



PRINCIPLES OF THE LAW POLICING

Revised Tentative Draft No. 1
(July 30, 2017)

SUBJECTS COVERED

PART III Use of Force
CHAPTER 5 Use of Force

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This document, Revised Tentative Draft No. 1, contains content that has been approved by the members of The American Law Institute and so represents the position of the Institute on the issues with which it deals. This draft, as revised, was approved by the ALI membership at its Annual Meeting on May 24, 2017.
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**Principles of the Law, Policing
Tentative Draft No. 1**

Comments and Suggestions Invited

We welcome written comments on this draft. They may be submitted via the website [project page](#) or sent via email to PLPIcomments@ali.org. Comments will be forwarded directly to the Reporters, the Director, and the Deputy Director. You may also send comments via standard mail; contact information appears below.

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The typical ALI Section is divided into three parts: black letter, Comment, and Reporter’s Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project’s Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter’s and Statutory Notes remain the work of the Reporter.

This project was initiated in 2015.

Earlier versions of Chapter 5 of this Draft can be found in Preliminary Draft No. 1 (2016) (as Topic 2 of Chapter 3) and in Council Draft No. 1 (2016).

**Principles (excerpt of the Revised Style Manual approved by the ALI Council
in January 2015)**

Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions.

a. The nature of the Institute's Principles projects. The Institute's Corporate Governance Project was conceived as a hybrid, combining traditional Restatement in areas governed primarily by the common law, such as duty of care and duty of fair dealing, with statutory recommendations in areas primarily governed by statute. The project was initially called "Principles of Corporate Governance and Structure: Restatement and Recommendations," but in the course of development the title was changed to "Principles of Corporate Governance: Analysis and Recommendations" and "Restatement" was dropped. Despite this change of title, the Corporate Governance Project combined Restatement with Recommendations and sought to unify a legal field without regard to whether the formulations conformed precisely to present law or whether they could readily be implemented by a court. In such a project, it is essential that the commentary make clear the extent to which the black-letter principles correspond to actual law and, if not, how they might most effectively be implemented as such. These matters were therefore carefully addressed at the beginning of each Comment, as they should be in any comparable "Principles" project.

The "Principles" approach was also followed in Principles of the Law of Family Dissolution: Analysis and Recommendations, the Institute's first project in the field of family law. Rules and practice in this field vary widely from state to state and frequently confer broad discretion on the courts. The project therefore sought to promote greater predictability and fairness by setting out broad principles of sufficient generality to command widespread assent, while leaving many details to the local establishment of "rules of statewide application," as explained in the following provision:

§ 1.01 Rules of Statewide Application

(1) A rule of statewide application is a rule that implements a Principle set forth herein and that governs in all cases presented for decision in the jurisdiction that has adopted it, with such exceptions as the rule itself may provide.

(2) A rule of statewide application may be established by legislative, judicial, or administrative action, in accord with the constitutional provisions and legal traditions that apply to the subject of the rule in the adopting jurisdiction.

Principles of the Law of Family
Dissolution: Analysis and
Recommendations

Thus, a black-letter principle provided that, in marriages of a certain duration, property originally held separately by the respective spouses should upon dissolution of the marriage be recharacterized as marital, but it left to each State the formula for determining the required duration and extent of the recharacterization:

§ 4.12 Recharacterization of Separate Property as Marital Property at the Dissolution of Long-Term Marriage

(1) In marriages that exceed a minimum duration specified in a rule of statewide application, a portion of the separate property that each spouse held at the time of their marriage should be recharacterized at dissolution as marital property.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application.

(b) The formula should specify a marital duration at which the full value of the separate property held by the spouses at the time of their marriage is recharacterized at dissolution as marital property.

Principles of the Law of Family
Dissolution: Analysis and
Recommendations

The Comments and Illustrations examined and analyzed the consequences of selecting various possible alternatives.

“Principles” may afford fuller opportunity to promote uniformity across state lines than the Restatement or statutory approaches taken alone. For example, the Institute’s Complex Litigation: Statutory Recommendations and Analysis combines broad black-letter principles with the text of a proposed federal statute that would implement those principles.

