arrest.

POLICE SHOOTINGS

Legal Controls and Review Procedures

While Milton et al., (1977:41-43) detect both a "recent eagerness of the judiciary to impose restraints upon police conduct" and an increase in the number of civil actions alleging excessive police force, police shooting discretion in many jurisdictions is limited only by the broad common law fleeing-felon and defense-of-life rules (National Advisory Commission. 1973:18). In addition, police shooting is often subjected to review procedures of questionable effectiveness (Harding and Fahey, 1973).

The fleeing-felon rule is very briefly, but accurately, described by Wilson as police "authority to use deadly force to prevent escape from any felony charge" (1972). Milton et al., (1977:39) note that this principle was defensible when "virtually all felonies were punishable by death," but question its wisdom in an era in which the death penalty is all but extinct.

An only slightly lengthier definition of the defense-of-life rule is offered by Rhine (1968:834):

> [It is the police officer's] general right to use deadly force for defense of self and others against threats of death and serious bodily action. In addition, law enforcement authorities never have a duty to retreat before using deadly force, and may always use this for defense of others solely upon reasonable belief that they are being threatened with death or serious bodily harm.

The most striking features of these guidelines are brevity and breadth. Further, while many states have supplemented them by legislating more narrow and clearly delineated statutory limits on police shooting discretion, the record suggests that police officers are rarely penalized for violating them.[1] The adjudication of violations of either codified common law principles or more restrictive legislative guidelines requires that they be subjected to the criminal process. Here, one finds that, even among those cases that do come before the courts,[2] often the only civilian eyewitness to a police shooting is its subject—if surviving. The only version of a police shooting that comes to court attention, therefore, is likely to be that of the police officer involved. Further, even where alternative versions are offered, the prosecutor must decide to take action if a case is to go to trial. Several reasons have been proposed to explain the reluctance of district attorneys to take these cases to trial. Rhine (1968:856) suggests that it is very difficult to prove criminal intent in police killings. Harding and Fahey (1973: 298,299) point out that elected prosecutors may find that both constituent concern with law and order and the need to maintain a cooperative relationship with police militate against such prosecutions.

Administrative Controls and Review Procedures

The broad nature of legal restrictions on police shooting discretion and the difficulties of enforcing them have led many to argue that police agencies should formulate narrower administrative guidelines and internal procedures for the review of shootings (President's Commission, 1967:189, 190; American Bar Association 1973:125-31). Milton et al., (1977:45-57) report a "clear trend" toward the adoption of such policies. They note also, however, that where administrative standards are operative, they vary widely and are frequently contradictory or (perhaps intentionally) vague. As a result, "their impact on the conduct of police officers is questionable." Further, the adoption of administrative guidelines and review procedures is often resisted by police who perceive such rules as arbitrary restrictions on their ability to defend themselves (Berkley, 1969; McKiernan, 1973). This argument is based on the premise that such regulations would promote police reluctance to shoot when necessary for self-defense out of fear that their split-second, life-or-death decisions will be subject to leisurely second-guessing (Rubinstein, 1973:333).

NEW YORK CITY: A TEST CASE

One agency that has adopted clearly delineated administrative shooting guidelines and review procedures is the New York City Police Department. In August, 1972, that department promulgated Temporary Operating Procedure 237 (T.O.P. 237), a directive that narrowed officer shooting discretion considerably more than did New York's statutory provisions. In addition, T.O.P. 237 established a high-level Firearms Discharge Review Board (FDRB) to investigate and adjudicate all officer firearms discharges.

T.O.P. 237 refined New York's penal law restrictions on police shooting (which are based on the American Law Institute's 1962 Model Penal Code and permit officer use of deadly

force to "defend life" or to arrest for several specified "violent felonies") by providing that:

a. In all cases, only the minimum amount of force will be used which is consistent with the accomplishment of a mission. Every other reasonable means will be utilized for arresting, preventing or terminating a felony or for the defense of oneself or another before a police officer resorts to the use of his firearm.
b. A firearm shall not be discharged under circumstances where lives of innocent persons may be endangered.
c. The firing of a warning shot is prohibited.
d. The discharging of a firearm to summon assistance is prohibited, except where the police officer's safety is endangered.
e. Discharging a firearm at or from a moving vehicle is prohibited unless the occupants of the other vehicle are using deadly physical force against the officer or another, by means other than the vehicle. (NYPD, 1972:1)

Except for some minor changes in 1973 (NYPD, 1973:2), these provisions have been in effect since 1972. So too, has the FDRB, which is chaired by the Chief of Operations (the department's highest ranking sworn officer), and which also includes as members two deputy police commissioners and the supervisor of the Police Academy's Firearms Unit. FDRB is empowered to conduct hearings at which it may question civilian witnesses, the officer involved, the officer's commander, or any other officers. Its findings are submitted in the form of recommendations to the commander of the officer involved. These, a review of case dispositions reveals, fall into one or more of the following categories:

1. The discharge was in accordance with law and department policy.
2. The discharge was justifiable, but the officer should be given additional training in the use of firearms or in the law and department policy.
3. The shooting was justifiable under law, but violated department policy and warrants department disciplinary action.

4. The shooting was in apparent violation of law and should be referred to the appropriate prosecutor if criminal charges had not already been filed.
5. The officer involved should be transferred (or offered the opportunity to transfer) to a less sensitive assignment.
6. The officer involved should be the subject of psychological testing or alcoholism counselling.[3]

T.OP. 237 became the core of this study, which attempts to examine the impact of that directive on the frequency, nature, and consequences of police shooting in New York City.

DATA SOURCES

The primary data for this study consist of 4,904 Firearms Discharge/Assault Reports, (FDAR) or all of those filed by officers who had reported discharging their firearms (N = 3,827) or being the subjects of serious assaults (assaults with deadly weapons that may have resulted in officer death or serious injury) between January 1, 1971 and December 31, 1975. These FDAR reports, supplemented by various personnel records, were converted to computer data and analyzed using the Statistical Package for the Social Sciences (Nie et al., 1975).

We would have preferred to have included in this data set reports on shootings and assaults on officers that occurred during the two or three years immediately preceding 1971. While this endeavor might have strengthened our analysis by providing a clearer description of shooting frequencies and patterns before the promulgation of T.O.P. 237, we were precluded from undertaking it by the unsystematic and incomplete shooting and assault data available. Of necessity, therefore, we contented ourselves with the inclusion of data on shootings and assaults on officers reported during the nineteen months preceding T.O.P. 237.

A potential weakness of this data base (or any other that consists of incident reports) involves the degree to which events have not been reported or have been inaccurately reported. Because officers who fired justifiably would not be disciplined

for shooting but would be charged for failing to report, we concluded that missing data would most often include shootings of questionable justifiability. Even in violative cases, however, officers would be unlikely to omit reports of shootings in which they had (or thought they might have) hit someone or something. They would also be unlikely to omit reports of shootings perceived as likely to be brought to official attention by third parties, including their colleagues. Because of New York City's population density and because its police rarely work alone, it is unlikely that more than a very few police could fail to file incident reports in confidence that their shootings would not otherwise come to light. We concluded that the problem of missing data was of minimal import.

The problem of inaccurate reports was viewed as more substantive. Following the T.O.P. 237 ban on warning shots, for example, we had found a great and unexpected increase in reported accidental "shots in the air" fired by police who "tripped on curbs" while pursuing fleeing suspects (Fyfe, 1978:316-28). FDRB generally recommends disciplinary action against officers who fire warning shots, but usually refers accidental shooters to nonpunitive tactical retraining classes. It is probably, therefore, that this specific pattern change reflects altered reporting behavior rather than changes in actual field behavior. To minimize the effects of this and any other distortions, we attempted to limit our analyses to variables reasonably immune to reporting bias.[4]

ANALYSIS

Shootings and Intra-community Violence

In related research (Fyfe, 1978:32-106), we had found strong correlations among the geographic distributions of shooting incidents, arrests for felonies against the person, and reported murders and non-negligent manslaughters (Pearson's $r = +0.62$ and $+0.78$, respectively). Therefore, we commenced the present investigation by examining the relationships between these variables over the five years studied. If we found

that these associations also existed over time, it would be reasonable to conclude that changes in shooting frequencies were at least in part attributable to these nonorganizational variables.

Table 1, which contrasts annual shooting incidents (which may include one or more officer shooters who fired at the same time and place) with reported criminal homicides and arrests for felonies against the person, presents strong evidence to the contrary. After peaking in 1972, homicides remain fairly constant over the period studied (the relatively large 1973-1974 decrease is only a 7.5 percent decline), while arrests register a regular annual increase and firearms discharge incidents decline annually after a large increase between 1971 and 1972. More specifically, columns four and five reveal considerable variation in annual ratios of homicides/shootings and arrests/shootings before and after the promulgation of T.O.P. 237. In 1971, there were 2.33 reported criminal homicides for every police shooting in New York City; this ratio declines slightly (to 2.11) in 1972, then increases considerably over 1973 and 1974 to a high of 3.67 in 1975. Perhaps most significant for the purposes of police administrators, the table indicates that the annual ratio of arrests/shootings has been nearly doubled over the five years studied (from 47.62 in 1971 to 86.88 in 1975).

T.O.P. 237

The decline in reported shooting incidents in the face of a continuing increase in arrests since 1972 suggests the intervention of another variable. A logical first subject of investigation in looking for such an event is T.O.P. 237, which became effective in late 1972, after which the relationship seems to have changed. Our examination of the association of T.O.P. 237 with decreased shooting frequencies commenced by dividing the five years under study into two-month periods and displaying the number of reported officer shooters and shooting incidents for each, as shown in Figure 1. The two-month observation periods were chosen to refine the trend as far as possible without losing information: they reduce the total of observations from sixty to

TABLE 1 VIOLENT CRIMES AND POLICE SHOOTINGS BY YEAR, 1971-1975

Year	Reported Homicides[a]	Felony Arrests[a,b]	Police Shootings	Ratios Homicides/ Shootings	Ratios Arrests/ Shootings
1971	18.2% (1466)	17.1% (30002)	21.5% (630)	2.33	47.62
1972	21.0 (1691)	18.9 (33070)	27.5 (803)	2.11	41.18
1973	20.9 (1680)	20.1 (35163)	19.6 (574)	2.93	61.26
1974	19.3 (1554)	21.7 (37971)	16.1 (471)	3.30	80.62
1975	20.5 (1645)	22.2 (38922)	15.3 (448)	3.67	86.88
Totals	100.0 (8036)	100.0 (175128)	100.0 (2926)	2.75	59.85

[a] Calculated from: New York City Police Department (December, 1971-1975). *Monthly arrest report.*
[b] Includes murder, non-negligent manslaughter, forcible rape, robbery, felonious assault.
NOTE: Subcell percentages may not total 100.0 due to rounding.

thirty and allow for the data to be cut September 1, close in time to T.O.P. 237 (August 18, 1972) and its slightly altered successor, I.O. 118 (August 27, 1973).