Foreword

Principles of the Law, Policing, is coming to the Annual Meeting for the first time. The project was launched in 2015 under the leadership of Reporter Barry Friedman of New York University School of Law. Barry directs a very talented group of Associate Reporters: Brandon L. Garrett and Rachel A. Harmon of the University of Virginia School of Law, Tracey L. Mearns of Yale Law School, and Christopher Slobogin of Vanderbilt University Law School. Also, the project has benefited enormously from the excellent substantive work of its Fellow, Maria Ponomarenko of New York University School of Law.

At the Annual Meeting, the membership will be asked to approve the portion of the project dealing with Use of Force. Even casual readers of major newspapers know how salient and controversial the issue of excessive police force has been in recent years, particularly in metropolitan areas. In New York City, where I live, the issue captured the front pages in July 2014 with the tragic death of Eric Garner after a police officer put him in a chokehold while arresting him for the sale of single cigarettes from packs without tax stamps.

As I wrote in one of my quarterly letters to the ALI membership, because we undertook a “Principles” project, rather than a Restatement, our goal is not to synthesize judicial precedent. Instead, the Reporters are working to develop best practices for issues concerning policing that have significant legal underpinnings. Our work is informed by a variety of sources, including existing policies and practices in various jurisdictions, social science research, and constitutional norms. Finally, the audience for the project is quite broad, including legislatures, policing agencies, bodies that regulate or conduct oversight on policing, the public, and also, in some instances, the courts.

This project is distinctive in terms of the breadth of experiences of its Advisers. The group includes police chiefs and leaders of organizations that have expressed concern about policing practices, as well as judges, prosecutors, and defense attorneys. It is comforting and significant that this very diverse group agreed about the importance of addressing the Use of Force issue as soon as possible, and coalesced around the position reflected in this Draft.

During my first year as Director—a position to which I had the great honor of being appointed in May 2014—the ALI launched seven new projects. All of these projects have now

had multiple meetings with their respective Advisers and Members Consultative Groups. Principles of the Law, Policing is the first to have a portion ready for Annual Meeting approval. It is very gratifying to see this progress!

As all close observers of the ALI's work know, it takes a village to produce an ALI project. I am therefore very grateful to the team of Reporters, particularly Professors Friedman, Garrett, and Harmon, who took the laboring oar on this portion of the project, and to the very dedicated Advisers and Members Consultative Group. At a time when our society appears unusually divided, observing individuals from very different walks of life approach very difficult issues civilly and constructively is a real privilege!

RICHARD L. REVESZ

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The American Law Institute

February 26, 2017

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School of Law

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MEMORANDUM

TO: ALI Membership

DATE: February 17, 2017

RE: Policing Materials (Including Use-of-Force Principles)

I am the Reporter for Principles of the Law, Policing. At the 2017 Annual Meeting we are bringing to you our first set of Principles, on the subject of Use of Force.

Because this is our first set of materials for you to consider, I am also including the materials we sent to our Advisers and MCG prior to our first meeting, so that you can get a sense of the scope of the project. The only document I have revised is the Projected Overall Table of Contents, which has been altered to reflect input from the Advisers and MCG.

I know this is a somewhat novel project for ALI. I wanted to say that it is going quite well, in the sense that our Advisers and MCG are very engaged, and we are making good progress. Our group of Advisers includes a wide swath of individuals and organizations that work with policing, from prosecutors and judges, to law-enforcement officials, to community groups, advocacy groups, and activists. All are working well together, and we are finding many areas on which we can agree.

We are bringing you the Use of Force materials because the subject is timely, the need is evident, and the Advisers and MCG were able to come to agreement fairly quickly on the content. These were the subject of a meeting of the Advisers and MCG, as well as two extended conference calls. We had an excellent discussion of the material at the Council Meeting in October 2016, and made a few revisions afterward. We are very pleased to bring

them to you for your consideration. The Associate Reporters who have taken the lead on this part of the project—Brandon Garrett and Rachel Harmon (both at the University of Virginia School of Law)—and I look forward to discussing these with you in May. I also appreciate the opportunity to discuss other aspects of the project with you at that time, should you have questions.