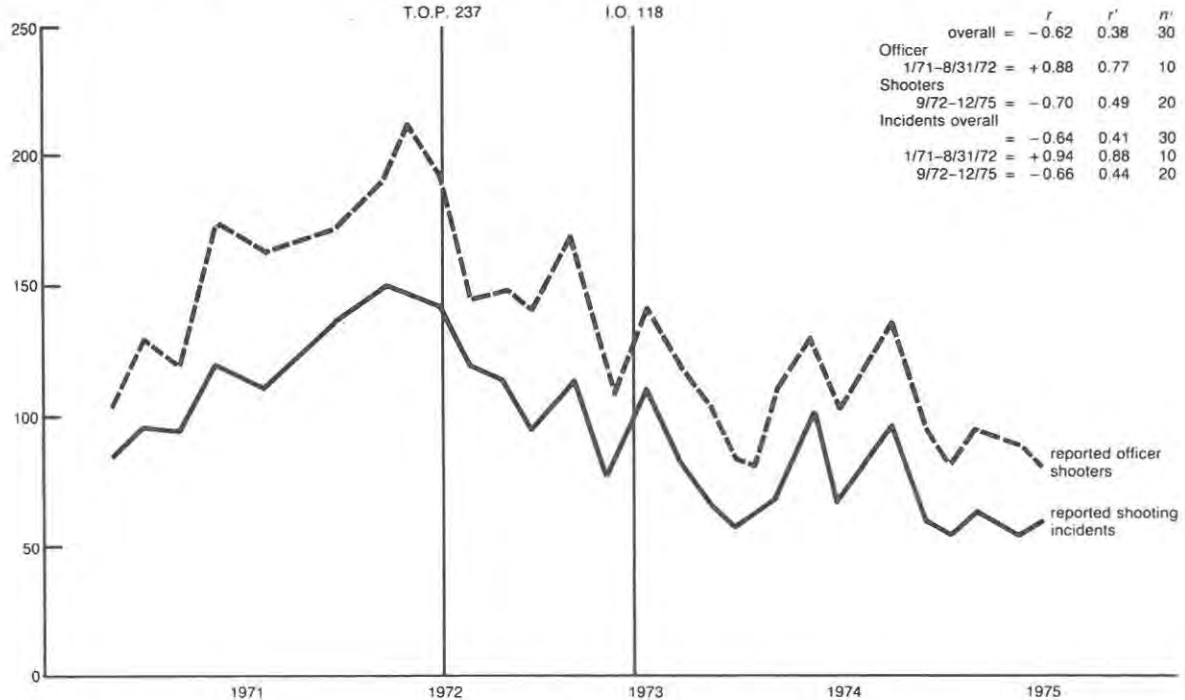
The chart, and the overall r's of -0.62 and -0.64 for officer shooters and shooting incidents, indicate that both phenomena have fluctuated somewhat, but have been declining steadily since the period during which T.O.P. 237 became effective; "officer shooters" show a peak of 210 during May and June, 1972, decline to 175 during July and August, 1972, and never again reach either level. Similarly, "shooting incidents" peak at 149 during the May-June, 1972, period, decline to 141 during July-August, 1972, and remain below those levels for the duration of the period studied.

One cannot argue, of course, that incident declines are entirely attributable to T.O.P. 237. Indeed, the "shooter" and "incident" r values of 0.38 and 0.41 serve notice that fewer than half these variations are explained by the passage of time. Many other variables over which the department has little or no control (e.g., economic and social conditions, the numbers of officers available for street duty) are certain to have affected these frequencies. On the other hand, splitting the chart at September 1, 1972, produces Pearson's r values of $+0.88$ (officer shooters) and $+0.94$ (shooting incidents) for the earlier period and respective r's of -0.70 and -0.66 for the latter. It is evident, therefore, that T.O.P. 237 was accompanied by rather dramatic changes in the frequencies with which New York City police officers reported discharging their firearms.

I.O. 118

The second department firearms policy statement was I.O. 118, which was issued on August 27, 1973. The major purposes of this directive were to clarify T.O.P. 237's ambiguities and to establish decentralized "area level" review boards,[5] but the document appears at the beginning of a six-month decline in shooting incident frequencies and an eight-month decline in officer shooter frequencies. Some percentage of these decreases may be attributable to a cold weather slump. But the declines continued in the absence of other possible explanations (e.g., the

FIGURE 1. POLICE FIREARMS DISCHARGES, JANUARY 1, 1971–DECEMBER 31, 1975.



*N = number of bimonthly periods.

department was, at that time, adding to its ranks; reported homicides and arrests for violent crime did not show similar declines), and are at least as severe and as long as those that followed the issuance of T.O.P. 237.

Because so few observations are included in this second period, it was decided not to attempt to test their possible significance statistically. It would be interesting, however, to continue following the frequencies of shooting incidents and reported shooters consequent to other clarifications, procedural alterations, and minor discretionary changes. If further declines occured, one might postulate that substantial influence is exerted on shooting frequencies by continuing emphasis on limits to individual officer discretion or the institution of decentralized reporting and review procedures.

Weekly Means

The two-month periods studied thus far are, of course, rather inexact and may be criticized if used as a basis for comparison because they include varying numbers of days. July/August periods, for example, encompass sixty-two days, while January/February includes only fifty-nine (in all years except 1972, which was a leap year). In addition, bimonthly figures do not allow the data to be split precisely at the effective date of T.O.P. 237 (August 18, 1972).

To provide more comparable figures, the five years under study were therefore split at midnight, August 18, 1972, and means of reported officer reason for shooting were computed weekly for each period (period 1 weeks = 85.1; period 2 = 175.7). The results are presented in Table 2. Its column totals reveal that a weekly mean of 18.4 officers reported discharging their firearms prior to T.O.P. 237 and that this figure dropped to 12.9 officers after the directive was put into force (this represents a decrease of 29.9 percent). Further, the table shows important changes in the reasons given by officers in reported discharging of firearms ($p = 0.001$; $v = 0.28$). Indeed, while the weekly mean reported "defense of life" shootings has decreased (from 11.9 to 9.0), the pre-T.O.P. 237 percentage for

these shootings (65.8 percent) has increased since the order (to 70.6 percent). Concomitantly, both the weekly mean and percentage of "prevent/terminate crime" shootings (usually fleeing-felon situations) have decreased substantially (from 3.9 and 21.4 percent to 0.6 and 4.6 percent, respectively). Conversely, Table 2 demonstrates that both the weekly means and percentage of suicide attempts have remained relatively constant. As one would expect, T.O.P. 237 has little effect in deterring suicides.

Warning Shots

While Table 2 demonstrates reduced shooting frequencies and varying reported reasons for shooting, it leaves unanswered many questions about other consequences of T.O.P. 237. Its frequencies, for example, are confounded because they include warning shots, which were not treated separately but were coded on the basis of the officer shooter's reported intent. If, for example, a police officer fired a shot into the air in an attempt to stop a fleeing burglary suspect, the shooting would be classified as "prevent/terminate crime" and would be included in Table 2. What Table 2 does *not* provide, therefore, is a measure of T.O.P. 237's effect in reducing shots fired *at* fleeing burglars or other opponents. Instead, it indicates that before T.O.P. 237, 3.9 officers per week reported discharging their firearms to prevent or terminate crimes, regardless of whether or not they fired *at* or over the heads of suspects, and that this mean has subsequently declined to 0.6. Since, in addition to mandating the use of "every other reasonable means . . . for arresting, preventing or terminating a felony . . . before a police officer resorts to the use of a firearm," T.O.P. 237 flatly prohibits warning shots, one might expect that much of the decrease discussed above is attributable to lower warning shot frequencies rather than to reduced numbers of shootings at human targets.

To control for this possibility and to better measure relative frequencies of officers who shot at targets (except, obviously, accidental shooters), Table 3, which excludes all officers who

TABLE 2 OFFICER-REPORTED REASON FOR SHOOTING

	Pre-T.O.P. 237	Weekly Mean	Post-T.O.P. 237	Weekly Mean	Totals	Weekly Mean
Defense of Life	65.8% (1016)	11.9	70.6% (1582)	9.0	67.9% (2598)	10.0
Prevent or Terminate Crime	21.4 (330)	3.9	4.6 (103)	0.6	11.3 (433)	1.7
Destroy Animal	4.4 (68)	0.8	11.4 (255)	1.5	8.4 (323)	1.2
Suicide Attempt	0.7 (11)	0.1	0.8 (18)	0.1	0.8 (29)	0.1
Accidental	3.6 (56)	0.7	9.0 (201)	1.2	6.7 (257)	1.0
Other	4.1 (63)	0.7	3.7 (83)	0.5	3.8 (146)	0.6
Totals	40.8 (1562)	18.4	59.2 (2265)	12.9	100.0 (1827)[a]	14.7

NOTE: Chi-square = 318.82; $p = 0.001$; $v = 0.28$. Subcell percentages may not total 100.0 due to rounding.

[a] All column totals include 18 pre-T.O.P. 237 and 23 post-T.O.P. 237 cases in which reason for shooting was not reported.

TABLE 3 OFFICER-REPORTED REASON FOR SHOOTING, EXCLUDING WARNING SHOTS

Reason	Pre-T.O.P. 237	Weekly Mean	Post-T.O.P. 237	Weekly Mean	Totals	Weekly Mean
Defense of Life	72.7% (902)	10.6	70.7% (1536)	8.7	71.5% (2438)	9.0
Prevent or Terminate Crime	13.9 (172)	2.0	4.3 (93)	0.5	7.8 (265)	1.0
Destroy Animal	5.5 (68)	0.8	11.7 (254)	1.4	9.4 (322)	1.2
Suicide Attempt	0.9 (11)	0.1	0.8 (18)	0.1	0.8 (29)	0.1
Accidental	4.5 (56)	0.7	9.2 (201)	1.2	7.5 (257)	1.0
Other	2.5 (31)	0.4	3.3 (71)	0.4	3.0 (102)	0.4
Totals	36.3 (1240)	14.6	63.7 (2173)	12.3	100.0 (3413)	13.1[a]

NOTE: Chi-square = 102.62; $p = 0.001$; $v = 0.17$.

[a] Total weekly mean includes 36 cases in which a reason for shooting was not reported.

reported firing only warning shots, was calculated. This table presents some important differences from the data in Table 2. Its total (3,413 shooters) indicates that 414 of the shooters reported in the previous table had fired only warning shots. Further, most of the reported warning shots (304 of the 414) took place during the period preceding T.O.P. 237. Consequently, the weekly mean number of officers who reported firing "in defense of life" during the early period has declined to 10.6 and the weekly mean "prevent/terminate crime" shooters is almost halved from 3.9 to 2.0). While this table's exclusion of "warning shots" still leaves significant pre- post-T.O.P. 237 differences in the mean weekly frequencies of reported reasons for shootings, the differences shrink considerably; indeed, the relative percentage of reported "defense of life" shootings decreases.[6] In terms of weekly shots fired at people, however, this table also demonstrates significant decreases following T.O.P. 237.

T.O.P. 237 and Firearms Discharge/Assault Generated Injury

In measuring the impact of T.O.P. 237 on officer injury, we chose to include in our analysis only injuries and deaths sustained in the line of duty. In this manner, we eliminated from consideration injuries on which one might reasonably expect that T.O.P. 237 would have no impact (e.g., officer suicides, injuries accidentally suffered while handling or cleaning weapons. This does not, however, limit the analysis to injuries sustained by on-duty officers. Off-duty officers hurt while "taking police action" (e.g., while attempting arrests, stopping and questioning suspicious persons) are defined by the department to have been injured in the line of duty. Thus, for example, an off-duty officer who is shot while attempting to apprehend the perpetrators of a robbery that the officer witnesses is deemed to have been injured only because of his or her status and actions as a police officer. The injury was sustained in response to "duty's call." If, conversely, whether the officer is off or on duty when injured in circumstances that do not involve the performance of the police function or that involve negligence on

TABLE 4 REPORTED LINE-OF-DUTY INJURIES SUSTAINED BY OFFICERS IN FIREARMS DISCHARGE/ASSAULT INCIDENTS[a]

Officer Injury	Pre-T.O.P. 237	Weekly Mean	Post-T.O.P. 237	Weekly Mean	Totals	Weekly Mean
Injured	95.9% (376)	4.4	96.9% (438)	2.5	96.4% (814)	3.1
Killed	4.1 (16)	0.2	3.1 (14)	0.1	3.6 (30)	0.1
Totals	46.4 (392)	4.6	53.6 (452)	2.6	100.0 (844)	3.2

NOTE: Chi-square = 0.14; $p = 0.70$; $Q = 0.14$.
[a] Excludes incidents not involving confrontations with human opponents (e.g., destroying injured animal).

the officer's part, the injury is defined as non-line of duty. As a case in point, an officer stabbed in a street robbery by individuals who do not know that he or she is a police officer is regarded as having been injured as would any citizen in similar circumstances. The injury, therefore, is classified as non-line of duty. Similarly, an on-duty officer who is injured by, for example, the accidental discharge of a carelessly handled weapon while not engaged in a specific police action, is also recorded as having suffered a non-line of duty injury.

Table 4, which presents comparative frequencies of FDAR-generated, officer-line-of-duty injury and death before and after T.O.P. 237, demonstrates that the injury vs. death percentages remained fairly constant across the two periods. Once again, however, one finds that weekly means for injured and killed officers vary considerably. Before T.O.P. 237, 4.4 officers a week suffered nonfatal FDAR-generated, line-of-duty injuries: after T.O.P. 237, the figure declines to 2.5. Similarly, the frequency with which officers are killed in the line of duty drops from 0.2 (one every five weeks) to 0.1 (one every ten weeks).

Table 5, which presents frequencies of known shooting incidents opponent degree of injury for the pre- and post-T.O.P. 237 periods, shows reductions in these frequencies as well. Again, one finds that the relative chances of opponent injury have remained fairly constant across the five years studied. Of opponents whose degree of injury was known to the police, approximately seventy percent suffered no injury, slightly more than twenty percent were wounded and just over nine percent were killed during both periods.

But in examining the weekly means, we again find considerable reductions in all our categories following T.O.P. 237. Most specifically, Table 5 shows us that New York City police wounded a weekly average of 3.9 opponents and that they killed 1.6 prior to T.O.P. 237; during the period between that intervention and December 31, 1975, these means fell to 2.3 and 1.0 respectively.

While both tables 4 and 5 present rather striking differences between the pre- and post-T.O.P. 237 periods, several

TABLE 5 KNOWN INJURIES SUSTAINED BY OPPONENTS IN POLICE SHOOTING INCIDENTS

Opponent Injury	Pre-T.O.P. 237	Weekly Mean	Post-T.O.P. 237	Weekly Mean	Totals	Weekly Mean
None	69.0% (1043)	12.3	70.9% (1435)	8.2	70.1% (2478)	9.5
Injured	21.8 (329)	3.9	20.0 (405)	2.3	20.8 (734)	2.8
Killed	9.2 (139)	1.6	9.1 (184)	1.0	9.1 (323)	1.2
Totals	42.7 (1511)	17.8	57.3 (2024)	11.5	100.0 (3535)	13.5

NOTE: Chi-square = 0.03; $p = 0.99$; $v = 0.01$.

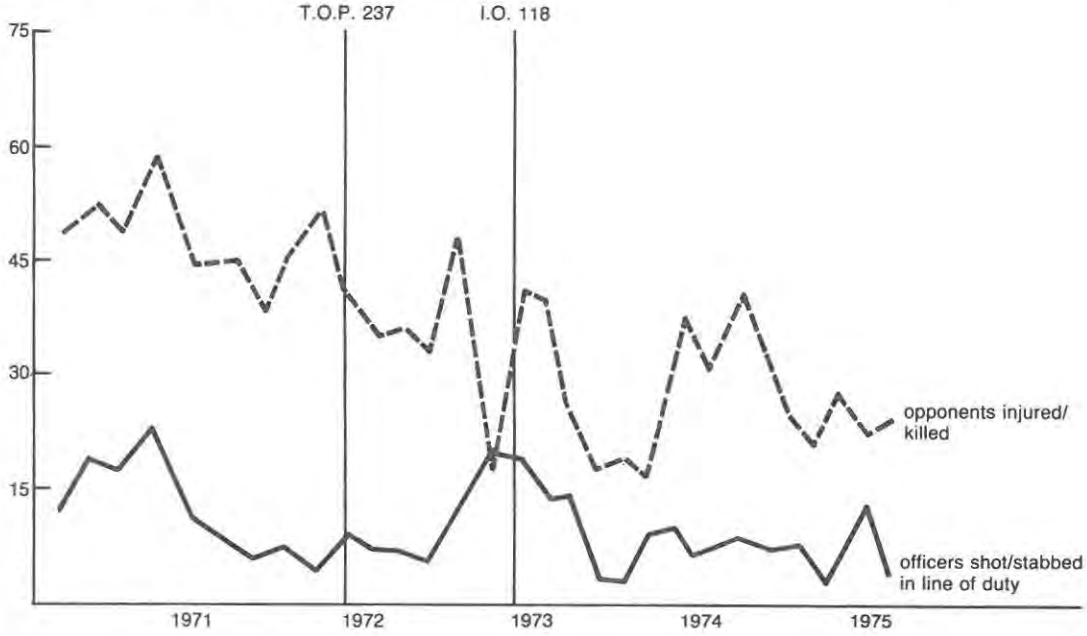
considerations prevent our concluding that these differences are entirely attributable to that directive and they limit the degree to which equivalent reductions might be predicted for other agencies. Simply stated, the reduced frequencies that are presented in both tables are based on two observations made over a five-year period, during which other variables might have been expected to influence police and citizen injuries. Those other variables (e.g., injuries resulting from the unprovoked police assassination attempts by the radical "Black Liberation Army," which were most frequent during the pre-T.O.P. 237 period; police personnel deployment), however, are beyond the scope of the present inquiry.[7] We elected, therefore, to more clearly identify the effect of T.O.P. 237 on police and citizen injury by increasing the number of observations in our examination of those phenomena during the five years studied.

Figure 2 contrasts the bimonthly frequency of civilian FDAR-generated deaths and injuries (classified as one entity on the premise that degree of injury is subject to chance variations) with the frequency with which officers were shot or stabbed in the line of duty (including only what are generally the most serious injuries). This figure demonstrates a general decrease in both these phenomena between 1971 and 1975. In addition, the figure reveals that the relationship between citizen injuries and officer shot or stabbed frequencies is subject to considerable variation. In some periods, citizen injuries far outweigh officer shot or stabbed frequencies, while in others, the gap is closed considerably: during May and June, 1973, officer injuries even exceeded citizen injuries. Again, except for these periods, and despite the gross incident and injury reductions cited earlier, the relative risk of FDAR-generated officer of citizen injury or death looks relatively stable.

CONCLUSIONS

Our examination has demonstrated that a considerable reduction in the frequency of police shooting accompanied New York City's direct intervention on the firearms discretion of its police officers. Further, our data indicate that this reduction

FIGURE 2. POLICE OPPONENT INJURIES AND DEATHS AND POLICE OFFICERS SHOT OR STABBED IN THE LINE OF DUTY (*N* = 30).



was greatest among the most controversial shooting incidents: shootings to prevent or terminate crimes, which frequently involve police shots at fleeing felons. To the extent that this New York experience may be generalized to other agencies, therefore, an obvious consequence of the implementation of clear shooting guidelines and their stringent enforcement is a reduction of injuries and deaths sustained by suspects who would face far less severe penalties even if convicted after trial.

Of equal significance to the police administrator is the fact that these shooting decreases were not accompanied by increased officer injury or death. Conversely, since both these phenomena appear to be associated with the frequency of shooting incidents and related citizen injury, both declined pursuant to T.O.P. 237.

In the most simple terms, therefore, the New York City experience indicates that considerable reductions in police shooting and both officer and citizen injury and death are associated with the establishment of clearly delineated guidelines and procedures for the review of officer shooting discretion.

Notes

This paper is a revision of a paper presented at the Annual Meeting of the American Society of Criminology, Atlanta, Georgia, November, 1977.

1. Kobler (1975:164) reports that only three of the 1,500 police shooters he studied were criminally punished for their action.

2. It is probable that officers who do violate statutory provisions (e.g., by shooting at fleeing misdmeanants) but who both miss and fail to apprehend their targets do not often come to court attention.

3. Firearms Discharge Review Board cases disposed of with recommendations that include more than one of these categories most typically involve shootings deemed to have violated departmental guidelines and to have indicated that transfers from sensitive (and often desirable) assignments are appropriate. Narcotics officers and other plainclothes personnel who shoot in violation of departmental policy, for example, are often recommended for transfers to administrative assignments or to patrol duty in outlying areas where the chances of encountering circumstances provocative of weapons use are slight. In

such cases, we considered the board's recommendation for disciplinary action to be its major and most severe finding and coded dispositions under that single heading. Similarly, because we regarded criminal charges to be the major and most severe finding in all cases in which they resulted, we included such cases in that single category, although they also invariably involved some departmental disciplinary action. Cases involving criminal charges are held in abeyance by FDRB pending court disposition: officers convicted of criminal use of firearms are then summarily dismissed from the department: all officers acquitted of such criminal charges during the period we studied were subsequently subjected to departmental trials for their actions.