PLAN OF WORK: TEXTUAL OUTLINE

Note: This Plan of Work originally appeared in Preliminary Draft No. 1 (2016). Some Chapter numbers and contents have since changed.

PART I

The first Chapter of *Policing* will provide overarching principles that apply to the Chapters that follow. The first three Sections define the scope of the volume (i.e., to which governmental functions the Principles apply), specify the goals of policing, and identify core values that ought to guide agencies in carrying out their responsibilities. Then, the first Chapter will turn to some central themes that resonate throughout the Principles: the importance of developing written policies on all aspects of police investigations, and of making these policies available to the public; the need for better data on various aspects of policing, as well as some of the challenges that data collection poses both for policing agencies and for the public; and the role that training ought to play in ensuring that policing officials act in accordance with agency policies.

PART II

The first and largest subject in *Principles of the Law, Policing* deals with matter commonly described as “search and seizure.” There will be five Chapters of search and seizure principles: General Principles of Search and Seizure; Investigative Searches and Seizures; Programmatic Searches and Seizures; Technology and Surveillance; and Databases.

The first Chapter of search and seizure—Chapter 2—provides some cross-cutting principles. These include when and whether warrants are necessary; the means by which warrants can be obtained; and the protections essential for various sorts of searches, seizures, or surveillance. In its discussion of protections, the Principles will draw a distinction, important to all that follows, between traditional, investigative policing—which by definition is suspicion-based—and newer programmatic, regulatory, or deterrent approaches, which tend to be suspicionless. Suspicion-based searches and seizures are the stops, searches, and arrests that typically have been governed by warrants or exceptions to the warrant requirement. Suspicionless searches include (among other things) administrative searches, roadblocks, and

much of the surveillance driven by modern technology, such as CCTV, license-plate readers, and bulk data collection.

Chapter 3 will deal with policing in the investigative context. By this we mean policing directed primarily at criminal investigation, and usually, but not always, justified by—in the Supreme Court’s parlance—“individualized suspicion.” Thus, this Chapter does not address police actions such as checkpoints, drug testing programs, municipal inspection programs, and general camera surveillance, which are addressed in the Chapter on programmatic searches.

This Chapter is divided into three parts: policing encounters, generically referred to as seizures (stops and arrests); acquiring information (frisks, full searches, tracking, wiretapping); and the use of force.

Importantly, the principles of justification described here do not pertain solely to constitutional justification. The Constitution provides a floor of minimal standards, but more is needed to ensure democratic accountability and the use of police practices in a manner consistent with the rule of law, as discussed in Chapter 1. With respect to investigation, the Principles outlined below encourage departments to develop justification rationales that include attention to statutory constraints as well as constitutional ones. Because investigative policing is one of the most common sites of police–citizen interaction, this work must be carried out with attention to promoting the legitimacy of policing. That is, policing must be carried out in a way that promotes fairness and trust between police and citizens.

Chapter 4 will address programmatic searches and seizures, which are searches and seizures that, in contrast to investigative searches and seizures, are explicitly suspicionless. In other words, programmatic actions permit search or seizure of individuals despite the absence of what the courts call “individualized suspicion.” Examples of programmatic actions include checkpoints (aimed at illegal immigrants, drunk drivers, unlicensed drivers, etc.); drug testing programs; DNA sampling; residential and business inspection programs; collection of communications metadata; and general surveillance involving cameras, tracking systems, and the like.

Some of these programmatic actions may not involve “searches” or “seizures” as defined by the Supreme Court’s Fourth Amendment jurisprudence. Those that are so designated are usually governed by the Supreme Court’s “special needs” doctrine. The fact that programmatic actions are either not governed by the Fourth Amendment or are governed by a doctrine that

many believe suffers in coherence makes this topic a particularly important one to address in these Principles.

The Principles will address: (1) the role of legislatures and executive bodies in authorizing programmatic actions, including the degree of specificity required by authorizing statutes, regulations, or policies; (2) the types of oversight necessary for programmatic actions; (3) the application of administrative law principles to police agencies contemplating programmatic actions, including the need for notice and comment procedures, written rules, and explanations for those rules; (4) the requirement of even-handed implementation of programmatic actions both in a particular case (as with operation of a particular roadblock) and across cases (as with the decision as to where to operate roadblocks); (5) the interaction of the principles on programmatic actions with the principles on investigative policing (which might be triggered during a programmatic search or seizure), and with the principles on databases (since databases might provide the basis for programmatic actions or record their results).