By the time data collection for this report ceased (August, 1976), the Firearms Discharge Review Board had adjudicated 2,155 shootings. Their major recommendations in these cases were as follows:

Within law and department guidelines	70.8%	(1525)
Retrained in law or tactics	18.3	(395)
Disciplinary action	7.7	(167)
Criminal charges	1.2	(26)
Transfer	0.6	(13)
Psychological or alcoholic counseling	1.3	(29)
Total	100.0	(2155)

4. This attempt was not always successful. In the absence of information to the contrary (e.g., FDRB or judicial findings), we accepted "officer reported reason for shooting" at face value. This exception, however, affects only our examination of changes in the nature of shootings. It has little or no significance as far as total shooting frequencies are concerned.

5. I.O. 118's only new discretionary parameter was the statement that "(t)he discharge of a firearm at dogs or other animals should be an action employed ONLY when no other means to bring the animal under control exists."

6. A good part of this percentage decrease, however, is due to the great increase in frequency in reported "destroy animal" shootings. Had these remained constant at their pre-T.O.P. 237 level (0.8 per week), the post-T.O.P. 237 "defense of life shots at people" percentage would have been 74.6 percent.

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CHAPTER 12

ALWAYS PREPARED: POLICE OFF-DUTY GUNS

JAMES J. FYFE

ABSTRACT

Even while off duty, American police are expected to be armed and to actively intervene in situations threatening to life, property, or order. This article considers the assumptions upon which that expectation is based and suggests that they may be ill-founded. Research to determine whether armed off-duty police actually increase community violence levels is recommended as a prerequisite to an informed reconsideration of the appropriate role for off-duty police officers.

POLICE OFF-DUTY GUNS

Whether or not they are technically on duty, American police almost everywhere are expected to be armed and ready for action. As a 1978 survey of 49 major police departments found, 25 departments—51 percent—reported permitting officers to carry off-duty guns, and 24—49 percent—reported requiring that officers be armed off duty.[1] None required officers to leave their guns at police stations at the completion of the working day. If it is safe to generalize from these departments to the rest of America's 450,000 police, it is likely that at any time there are about in the country approximately 300,000 armed off-duty police.

Because the "twenty-four hour cop" is an American tradition, the presence of these 300,000 off-duty guns is not surprising. Nor is it surprising that there is so little debate over the

SOURCE: "Always Prepared: Police Off-Duty Guns," *The Annals of the American Academy of Political and Social Science* (November, 1980), 452-72-81. Reprinted with the permission of the American Academy of Political and Social Science.

merits of adding these weapons to the great number in circulation among citizens. Police, unlike most handgun owners, are psychologically screened and tested, trained, and sworn to protect life and property. Police possess weapons to protect public interests, whereas citizens possess weapons to protect their own private interests. Thus is likely that even handgun control advocates, if they have thought about the issue at all, regard police off-duty guns as a category of weapons separate and distinct from those in the hands of private citizens.

Despite this apparently reasonable distinction, and despite the fact that 300,000 off-duty police guns are a drop in the bucket of the estimated 40 million handguns in America,[2] the issue of off-duty weapons raises a number of important questions. While the benefits are unclear, the costs are potentially substantial. Over one in ten of the officers killed by felons nationwide from 1972 to 1978 were off duty at the time,[3] and almost one in four of the 239 officers killed by felons in the New York City Police Department since 1844 were off duty.[4] Off-duty guns are also important in police killings of citizens; several studies have found from 12 to 17 percent of homicides by police to occur while the officers are off duty.[5]

WHY ARM OFF-DUTY POLICE?

As suggested previously, the major rationale for arming off-duty officers is the notion that police professional responsibilities should not be constrained by their scheduled working hours. In many jurisdictions, off-duty police may be disciplined or prosecuted for failing to respond in an "appropriate" manner to situations threatening to life, property, or order.[6]

Thus the justification for arming off-duty police varies with the interpretation of this responsibility. If it is "appropriate" for off-duty officers to passively make observations of crimes in progress and to relay information to on-duty colleagues, one might argue that there exists little justification for off-duty guns. If, on the other hand, off-duty officers are expected to

intervene actively in circumstances which threaten life, property, or order, ther exists greater justification for equipping them with firearms.

A second rationale for arming off-duty police is that of deterrence. Here one would argue that justification for arming off-duty officers increases with the degree to which potential offenders are deterred from criminal behavior by the actual or feared presence of armed off-duty police.

A related consideration is that of officer safety. A consequence of police work is that some of those questioned, ordered to move on, ticketed, investigated, or arrested may wish to get even with officers or to impede cases against themselves. Disarming off-duty police, it may be argued, might increase both the temptation and the opportunity for their disgruntled clientele to do so. Thus there are unanswered questions about the extent to which off-duty guns ensure the safety of officers from those seeking revenge or forcible prevention of damaging testimony. Further, disarming off-duty officers may also affect their willingness to engage forcefully, but properly, in on-duty enforcement or order-maintenance activities. Why make enemies at work when one may be vunerable to them after work?

CONSEQUENCES OF ARMING OFF-DUTY POLICE

The best way to test the validity of these justifications for arming off-duty police is to examine them and to weigh them against negative consequences of providing police with off-duty guns. This is difficult for several reasons. It is probable, for example, that the bars widely known to be frequented by off-duty officers are held up less often than bars remote from police stations. Beyond that observation, however, it is nearly impossible to say much about the deterrent value of off-duty guns because no attempt to measure it systematically has been undertaken.

In addition, the data that are available on more concrete events are frequently rather one-sided. Police often point with pride to incidents in which armed off-duty officers have bravely and honorably protected the public interest. Less frequently do

they attempt to publicize cases in which off-duty officers have used their guns unwisely or dishonorably. As a result, little is known about the negative consequences of arming off-duty police. There is little knowledge of the degree to which off-duty guns, which ostensibly serve to decrease public violence, also serve to increase or escalate violence. It would be useful to know how often police off-duty guns are deliberately misused or are the instruments of tragic accidents. It would also be useful to know how often armed off-duty police make bad situations worse by well-intended but ill-advised interventions in threats to life, property, or order.

The question of consequences is extremely important. The measurement of consequences should, in fact, serve as the basis for any definition of the appropriate role of off-duty officers. As Safer notes, "proof of frequent misuse of weapons" might lead to the conclusion that "disarmament of off-duty officers would diminish the community's level of violence."[7] Disarmament would also necessarily result in limiting the "appropriate" off-duty police role to that of passive observer and information transmitter. Such a definition would be a major police reform because, as the survey of off-duty weapons policy suggests, the prevailing definition of the appropriate off-duty police role is that of active intervenor.

REDEFINING THE ROLE OF OFF-DUTY POLICE

Police agencies, like all bureaucracies, are conservative institutions. Even given evidence of frequent misuse of off-duty guns, it is likely that attempts to disarm off-duty police and to redefine the off-duty role would be strongly resisted. Police chiefs—among whom are some advocates of strict public handgun controls—might argue that, despite a few freak accidents and some regrettable incidents, off-duty guns are a major contributor to public safety and to society's ability to protect itself against criminality. They might also point out that a precise assessment of the positive consequences of off-duty guns was precluded by the absence of data. Further, it could be argued, attempting to complete an off-duty gun cost-benefit equation by

acquiring those data would require experimental conditions—disarming off-duty police—that might prove too costly to society and to officers themselves. Finally, it might be pointed out that since police are paid only for their formal working hours, the financial costs of the extra protection of off-duty guns are negligible.

In these justifications for off-duty guns, a cynic might find the suggestion of a hidden agenda. The economic argument may be a rationalization offered by police administrators unwilling to face up to the question of off-duty guns for reasons more closely related to organizational labor tranquility than to public safety. Police unions and labor groups exert considerable influence over police managerial decisions. Police unions often base their salary demands in part on the public expectation that their members will keep and bear arms 24 hours a day. Their logic generally runs as follows:

> Police deserve more money than other civil servants for two reasons. First, their duties are uniquely demanding and dangerous: they alone are expected to put their lives on the line against society's enemies.
>
> Second, they alone are expected to fulfill their job duties, whether or not they are technically working: they alone are expected to be equipped with the tools of their trade at all times. Sanitation workers are not expected to clean dirty streets once they sign out of work, but off-duty police are expected to help keep the streets free of crooks. Fire fighters do not carry off-duty axes, but police carry off-duty guns.
>
> Further, no other workers have to worry constantly about safeguarding lethal weapons from their curious children. To know how much a police officer is worth, you have got to look at the number of officers killed taking police action off duty. While you are doing that take a look at the little kids who have found daddy's gun in the closet and killed themselves while playing with it.

These are potent arguments which make it clear that police unions do not regard off-duty guns as cost-free protection. Conversely, unions regard their responsibility and willingness to be

armed off duty as a blue chip at contract negotiations. It is also likely, therefore, that they would strongly resist efforts to either disarm off-duty police or to limit the off-duty role to that of observer and information transmitter. Further, such efforts can easily be interpreted as "handcuffing the police and reducing police protection." Thus it is probable that chiefs would choose not to be publicly identified with these efforts unless there existed an extremely unambiguous and convincing case that they are in the public interest.

The absence of much of the information upon which such a case might be made reinforces the suggestion that administrators are not anxious to deal with the issue. Data related to the number of lives saved and the number of important arrests effected by off-duty police, for example, would be relatively easy to collect, but little or no comprehensive information on these events is at hand. As noted previously, we also know little about the deterrent effects of off-duty guns, a subject about which data are more difficult, but not impossible, to collect and analyze.

Despite these omissions, it is possible to make a preliminary assessment of the consequences of arming off-duty police. Such an assessment suggests that it might be appropriate to fill the information voids cited previously and to conduct more complete and detailed evaluations of the merits of police off-duty guns.

WHAT DO POLICE DO WITH OFF-DUTY GUNS?

Police in New York City are required to carry off-duty guns[8] while within the limits of the city and may do so at their option outside the city. Between 1971 and 1975, 681 New York City police officers reported discharging their firearms while off duty.[9] Most of these events occurred for apparently meritorious reasons, but others did not. Table 1 shows that roughly seven in ten of these shootings reportedly involved the defense of life or prevention of crime. If we add to those the number of incidents in which officers destroyed dangerous or hopelessly injured animals (3.2 percent), we find that about three quarters of the

events ostensibly involve some law enforcement or order maintenance function.

TABLE 1 OFF-DUTY NEW YORK CITY POLICE REASONS FOR SHOOTING, 1971-75

Reasons for Shooting	Percent	Number
Self-defense	55.8	380
Defense of others	2.5	17
Prevention or termination of crime	13.1	89
Destruction of animal	3.2	22
Suicide attempt	3.8	26
Accident	12.6	86
Other/not ascertained	9.0	61
Total	100.0	681

What about the other quarter? Officers used their guns against themselves often enough to make "suicide by gun" the largest single cause of violent officer death and an event nearly as frequent as line of duty deaths during the years included in the table. During 1971-75, 30 New York City officers died at the hands of others in the line of duty; 25 off-duty officers shot and killed themselves, and one other attempted to do so but sustained a nonfatal wound.[10] Almost half of the "nonenforcement" shooters—12.6 percent of the total—reportedly fired their guns accidentally. In doing so, they shot themselves, family members, friends, other officers, and total strangers, for example:

> Patrolman Hines and his wife were in the kitchen... Officer removed his off-duty gun from the top of a six foot china closet, noticed that the holster strap was loose and pushed the gun firmly in the holster discharging the gun. Mrs. Hines was across the room and the bullet struck her above the right ear. She was pronounced D.O.A. by Dr. Thompson.

In another case which appears to have been accidental, the

> officer was found lying dead on the floor in front of a bureau and his service revolver with one shot fired was

found in an open top drawer. Apparently Ptl. Adams was standing at a right angle in front of the bureau and discharged one shot from service revolver. Interrogation of parents, in-laws, and wife of officer indicated no medical history or other known reason for Ptl. Adams to have willfully committed this act.

A substantial percentage of off-duty shooters—nine percent of the total—fired their guns for "other" reasons or for reasons that are not readily articulable. One officer, for example, shot and killed his wife and his mother-in-law; in other cases:

> While apparently intoxicated, Ptl. Jones was ejected from a St. Patrick's Day party in a bar and grill and fired six shots from his revolver into the premises, wounding two persons.
>
> . . . [Officer who shot his wife once in the head and three times in the back] stated that he had been married for seven years and had various problems with his wife; their problems focused on mother-in-law trouble, his wife's spending of money, and his studying for the sergeant's promotional examination.
>
> After a dispute with my wife, I went outside and fired 12 shots into a tree behind my house in order to vent my frustrations.

Various explanations for such bizarre violence may be found in the growing body of literature on police occupational stress which generally concludes that the police career places extreme psychological pressures on its incumbents and their families.[11] Sadly, in the previous cases, it also placed in the officers' hands the means to deal with those dilemmas in a destructive manner. Thus it is apparent that some officers use their off-duty guns for purposes other than those for which they were intended.[12]

Less apparent is the number of unwise or imprudent shootings concealed within Table 1's more seemingly admirable reasons for shooting. A suggestion of their numbers appears in Table 2, which describes the departmental adjudications of off-duty shootings that occurred after 18 August 1972, when a formal shooting review and adjudication process was established.[13]

TABLE 2 NEW YORK CITY POLICE DEPARTMENT ADJUDICATIONS OF OFF-DUTY SHOOTINGS, 18 AUGUST 1972-31 DECEMBER 1975

Adjudications	Percent	Number
Shooting justifiable	58.5	224
Officer retrained in law and/or tactics	15.1	58
Officer disciplined	16.7	64
Officer arrested	5.5	21
Officer transferred	0.3	1
Officer referred to psychological and/or alcoholic counseling	3.9	15
Total	100.0	383

The table shows that the department itself found that more than four in ten shootings warranted some administrative or criminal sanction: 15.1 percent of the officers were retrained in law and/or tactics;[14] 16.7 percent were disciplined by the department; 5.5 percent were arrested; and the remainder were transferred to other assignments or referred to the department's psychologists or alcohol abuse counselors. Thus while three quarters of the shootings between 1971 and 1975 involved some law enforcement or order maintenance activity, only slightly more than half of the shootings adjudicated during most of those years were found to have been beyond official reproach.

Even among those found formally justifiable, however, questions of prudence and impact on violence may be raised. More than one third of the shootings were immediately precipitated by robberies. A review of those incident reports causes one to speculate on how appropriate it is for lone off-duty officers to attempt to intervene in such events. One example involved an officer dining in a restaurant when two males entered and announced a stick-up.

> I was seated at a table in the dining area. I was ordered to get over to the bar. I leaped from my chair saying "police" and fired my revolver two times at [suspects].

After returning the officer's fire, both suspects escaped. Since the robbery was averted and nobody was injured, this unquestionably courageous intervention was not a total failure. On the other hand, it did escalate violence considerably and did create a great risk to the lives of the officer and other patrons, as well as to the robbers. It takes little imagination to conceive of possible far less happy endings to this event. The officer could not have been certain that on-duty police had not been summoned to the robbery. Thus he ran the risk of being mistaken for a robber by other officers, a scenario which has also occurred and ended tragically.[15] Indeed, once this officer intervened, literally anything could have happened. Eight months later, in fact, this same officer was again dining in a restaurant and was confronted by two armed robbers. On that occasion, the exchange of gunfire left the officer and both robbers dead.

The most immediate question raised by such events is what would have happened had the officer refrained from intervening and merely observed and transmitted information. Both sets of robbers would almost certainly have escaped with the proceeds of their endeavors. Although it is not likely, both sets of robbers might have been apprehended later as a result of information and descriptions provided by the officer.[16] Most important, the officer would almost certainly have survived both robberies.

This last observation will raise police eyebrows. A firmly held belief among police is that it is advisable for officers to take forcible action when confronted by situations like those described previously. This is so because it is believed that robbers who discover a police officer among their victims are likely to kill him simply because he is a police officer. Thus, it is better to resist than to passively submit and risk the possibility of discovery and execution.[17] This belief has powerful implications. The officer operating under it perceives the gun duel with robbers as not merely appropriate, but as imperative.

Logic suggests, however, that this last belief is ill-founded. Holdup men commit their crimes for personal gain. Their goal, apparently, is to survive their acts and to quietly enjoy their

earnings. Why, then, would they wantonly execute police officers and gratuitously become the subject of manhunts for "coldblooded cop killers?"

This logic is supported by experience. This New York City data include literally dozens of cases in which armed off-duty police responded to the sudden appearance of robbers' overwhelming firepower by submitting passively. Many were discovered to be police and were relieved of their guns and badges. None was wounded or killed merely "because he was a cop,"[18] but many were wounded or killed while resisting.

The apparent reluctance of criminals to kill police officers also suggests that police fear of assaults motivated by desire for revenge or prevention of testimony may be unfounded. One who contemplates such an act does so knowing that records of his prior encounters with his potential victim will make him a prime suspect. He also knows that his offense will be investigated, prosecuted, and penalized more intensely than any other he may have committed. Such attacks to impede justice, then, appear quite unlikely regardless of whether or not police are armed off duty. Further, the relative infrequency of such attacks on citizen witnesses, jurors, prosecutors, and judges reinforces the notion that off-duty guns make little difference where violence of this nature is concerned.

CONCLUSION

The classic and often derided conclusion of social scientists is to recommend further research. In the present case, however, it is genuinely appropriate to conclude by recommending a test of the assumption that armed off-duty police contribute to the public good.

American police are citizens and police officers. Considerable effort has been expended to eliminate distinctions between them and the communities they serve. Some distinctions, however, are both desirable and necessary and thus are not subject to these efforts. It is desirable and necessary that on-duty police fulfill the role of active intervenor in threatening situations.

It is also necessary, therefore, that they be distinguishable from most citizens by being armed during that time.

It is less clear that it is desirable and necessary for police to attempt to fulfill the active intervenor role while off duty. To do so, they must continue to be armed and therefore distinguishable from other citizens. Thus it may be difficult for police to relate their own life experiences to those of the unarmed citizens for whom they work. Further, this distinction may be less than desirable because police may be even more vulnerable than most citizens to the forces that lead to gun abuse.

Before police practice their craft, they are usually screened, tested, and trained. While they practice their craft, they are subject to stresses far more psychologically demanding than are most citizens. The combination of these job stresses and ready access to off-duty guns sometimes ends tragically. Many laudable efforts to avert such tragedies have focused on eliminating or neutralizing the stresses which precede them, but little or no attention has been given to the desirability or necessity of access to the off-duty guns which complete the tragedies.

The question of the desirability or necessity of off-duty guns does not involve only intentional and accidental misuse. When off-duty police do use their guns in well-intended interventions, it is not at all clear that they reduce violence. Conversely their actions in threatening situations may even create actual violence where only potential violence exists.

This negative effect is often due to important qualitative distinctions between the situations in which on-duty and off-duty police typically intervene. On-duty police are usually advised by their radio dispatchers of potential violence. Since this usually occurs while they are at a distance from the scene, they have the opportunity to plan their approach to it and to coordinate their efforts with colleagues. On-duty police are also usually in uniform and are clearly identifiable to other officers.

Off-duty police who intervene in potential violence rarely enjoy such luxuries. They are typically not given any warning of impending events but rather, are suddenly confronted by suspects whose guns are already drawn. Off-duty police are not

typically in the company of colleagues, but are alone or with friends or family. They do not usually have instant access to police communications systems. They are usually in civilian clothes and are thus easily mistaken for armed suspects by arriving police. Finally, they are far more likely than on-duty officers to have judgment and reflexes dulled by liquor.

In such circumstances, it is rarely desirable or necessary that off-duty police distinguish themselves from other citizens by attempting to actively intervene nor is it fair to them or other citizens. Indeed, it may be most fair to require off-duty police to leave their guns in their lockers with the rest of their uniforms.

Notes

1. John F. Heaphy, ed., *Police Practices: The General Administrative Survey* (Washington, DC: Police Foundation, 1978), item 20.

2. Matthew G. Yeager, Joseph Alviani, and Nancy Loving, *How Well Does the Handgun Protect You and Your Family? Technical Report: Two* (Washington, DC: United States Conference of Mayors, 1976), p.1.

3. Mona Margarita, *Criminal Violence Against Police in the United States* (Washington, D.C.: U.S. Bureau of Justice Statistics, forthcoming).

4. Mona Margarita, "Criminal Violence Against Police" (unpublished Ph.D. dissertation, School of Criminal Justice, State University of New York at Albany, 1980), p.83.

5. Lawrence W. Sherman, "Homicide by Police Officers: Social Forces and Public Policy" (grant proposal submitted to the Center for Studies in Crime and Delinquency, National Institute of Mental Health, (1977), p.3.

6. *See,* for example, J. Gerald Safer, "Deadly Weapons in the Hands of Police Officers, On Duty and Off Duty," *J. Urban Law,* 49(3):577.

7. *Ibid.,* p.579.

8. New York City police may use as "off-duty guns" either the regulation four-inch barrel .38 caliber service revolver or a lighter and more

compact two-inch barrel .38 caliber revolver. The former must be purchased by officers, and the latter is an option chosen by most for reasons of convenience. Some officers, however, carry their service revolvers both on and off duty.

9. For access to these data, I am indebted to former Chief of Personnel Neil J. Behan, former Assistant Chief Patrick Fitzsimons, and Lieutenant Frank McGee of the New York City Police Department.