Chapter 5 will address some of the key issues surrounding technology and policing—both policing agency use of various surveillance technologies, and government access to private data stored on technological devices, social networking sites, and cloud servers. New technologies have greatly enhanced the capabilities of policing agencies, but also the ability of those who wish to do harm to society to avoid detection. Use of new surveillance technologies—such as CCTV cameras, license-plate trackers, and GPS devices—also poses a threat to individual privacy and anonymity by enabling policing agencies to collect and store information about civilians’ movements, habits, and associations. In addition, surveillance technologies present difficult choices about who will be subject to enhanced monitoring and observation.

Given the rapid pace of technological change and the limited reach of the Fourth Amendment in this area, many of the questions surrounding use of technology ultimately will need to be resolved by legislatures, executive bodies, policing agencies, and their communities. The Principles in this Chapter will provide much-needed guidance to these various bodies as they consider how best to make the most of the promise of new technologies, while addressing the various threats to individual liberty and privacy that their use can potentially pose.

This Chapter will proceed in two parts. Part 1 will provide a framework for analyzing various surveillance technologies, explain why it is necessary to create rules governing their use, and then address specific categories of technologies based on the unique concerns that they raise.

These will include: (1) technologies (such as GPS tracking) that allow ubiquitous monitoring of a person's public movements over time; (2) technologies that do not track over time, but enhance detection or surveillance capacity, such as bio-recognition software, license-plate trackers, sting rays (which detect the instantaneous location of a cell phone), and drones; and (3) technologies designed to monitor police, such as body cameras. Part 2 will focus on government access to individuals' data stored on technological devices (i.e., cell phones or laptops), e-mail providers, or digital storage sites; and shared on social networking sites.

The final Chapter of Part II will focus on police use of databases. Law enforcement agencies maintain databases that contain information about identified or identifiable individuals in a number of domains, including: stop, arrest, criminal, and correctional histories; DNA profiles; terrorist affiliations; gang membership; weapons use; released sex offenders; and compilations of communications, financial, travel, and other transactions (as might occur, for instance, with "fusion centers"). Law enforcement also often seeks to access the databases of other public and private entities, including banks, phone companies, and Internet service providers.

Regulation of the creation, maintenance, and use of law enforcement databases is often nonexistent or haphazard. Constitutional jurisprudence regarding police access to information held by third parties is in a state of flux, and federal and state legislatures have created a welter of statutes regulating this type of law enforcement activity. Thus, principles that provide guidance on law enforcement use of databases would be of significant assistance to law enforcement agencies.

The Principles on databases will cover: (1) the types of data law enforcement may retain; (2) the duration of such retention; (3) measures designed to keep data secure; (4) measures designed to assure the accuracy of data, including procedures for permitting subjects to correct misinformation; (5) when, and with what restrictions, law enforcement may access its own databases; (6) when law enforcement may access the databases of other government agencies and private entities, including the role of subpoenas and other mechanisms for obtaining recorded information; (7) when data may be used for adjudicatory purposes; (8) disclosure of law enforcement data to other agencies and entities; and (9) accountability mechanisms, including notice to the subjects of databases and periodic reporting.

PART III

Part III will begin by setting out general goals of criminal investigations, including accuracy in evidence gathering, fairness during the process of evidence gathering, and principles for documentation and report writing during investigations. The first Chapter also will discuss at the outset professional and ethical obligations during evidence gathering including by taking a risk-based approach to investigation integrity. Then, in four separate Chapters, this Part will address forensic evidence, eyewitness identification evidence, confessions, and the use of informants.

Chapter 8 on forensic evidence will establish the importance of policy and training on the accurate and well-documented collection and preservation and retention of crime scene evidence. Principles will set out obligations of law enforcement and crime lab personnel to document their analysis of that crime scene evidence. Principles will set out their legal and ethical obligations to clearly and accurately convey their findings to law enforcement, prosecutors, and the defense, including by conveying the documentation of their analysis, the findings, their methods, and the statistical significance of their findings, together with applicable error rates. Principles will set out a framework for pretrial judicial review of forensic evidence, use of expert testimony, jury instructions at trial, and postconviction review.

The Principles regarding eyewitness identifications in Chapter 9 will describe the need to adopt in policy clear written procedures that reflect scientific evidence concerning human vision and memory. Principles will describe: the need for standardized eyewitness identification procedures that provide easily understood instructions to eyewitnesses; procedures for selecting and presenting photographs to eyewitnesses; procedures for presenting images “blind” or “blinded” so that the administrator cannot even unintentionally influence the outcome; procedures for recording the level of confidence of the eyewitness; and when available, procedures for electronically recording the procedures. The Principles will set out a framework for pretrial judicial review of eyewitness evidence, the use of experts, jury instructions at trial, and postconviction review.

The Principles on confession evidence in Chapter 10 will include police interviews and interrogations. Principles will set out the need to electronically record interviews and custodial interrogations, as well as the need for written policies to guide the use of recording equipment and the retention and disclosure of such recordings. Principles will guide the use of interrogation

and interview techniques and constitutional and professional obligations to avoid coercion and contamination of resulting statements. Principles will separately treat interviews and interrogations of juveniles and mentally ill and disabled persons. Principles will set out a framework for pretrial judicial review of confession evidence, use of expert testimony, jury instructions at trial, and postconviction review.

The final Chapter, on informant evidence, will cover the need for written policies regulating: the recruitment of such informants; the screening, qualifications, and eligibility of informants; the documentation of cooperation, payment, and leniency arrangements with informants; the documentation and electronic recording of interviews with informants; as well as the systematic tracking of the use of informants across cases. Principles will set out a framework for pretrial judicial review of informant evidence, use of expert testimony, jury instructions at trial, and postconviction review.

PART IV

This Part will consist of three Chapters on remedies and accountability. Chapter 12 will focus on Principles to ensure that police officers are accountable within the policing agencies that employ them. The Principles will describe the role that legislatures and agencies can play in articulating expectations for police conduct. They will elaborate upon the training necessary to enable officers to pursue their mission and to adhere to the rules and law that govern their conduct. They will describe the importance of reinforcing those rules with agency supervisory practices, performance measures, and disciplinary processes. And they will emphasize the role that collecting data on police conduct and practices, complaints, civil suits and settlements, and other sources of information can play in internal accountability.

Chapter 13 will provide Principles designed to facilitate political governance of policing. These Principles will highlight the significance of departmental and municipal structure in this regard, and will describe external mechanisms for evaluating policing policy and practices such as civilian review and auditing mechanisms. They will discourage practices that undermine political governance of the police, such as providing resources to policing agencies outside traditional paths of political control. They will also state Principles for collecting, aggregating, and making accessible information and data about policing policy and conduct.

The final Chapter will state principles concerning the legal mechanisms for ensuring individual officer and agency accountability. Although legal accountability for police

misconduct covers several major areas of law, including some addressed in other ALI projects, the Principles here are intended to ensure that legal responses to police misconduct provide adequate remedies for harms caused by police conduct to individuals, that they encourage officers and agencies to comply with the law and work to avoid future violations, and that they are fair to officers and agencies. This Chapter will include discussion of the following remedies: the exclusionary rule, civil liability for damages, civil liability for equitable relief, criminal prosecution, and decertification.

PROJECTED OVERALL TABLE OF CONTENTS

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Chapter 2. General Principles of Search and Seizure

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[Additional chapters TBA]

Part V. Databases

Chapter 7. Databases

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Chapter 13. Internal Agency Accountability

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**PART III
USE OF FORCE**

**CHAPTER 5
USE OF FORCE**

1 **§ 5.01. Scope and Applicability of Principles**

2 **The following Principles:**

3 **(a) are intended to guide the conduct of all agencies that possess the lawful authority**
4 **to use force, which are referred to throughout this Chapter as “agencies”;**

5 **(b) are intended for consideration by an informed citizenry, and for adoption as**
6 **deemed appropriate by legislative bodies, courts, and agencies;**

7 **(c) are not intended to create or impose any legal obligations or bases for legal**
8 **liability absent an expression of such intent by a legislative body, court, or agency.**

Comment:

9 *a. Scope and applicability of Principles.* These Principles relating to the use of force by
10 public-safety agencies are directed at agencies and agency employees that possess this power
11 lawfully.