10. Three other officers committed suicide by gun during working hours.

11. A Law Enforcement Assistance Administration bibliography, J.T. Skip Duncan, Robert N. Brenner, and Marjorie Kravitz, *Police Stress : A Selected Bibliography* (Washington, D.C.: U.S. Government Printing Office, 1979), lists 112 articles, books, and monographs and 33 films. These cite as factors causing stress such police job characteristics as danger, unpredictability, boredom, the need to repress emotions, rotating shift work, quasi-military organizational structure and discipline, lack of lateral transfer opportunities, inadequate career development, frustration about court appearances, concern over criticism, and a police image distorted by the media. It cites as effects of stress disproportionate police rates of suicide, alcoholism, heart disease, gastrointestinal disorders, and marital, family, and emotional problems.

12. Neither is such abuse of off-duty guns confined to the officers themselves. Included in the data examined in this study, for example, are nine incidents in which officers' off-duty guns were used against them by wives and female friends. Five officers were wounded and four were killed in these shootings.

13. New York City Police Department, "Temporary Operating Procedure #237," (18 Aug. 1972).

14. A finding that retraining is appropriate most often reflects the reviewers' opinion that a shooting itself was justifiable, but might have been avoided had the officer handled the events which precipitated it differently, for example, by calling for help rather than by attempting to confront a dangerous person alone.

15. Nine of the shootings studied involved "mistaken identity" exchanges of shots between uniformed police and plainclothes or off-duty officers at crime scenes. Three resulted in death.

16. The successful escape of the first set of robbers—who may even have been the same individuals involved in the second robbery—argues against this outcome. Had the officer concentrated his efforts on obtaining good descriptions at the first robbery, however, he might have improved the possibility of apprehension.

17. Joseph Wambaugh's *The Onion Field* (New York: Delacorte Press, 1973) is an excellent treatment of a variant of this belief.

18. One robber threatened to do so, but was dissuaded by his accomplice who made precisely the arguments cited above. In another case, an officer was one of several restaurant patrons searched and locked in a restroom by robbers. His victimizers kept their promise to leave his badge on the restaurant's bar and to deposit his gun in a nearby mailbox, so as not "to get him in trouble."

CHAPTER 13

OBSERVATIONS ON POLICE DEADLY FORCE

JAMES J. FYFE

The subject of police use of deadly force[1] has generated considerable controversy in recent years. Questions related to deadly force have been raised and analyzed by presidential commissions, police practitioners, researchers contracted by police practitioners, radical criminologists, more traditional academics, social activists, law reviews, and popular writers.[2] Two salient questions addressed from these widely varying perspectives are

1. Should the police be permitted to shoot at unarmed and nonviolent fleeing suspects?
2. To what degree have police agencies insulated themselves and their members from criticism, as well as from criminal or civil liability, by "covering up" incidents in which police officers have shot others in violation of law or administrative regulations?

SOURCE: "Observations on Police Deadly Force," *Crime and Delinquency* (July, 1981), 27:3:376-389. Reprinted with the kind permission of the National Council on Crime and Delinquency.

FLEEING SUSPECTS

The power of the police to use deadly force is derived from the English common law, which authorized the use of deadly force in defense of life and in order to apprehend persons committing or fleeing to avoid arrest for a felony. While few would quarrel with the defense of life rule, many do find fault with fleeing felon justifications for police use of deadly force. More specifically, they argue that the rule enabling police to use deadly force to apprehend any fleeing felon is overly broad, obsolete, and inconsistent with the philosophies that guide most of the operations of American criminal justice.[3]

Their arguments are based upon changes that have occurred since the fleeing felon rule became part of the common law. Centuries ago, they note, the fleeing felon rule may have been defensible because *all* felonies were capital crimes. We have long since ceased executing *all* felons, however. In recent years, very few persons convicted of even the most heinous crimes have been put to death. This precipitous drop in executions has not been accidental: The state's power to execute has been challenged and carefully reviewed at every level of government. Recognition of the irreversibility of the death penalty, notwithstanding its questionable deterrent value, requires that all decisions be carefully made and reviewed, and that defendants be executed only after they have presumably received every benefit of due process. On the other hand, police are often permitted to make hasty decisions "at three o'clock in the morning, in the rain" to take the lives of first-time offenders *suspected* of such felonies as burglaries of unoccupied commercial buildings, use of stolen credit cards, and auto larcenies. If apprehended and convicted, many of these unarmed nonviolent suspects would receive very minor sentences, especially in crowded big city courts; certainly, none would be executed.

In the distant past the fleeing felon rule may have functioned (and been necessary) to protect the lives of unarmed citizens required to participate in apprehending fugitives who knew they faced execution if brought to court and convicted. Thus, there was considerable overlap between the defense of

life and fleeing felon rules. Just as we long ago ceased executing all felons, however, we long ago ceased requiring unarmed citizens to apprehend felons by engaging in hand-to-hand combat, if necessary. Police are now solely responsible for the apprehension of felons, and the risk to the armed and trained police officer pursuing an unarmed thief today is generally far lower than was the risk facing the unarmed and untrained citizen attempting to bring to trial a suspect to whom arrest and conviction were literally matters of life and death.

Many legislatures have modified the fleeing felon rule. Eight states have limited justifiable use of police deadly force to defense of life situations and to apprehension of persons who have at least threatened the use of deadly force, or whose conduct indicates that delay in apprehension would create a substantial risk to others of death or serious bodily harm; and ten states have limited the use of deadly force in arrest to situations involving persons suspected of crimes of violence. Thirty-two states operate under the "any" fleeing felon rule, which authorizes use of deadly force to apprehend even unarmed suspects fleeing from nonviolent felonies.[4]

Those who favor allowing police to shoot at such nondangerous fleeing felons base their argument upon grounds of deterrence and general law enforcement effectiveness,[5] on the assumption that the power of the police to shoot unarmed fleeing nonviolent felony suspects serves as a deterrent to many who would otherwise commit felony crimes. Although relevant data on police shootings are scant, there is little empirical support for this assumption.

If this hypothesis were correct, one might anticipate finding that relatively high police shooting rates would be accompanied by relatively low crime rates, because of the great number of deterred potential offenders. Gerald Robin, however, reports that annual rates of justifiable police homicides during the years 1950-60 in ten American cities varied nearly twenty-fold (from .40 to 7.06 per 1,000,000 population).[6] FBI crime data for these cities for the same years demonstrate no similar variance in either direction.

More recent studies of police shooting rates among American cities also show that these rates vary greatly, with little apparent association with either crime or arrest rates.[7] Stated simply, nothing in the research to date suggests that a high frequency of police shooting reduces crime rates in any way. Conversely, given findings that many of the urban civil disorders of the 1960s were precipitated by police shootings,[8] it has been suggested that such shootings have even caused an increase in crime and disruptions of social order.[9]

Some indication of the reasons for the absence of a clear association between police shooting and reduced crime rates may be found in the criminological literature on deterrence. Donald Newman notes,

> General deterrence rests on a pleasure-pain principle, namely that potential offenders will be prevented from seeking the pleasures of crime if there is sufficient assurance that swift and certain punishment will follow any violation. . . .
>
> The idea of deterrence is evidently attractive, for it has existed as a form of social control from the very earliest times. It persists as operationally viable, even in the face of evident failure. It rests on a strange mixture of conceptions about the nature of man and human behavior, in part viewing man as rational, able to calculate gains and losses and in part treating him as an animal, able to be conditioned to obey. As its rational basis, the pleasure-pain principle adopts the legal fiction of the reasonable and prudent man. What prudent human is motivated more by pain than pleasure? Deterrence is also seen as a conditioning process resting on the same principle involved in Pavlov's experiments with dogs, not only imprinting avoidance on those subject to painful stimuli, but also conditioning all others who know about and identify with the punished. It is a sort of conditioning-once-removed approach.
>
> Some persons can be deterred or conditioned from at least some deviant acts under ideal laboratory conditions. However, even under controlled conditions the most serious crimes, the ones most desired to be deterred (e.g., murder, assault and sex crimes) are probably the least amenable to deterrence. In addition, the

real world is not a laboratory, and there are significant gaps in the speed and certainty of deterrent responses. Most crimes are not solved, and it is generally known that most perpetrators get away at least for a long time. A policeman cannot be put into every household, warehouse, or on every street corner. Yet despite its conceptual weakness and operational difficulties, deterrence persists as a major response to the challenge of crime prevention.

. . . [Deterrence] is probably the most popular of all crime prevention approaches because it is the cheapest and most simplistic. Witness the resurgence of death penalty provisions which almost always rest on deterrence claims. Given the horrors of kidnaping and murder, and the usually vague, infinitely complex, and controversial nature of other long-range prevention proposals, it is easy to see the political attractiveness of reestablishing the electric chair. No matter that it is likely to fail in its objective. It represents precise and immediate action in the face of pressures to do something about these crimes.[10]

In short, we know little about the real effects of deterrence. What we do know suggests that its effects depend in large measure on the certainty of punishment. Given the comparative rarity of police shootings,[11] it would appear that the absence of the element of certainty is a major limitation upon the deterrent effect of police guns. Considering the well-publicized proliferation of handguns and the relative infrequency of on-the-scene police intervention, it would seem that the would-be robber, burglar, or thief would be far more likely to be deterred from his crime by the prospect of meeting armed resistance from his victim than by the less likely prospect of being shot by police. Like the electric chair, liberal use of deadly force by the police is probably better described as a simplistic and politically attractive approach to crime prevention than as an effective deterrent.

Neither do the data suggest that the fleeing felon rule assists police in their efforts to apprehend perpetrators of nonviolent crimes. Even though police shootings are far more frequent in America than in other western countries, they are

extremely rare when measured against the number of nonviolent crimes reported in the United States. According to Lawrence Sherman and Robert Langworthy, American police shot and killed approximately 700 persons during 1978.[12] If my own figures on the ratio of woundings to killings resulting from New York City police shootings[13] can be applied to the rest of the country, it is likely that an additional 1,400 persons suffered serious injury from police shootings during that year. Obviously, not all of these 2,100 shooting victims were unarmed suspects fleeing nonviolent felonies; but, even were they, those shot would have represented a very small percentage (.02 percent) of the persons responsible for the 10,079,508 nonviolent felonies (i.e., burglary, auto larceny, larceny over $50) reported to American police in 1978.[14] Stated in another way, in order for the police to have cleared even 1 percent of the nonviolent felonies reported in 1978 through "apprehensions effected by shooting," they would have had to increase the rate at which they shot people during that year by at least fifty-fold. Doing so would have resulted in approximately 35,000 fatalities and 70,000 woundings. Unless we are prepared to add tremendous numbers of police to accomplish even this modest clearance rate, and unless, we are prepared to increase dramatically our various types of medical facilities, and unless we are prepared to bear the social and moral costs of such carnage, any discussion of the broad fleeing felon rule as an adjunct to police apprehension efforts is futile.