12 The intended audience for these Principles relating to the use of force—as is true of all
13 Principles in this project—is broad. The Principles are intended to inform and guide the
14 decisions of all government actors, be they legislative, executive, or judicial, as well as members
15 of the public with an interest in public safety and law enforcement.

16 The Principles, standing alone, are not intended to create liability in agencies or their
17 employees. First, they are stated at a high level of generality and thus are less specific than
18 should be the rules that govern policing. Second, these Principles contain none of the appropriate
19 limits on liability, such as fault or causation standards. Rather, they are intended to inform the
20 principled development of policies and rules by governmental actors, including legislative
21 bodies, administrative bodies (including public-safety agencies themselves), and courts.

1 **§ 5.02. Objectives of the Use of Force**

2 **Officers should use physical force only for the purpose of effecting a lawful seizure**
3 **(including an arrest or detention), carrying out a lawful search, preventing imminent**
4 **physical harm to themselves or others, or preventing property damage or loss. Agencies**
5 **should promote this objective through written policies, training, supervision, and reporting**
6 **and review of use-of-force incidents.**

7 **Comment:**

8 *a. Definition of force.* Although there are many different definitions of “force” used in
9 law-enforcement law and policy, in these Principles, “force” refers to physically touching a
10 person or object either directly or indirectly, such as by use of a weapon, in order to control or
11 restrain a person, or to seize, examine, or damage property. It does not include nonphysical
12 efforts by officers to influence conduct through commands, warnings, or persuasion, although
13 those efforts can be used to control a person and can be used to avoid the need for physical force.

14 *b. Definition of deadly force.* “Deadly force” refers to physical force that creates a
15 substantial risk of death or serious physical injury, whether or not death results. Except where
16 these Principles make an express distinction, “force” includes both deadly and non-deadly force.

17 *c. Objectives of force.* Law-enforcement agencies face the unfortunate reality that some
18 individuals will fail to comply with officer commands and will impede officer efforts, sometimes
19 threatening public order and safety. Officers are therefore given the authority to use force in
20 some circumstances. This authority is a serious responsibility that must be exercised judiciously
21 and with conscious respect for human life, dignity, and liberty. Although the failure to use force
22 also imposes risks, balancing the competing concerns requires that force only be employed for
23 the purpose of achieving an important state end, namely, to conduct a lawful seizure, to conduct
24 a lawful search or frisk, to secure evidence, to prevent imminent physical harm to officers or
25 others, or to prevent property damage, property loss, or evidence destruction. In contrast, force
26 should not be used to punish an individual or retaliate for an individual’s conduct or attitude.
27 Moreover, force should not be used to enforce a lawful command unless compliance itself is
28 important to serve public order, officer or public safety, or criminal adjudication. Even if
29 enforcing a command serves an important and legitimate goal, and an individual refuses to
30 comply, the force used should be only as much as is needed to overcome noncompliance, as is
31 developed further in § 5.03. Given the central importance of safeguarding human life, deadly

1 force should be used only to stop a credible threat of death or serious physical injury to the
2 officer or others. Even non-deadly force, however, can cause serious nonphysical harm, serious
3 physical injury, or unexpected death, and should therefore be used with restraint, and in
4 adherence to these Principles. Similarly, force should not be threatened, such as by brandishing a
5 weapon, if using force would not be permitted under these Principles. Drawing or brandishing a
6 weapon can escalate a dangerous situation and increase the risk of injury.

7 *d. Promoting appropriate use of force.* Although many Sections in this Part should be
8 promoted by agency policy, training, and supervision, agency participation in ensuring the
9 appropriate use of force is especially critical. To emphasize the role of agencies, the Sections in
10 this Chapter state that role expressly. This reference is not intended to suggest that other Sections
11 in this Part or others should not be furthered by similar means.