POLICE "COVER-UPS"

Determining exactly what occurred at the scene of a police shooting is a challenging task. Most shootings occur in low visibility settings, and rarely are uninvolved witnesses present at such events. As a result, the source of most of the information made available is the police themselves. Since officers are presumably not motivated to expose themselves to criminal or civil liability,[15] there often is room for speculation that police shootings did not occur as reported on official documents.

Skepticism about the accuracy of police shooting reports is reinforced by occasional violations of what Rodney Stark calls the police "cult of secrecy."[16] Arthur Kobler documents two instances in which officers testified that their colleagues had falsely reported events at police shootings in order to make the shootings appear justifiable.[17] Skepticism about official versions of events is also supported by documentation of incidents in which the motive and methods of those charged with investigating police shootings have been suspect. Richard Harding and Richard Fahey studied fatal police shootings in Chicago, and report finding thirteen shootings in which there was prima facie evidence of murder or manslaughter; in only two of those cases were officers actually charged. The major reason for this variance, they assert, is that police investigators overlooked or failed to report nonpolice "alternate credible versions" of shootings.[18] More recently, the Los Angeles Board of Police Commissioners (a civilian board) overruled an internal department finding that a shooting was justifiable under department policy, and noted that

> The Commission's review of the Department's investigation and evaluation of the shooting of Eulia Love reveals that many of the factors on which the majority of the Shooting Review Board relied in reaching its conclusions were based on erroneous or misconstrued facts. The Board's failure properly to exercise its fact-finding function, and to obtain and assess all available evidence, prevented it from giving due consideration to all elements of Department policies and standards.[19]

Social scientists have also expressed skepticism about police shootings, reporting a cult of secrecy at the administrative levels of police agencies. Much of the research done on police shootings has been conducted without the cooperation of the agencies involved. Kobler, for example, employed as his data source a newspaper clipping service that supplied him with journalistic accounts of 1,500 police shootings. Newspaper accounts also served as the basis for a study conducted by the Public Interest Law Center of Philadelphia.[20] Harding and

Fahey based their analysis of Chicago police shootings on records compiled by that city's coroner because the police department refused to provide access to shooting-related data. Reticence to provide such information on the exercise of the ultimate police power may be a result of administrative fear of simplistic or biased interpretations, and be justified, particularly when administrators are dealing with clearly unfriendly researchers. It may also indicate that administrators wish to conceal potentially damaging or embarrassing research findings, and imply that the police are "hiding something."

The belief that police may be hiding something also is encouraged by agency reluctance to make public the dispositions of internal investigations of the justifiability of police shootings or the criteria upon which those dispositions are based. These perceptions may also be ill-founded, but their existence is damaging to agency credibility and may reduce public confidence in the police. Thus, as the Los Angeles Board of Police Commissioners has observed, it is in the interests of the police to report on the use of deadly force and to provide "for the communication of [results of investigations of use of deadly force] to the community in a manner which merits public credibility and confidence."[21]

DISCUSSION

Discussion of the limits of police power to use deadly force may be framed in the context of traditional responsibilities of the police. First, police manuals universally describe the primary police responsibility as protecting life. Nowhere is that responsibility construed not to apply to the lives of suspected criminals. Indeed, if we are to believe B-movies, much of the work of western sheriffs required that they endanger their own safety in order to protect the lives and due process guarantees of villains against the "quick justice" sought by lynch mobs composed of otherwise admirable townsfolk. Given that tradition and given the fact that, even if apprehended, tried, and proven guilty beyond a reasonable doubt, no unarmed fleeing

nonviolent felony suspect is likely to be executed by the state, there arises the question of whether the fleeing felon rule conflicts with the police responsibility to protect life. If it could be demonstrated that the loss of the lives of a few fleeing nonviolent felony suspects would somehow preserve the lives of some "good folks," one might conclude that no conflict exists. Attempting to demonstrate this point, however, involves arguments even more tenuous than those that are made by persons who favor capital punishment on the grounds that it preserves life. As indicated above, there is little to support the notion that the fleeing felon rule serves as a deterrent to criminality. But even if it did deter, it is doubtful that it would preserve life. Unlike the death penalty, the hypothetical deterrent power of the fleeing nonviolent felony suspect rule affects only potential nonviolent criminals.

A second police responsibility involves the preservation of order. At the extreme, one might argue that the fleeing felon rule serves as a symbol of society's determination to prevent anarchy by granting police extreme power to act against those who would violate the rights of others to possess and enjoy the fruits of their labors. From this perspective, the fleeing felon rule is an affirmation of traditional American values and an indicator of the boundaries of acceptable behavior. At the other extreme, the fleeing felon rule may be viewed as an indication that society places a higher value upon property than upon human life. Thus, the rule is likely to be regarded by the disenfranchised, who are its most probable subjects, as an oppressive and disproportionately harsh means of protecting the interests of the prosperous against the peccadilloes of the young poor. When contrasted with the minor penalties suffered by middle-class offenders' whose crimes are usually far more profitable than are those of the young poor, police shootings of unarmed fleeing nonviolent felony suspects are likely not to be legitimized by the disenfranchised, who know that shootings of fleeing white-collar-crime suspects are virtually unheard of. The rule that allows such shootings is likely to be greatly resented, and to contribute to public disorder rather than to public order.

A third police responsibility pertinent to this discussion is the mandate to fight crime through prevention and apprehension. As noted, the literature offers little evidence that the fleeing felon rule has contributed to lowering the crime rate.

The clear incongruities between the rule that police may shoot any fleeing felony suspect and police obligations to protect life, preserve order, and fight crime give rise to two questions. First, why does the fleeing felon rule remain the law in more than half the states? Second, what are the obligations of police in those states to remedy those incongruities?

The answer to the first question is probably to be found in the nature of the legislative process. Law making and law revocation are political processes, and lawmakers are politicians. Legislators are accountable to their constituents, who are, by definition, the franchised. The franchised are understandably concerned about any legislative action that appears to diminish the ability of police to protect society. Consequently, it takes a courageous legislator to introduce or vote for a bill that is likely to be perceived by voters as a "handcuff" on police powers. The introduction of such a bill (or even a vote for it) almost certainly would be raised during subsequent election campaigns as an indication that the incumbent was "soft on crime."

Because of the apparent reluctance of legislators to deal with the fleeing felon rule, police chiefs may face the choice of negating the rule administratively, perhaps by establishing an internal policy on deadly force with more stringent restrictions than are found in state laws. Here again, however, police chiefs who fear that implementing such policies will cause them to be perceived as "soft on crime" show considerable reluctance to act. Others fear that committing a restrictive policy to paper will increase the civil liability of their departments and individual officers. This fear is apparently based on the questionable logic that one cannot be sued successfully for shooting an unarmed fleeing nonviolent felony suspect if there is no policy formally prohibiting such an act. Finally, some chiefs are reluctant to restrict police use of deadly force more tightly than does the law, on the grounds that doing so would contradict the will of the people as expressed through the legislative process.[22]

The danger that police chiefs who implement restrictive deadly force policies will be perceived as soft on crime is real. On the other hand, many chiefs have avoided this perception by gaining the participation of community leaders and rank-and-file officers in policy formulation, and by carefully explaining the new policies produced as well as their purposes to both community and department members. Still others have issued such policies during periods of tension caused by specific instances of deadly force,[23] with the timing of the announcement immediately succeeding a manifestly unjustified use of deadly force mitigating the potential for opposition. Finally, in some states, police chiefs' associations have promulgated model deadly force policies that represent their collective professional opinions regarding proper use of police weapons.[24] The existence of such a model policy makes it possible for the individual police chief who wishes to restrict deadly force to do so without appearing arbitrary and without being singled out as soft on crime. Instead, he can point out that he is acting in accord with the consensus of his peers.

Chiefs who do not formulate policy on the ground that doing so will increase the civil liability of their agencies and their officers are interesting case studies. They are administrators of justice who permit police to use unrestricted discretion in the decision whether to shoot an unarmed fleeing nonviolent felony suspect because their jurisdictions and their personnel might be on the wrong end of wrongful death litigation if such shootings were prohibited. In addition to the question of whether these chiefs have correctly defined the "administration of justice" (and have correctly identified the wrong end of wrongful death litigation), such a policy omission involves the curious assumption that officers will expose themselves and their agencies to civil liability by violating a prohibition on use of deadly force to apprehend unarmed fleeing nonviolent felony suspects. Two inferences may be drawn from this assumpton. First, it is possible that this is a conscious assumption, that these chiefs believe that their officers are not capable of staying within administratively prescribed bounds of behavior. Given the plethora of regulations that govern other aspects of police behavior, however,

such an inference is probably not valid. A second inference is that this assumption is unconscious, and that these chiefs have not given significant thought to the issue.

The second inference is probably more valid because it accords with the problem-solving model that pervades many police agencies. Police administrators generally are career personnel who have worked their way up through the ranks from the patrol officer level. During the period in which they are socialized and trained, new patrol officers are typically schooled in the notion that "no two situations are alike." Thus, planning for police field problems is a fruitless endeavor, and police should be prepared to follow an ad hoc approach, solving problems as they arise. As a consequence, police usually become very skilled at responding to crises, but rarely develop comparable skill in devising plans to reduce or avoid future problems. Police manuals, for example, are replete with detailed prescriptions for such administrative behavior as the preparation of reports on incidents that have already occurred. Rarely, however, do they offer much guidance for response to such predictable police field problems as armed robbery calls or traffic stops. Instead, patrol officers are encouraged to assess situations as they occur, and to postpone formulation of an appropriate response until that time.

Recent history offers considerable evidence that this crisis management mode is operative at all police organizational levels. The riots in Watts, Newark, and Detroit are examples of large-scale police field problems for which administrative planning was either absent or inadequate. In these cases as in the 1971 Attica prison rebellion and the 1977 New York City blackout looting, real attempts to develop adequate plans of response occurred only after the fact. Thus, just as patrol officers rarely give much thought to hypothetical field problems until they materialize, police administrators rarely plan for more infrequent, but potentially cataclysmic, events until they have already taken place. Similarly, they often do not seriously consider methods of controlling police behavior until a specific behavior becomes a major public issue. Many police chiefs, in

other words, exercise few of their management prerogatives unless they are pressured to do so from outside the organization.

Ironically, the courts themselves may well become the source of pressure for administrative modification of broad statutory police deadly force justifications. The Eighth Circuit Court of Appeals, in a decision later overturned by the United States Supreme Court on grounds not related to the merits of the case, ruled that Missouri's statutory justification for the use by police of deadly force in order to apprehend any fleeing felony suspect was in violation of Fourteenth Amendment due process guarantees.[25] In a civil rights action based on a Pennsylvania police shooting, a federal court indicated that the mere flight of a forcible felon did not justify the use by police of deadly force, even though such action was permissible under Pennsylvania statutes. Instead the court ruled that the validity and necessity of police decisions to use deadly force would be evaluated case by case in terms of the danger posed by individual escapees.[26] The Supreme Court has not yet ruled on the constitutionality of the rule that police may shoot any fleeing felon, and the federal decisions cited above are relatively isolated cases. But these decisions nonetheless provide some evidence that the courts are becoming increasingly concerned about and involved with use of deadly force by state and local police. Some police chiefs known to this author have, in fact, instituted restrictive firearms policies in response to judgments against them for shootings of unarmed fleeing nonviolent felony suspects that were justified by law. Thus, the trend of court decisions is likely to make the institution of a restrictive deadly force policy the best insurance against wrongful death litigation.

The question of cover-ups is also a difficult one for the police administrator to resolve. As indicated earlier, the low-visibility milieux of most police shootings and the interests of reporting officers in avoiding criminal, civil, or administrative action frequently precipitate conjecture that official reports do not accurately reflect actually events. To be credible, therefore,

the police administrator must do everything possible to avoid even the appearance of impropriety in matters pertaining to use of deadly force. He must investigate instances of police deadly force as intensively as his agency investigates the most heinous crimes. Moreover, he must adjudicate shootings objectively, and he should make public the results of his investigation, as well as the reasons for it.

RECOMMENDATIONS FROM THE LITERATURE

Because of the effects of police shootings, and because even justifiable shootings and subsequent proceedings are so easily perceived as exercises in injustice, many recommendations have been made to reduce both the frequency of police shootings and the doubt that often accompanies them.[27] The consensus of these recommendations may be summarized as follows:

1. Police departments should institute clear policy guidelines to limit the use of deadly force.
2. Policy guidelines should be related to the dangerousness of suspects, and should prohibit use of deadly force to apprehend nonviolent suspects.
3. Police departments should investigate thoroughly all incidents in which police weapons are discharged, whether or not anybody or anything is actually struck by bullets.
4. Reports of these investigations should minimize uncertainty about what has happened by making as complete use of witnesses and forensic techniques as possible.
5. All police shootings should be reviewed and adjudicated by police departments, with contributions from as many perspectives and levels of the police organization as possible. These adjudications should consider both the circumstances of the instant shooting and the record of the officer involved.
6. The findings of investigations and adjudicatory bodies should be made available to the public, and police departments should react to questioning and criticism openly and responsibly rather than defensively.

7. Police agencies should attempt to improve and use state-of-the-art psychological devices and techniques to screen and monitor personnel in order to identify those likely to use violence without proper justification.

8. Police supervisors and field commanders should be held accountable for monitoring and acting on the unjustifiable use of force or violence by personnel reporting to them.

9. Police training programs should be based upon social science principles to increase officers' skills in daily interaction and crisis intervention in the community, and to reduce the possibility that police actions will cause the escalation of violence.

10. Police firearms training programs should consider legal, administrative, and moral questions concerning use of the gun, and should encourage the use of less drastic alternatives where possible.

11. Police deployment policies and practices should be formulated in such a manner that the potential for police-citizen violence is reduced.

12. Police internal reward systems should be structured in such a manner that quantitative measures of police work (e.g., numbers of arrests) and involvement in violent activities are not the predominant or exclusive means of obtaining recognition for outstanding performance.

13. Police agencies should encourage citizens to make complaints about officers' use of abuse or unnecessary force, should thoroughly investigate all such allegations, and should advise complainants of findings and the action taken.

CONCLUSION

Police have a major stake in determining the limits imposed on the use of deadly force. Indiscriminate use of weapons is a discredit to police departments and a disservice to the citizens they protect. Broad mandates to use police deadly force, such as the fleeing felon rule, have no place in the administration of justice in a democratic society.

Notes

1. Most definitions of "deadly force" describe it as force likely to kill or capable of taking life. Since deadly force is almost always exercised with a firearm, the most appropriate quantitative measure of its frequency is the number of times police shoot *at* others, rather than simply the number of persons killed. This is so because police bullets do not always kill, and because missed shots, woundings, and fatalities often are merely varying results of equally grave decisions. Stated simply, police deadly force is best measured by counting decisions to employ it: "Body counts" represent only the consequence of some percentage (approximately 9 percent in New York City) of those decisions. See James J. Fyfe, "Shots Fired: an Examination of New York City Police Firearms Discharges" (Ph.D. diss., State University of New York at Albany, 1978), p. 301.

2. See, respectively, President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (Washington, D. C.: Govt. Printing Office, 1967); Jerry V. Wilson, "Deadly Force," *Police Chief,* December 1972, pp. 44-56; Southern Methodist Law School, "Report on Police Shootings" (Report to Dallas Police Department, 1974); Paul Takagi, "A Garrison State in 'Democratic' Society," *Crime and Social Justice.* Spring-Summer 1974, pp. 27-33; John S. Goldkamp, "Minorities as Victims of Police Shootings: Interpretations of Racial Disproportionality and Police Use of Deadly Force," *Justice System Journal,* Winter 1976, pp. 169-83; Kenneth B. Clark, "Open Letter to Mayor Abraham D. Beame and Police Commissioner Michael J. Codd," *New York Times,* Sept. 17, 1974; Lawrence W. Sherman, "Execution without Trial; Police Homicide and the Constitution," *Vanderbilt Law Review,* January 1980, pp. 71-100; Robert Sherrill, *The Saturday Night Special* (New York: Charterhouse, 1973).

3. President's Commission, *The Police,* pp. 189-90; Sherman, "Execution without Trial."

4. Sherman, "Execution without Trial," pp. 71, 72.

5. Robert M. McKiernan, "Police Shotguns: Devastating to the Animals," *New York Times,* Feb. 7, 1973, p. A-35.

6. Gerald D. Robin, "Justifiable Homicide by Police Officers," *Journal of Criminal Law, Criminology and Police Science,* June 1963, pp. 225-31.

7. Michael Kiernan, "Shooting of Civilians by District Police Declines by Nearly Half," *Washington Star,* Sept. 2, 1979, p. B-1; Catherine H. Milton et al., *Police Use of Deadly Force* (Washington, D.C.: Police Foundation, 1977); Gerald F. Uelman, "Varieties of Police Policy: A

Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County," *Loyola of Los Angeles Law Review,* 1973, pp. 1-61. In addition, previous research by this author also supports the contention that there is little association between police shooting rates and rates of reported crime. The 1972 imposition of restrictive police shooting guidelines in New York City resulted in precipitous drops in shooting by that agency's personnel, with no significant increases or decreases in either crime or arrest rates. See Fyfe, "Shots Fired," pp. 218-329.

8. National Advisory Commission on Civil Disorders, *Commission Report* (New York: Bantam, 1968).

9. John P. Adams, "Police Deadly Force and Church Concern," in *A Community Concern: Police Use of Deadly Force,* Robert N. Brenner and Marjorie Kravitz, eds. (Washington, D.C.: Govt. Printing Office, 1979), pp. 13-18.

10. Donald J. Newman, *Introduction to Criminal Justice,* 2d ed. (Philadelphia, J. B. Lippincott, 1978), pp. 430-31.

11. Kiernan, "Shootings of Civilians," reports that 1978 police shooting rates per 1,000 forcible felony arrests in ten American cities varied from less than 1 per 1,000 arrests to more than 20 per 1,000 arrests.

12. Lawrence W. Sherman and Robert H. Langworthy, "Measuring Homicide by Police Officers," *Journal of Criminal Law and Criminology,* Winter 1979, pp. 546-60.

13. Fyfe, "Shots Fired."

14. Federal Bureau of Investigation, *Crime in the United States:* 1978 (Washington, D.C.: Dept. of Justice, 1979), p. 35.

15. See Paul Chevigny, *Police Power: Police Abuses in New York City* (New York: Pantheon Books, 1969).

16. Rodney Stark, *Police Riots* (Belmont, Calif.:Wadsworth, 1972).

17. Arthur L. Kobler, "Police Homicide in a Democracy," *Journal of Social Issues,* Winter 1975, pp. 168-84.

18. Richard W. Harding and Richard P. Fahey, "Killings by Chicago Police, 1969-70: An Empirical Study," *Southern California Law Review,* March 1973, pp. 284-315.

19. Board of Police Commissioners, "Part I—The Shooting of Eulia Love," *The Report of the Board of Police Commissioners Concerning the Shooting of Eulia Love and the Use of Deadly Force* (Los Angeles: Board of Police Commissioners, 1979), p. 30.

20. Public Interest Law Center of Philadelphia, "A Study of the Use

of Firearms by Philadelphia Policemen from 1970 through 1974" (1975).

21. Police Commissioners, "Shooting of Eulia Love." p. 29.

22. At a panel on deadly force at the National Forum on Criminal Justice held in Columbus, Ohio, in 1980, for example, a former police chief who is directing a federally funded International Association of Chiefs of Police study of police use of deadly force remarked that an administrative policy that restricted deadly force more stringently than state law was "unfair to officers," because it increased the chance that they could be successfully sued for violating it. Evidence that this sentiment is widespread among police also is provided by an International Association of Chiefs of Police membership vote to reject a resolution recommending that police agencies limit deadly force to "defense of life" situations. Instead, at its 1980 annual convention, the International Association of Chiefs of Police approved a resolution calling upon police agencies to adopt deadly force policies "consistent with state law."

23. Sherman, "Execution without Trial," p. 91.

24. See, for example, Milton et al., *Police Use of Deadly Force,* pp. 151-54; Delaware Police Chiefs' Council, "Administrative Policy Statement: Deadly Force" (Draft; Feb. 16, 1981).

25. Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976).

26. Phillips v. Ward, 415 F. Supp. 976 (D.C. 1976).

27. See James J. Fyfe, "Administrative Interventions on Police Shooting Discretion: An Empirical Evaluation," *Journal of Criminal Justice,* Winter 1979, pp. 309-23; Harding and Fahey, "Killings by Chicago Police"; Kobler, "Police Homicide": Kenneth R. McCreedy and James L. Hague, "Of a Policy to Limit the Use of Firearms by Police Officers," *Police Chief,* January 1975, pp. 48-52; Milton et al., *Police Use of Deadly Force:* Gilbert G. Pompa, "A Major and Most Pressing Concern" (Paper presented at the Annual Meeting of the National Organization of Black Law Enforcement Executives, St. Louis, June 22, 1978); President's Commission, *The Police;* Barbara Rhine, "Kill or Be Killed: Use of Deadly Force in the Riot Situation," *California Law Review,* 1968, p. 829; Sherman, "Execution without Trial"; Hans Toch, *Peacekeeping—Police, Prisons, and Violence* Lexington, Mass.: D.C. Heath, 1977).

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