12 *e. Relationship to other Sections.* This Section states the permissible purposes of use of
13 force by law-enforcement officers. Even if force is intended to serve one of the purposes stated
14 in this Section, the decision to use force, and the kind and degree of force employed, should
15 comply with the requirements of §§ 5.03-5.06. Thus, officers should use the minimum force
16 necessary to serve the law-enforcement purpose safely (§ 5.03); they should seek to avoid force
17 if circumstances permit (§ 5.04); even if force is necessary to serve a permissible purpose, it
18 should not be used if the harm the use of force is likely to cause is disproportionate to the threat
19 to or the significance of the public interest (§ 5.05); and officers should provide clear instructions
20 and warnings before using force whenever feasible (§ 5.06).

21

REPORTERS' NOTE

22 The definitions of “force” and “deadly force” in this Section are consistent with both
23 judicial rulings and state and federal statutes. See Mark A. Henriquez, *IACP National Database*
24 *Project on Police Use of Force*, in NATIONAL INSTITUTE OF JUSTICE, *USE OF FORCE BY POLICE:*
25 *OVERVIEW OF NATIONAL AND LOCAL DATA 19* (1999); see also INTERNATIONAL ASSOCIATION OF
26 CHIEFS OF POLICE, *POLICE USE OF FORCE IN AMERICA 2001*, at 1 (2001),
27 <http://www.theiacp.org/Portals/0/pdfs/Publications/2001useofforce.pdf> (“The IACP use of force
28 project defines force as ‘that amount of effort required by police to compel compliance from an
29 unwilling subject.’”); cf. TOM MCEWEN, *NATIONAL DATA COLLECTION ON POLICE USE OF FORCE*
30 *5-6* (1996) (describing varying definitions of “force” among law enforcement and researchers,
31 and questioning whether the presence of officers or initial verbal commands should be included
32 in such definitions).

1 Deadly force is defined—by the Model Penal Code and by federal and state courts and
2 statutes—as physical force that creates a substantial risk of death or serious physical injury. See
3 Model Penal Code § 3.11(2) (AM. LAW INST. 1985) (defining “deadly force” as force that creates
4 “substantial risk of causing death or serious bodily injury”); *Smith v. City of Hemet*, 394 F.3d
5 689, 693 (9th Cir. 2005) (“We also hold that in this circuit ‘deadly force’ has the same meaning
6 as it does in the other circuits that have defined the term, a definition that finds its origin in the
7 Model Penal Code” and noting that “[a] definition including ‘a substantial risk of serious bodily
8 injury’ is used by police in all fifty states, the District of Columbia, and Puerto Rico”); see, e.g.,
9 N.Y. PENAL LAW § 10.00(11) (“‘Deadly physical force’ means physical force which, under the
10 circumstances in which it is used, is readily capable of causing death or other serious physical
11 injury.”); 10 C.F.R. § 1047.7(a) (“Deadly force means that force which a reasonable person
12 would consider likely to cause death or serious bodily harm. Its use may be justified only under
13 conditions of extreme necessity, when all lesser means have failed or cannot reasonably be
14 employed.”); Kenneth Adams, *What We Know About Police Use of Force*, in USE OF FORCE BY
15 POLICE, supra, at 1, 4 (1999) (describing definition of “deadly force”); *Deadly Force*, BLACK’S
16 LAW DICTIONARY 760 (10th ed. 2014) (“[v]iolent action known to create a substantial risk of
17 causing death or serious bodily harm.”); Restatement Second, Torts § 131, “Use of Force
18 Intended or Likely to Cause Death,” Comment *a* (AM. LAW INST. 1965) (“In determining
19 whether the particular means used to effect an arrest are privileged under the rule stated in this
20 Section, the fact that they are or are not intended to cause death or are or are not such that the
21 actor, as a reasonable man, should realize that they are likely to cause such a result, is decisive;
22 the harm which results from their use is immaterial.”); see also International Association of
23 Chiefs of Police, National Consensus Policy on Use of Force (January 2017), at
24 [http://www.iacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.p](http://www.iacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf)
25 [df](http://www.iacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf) (defining “deadly force” as “Any use of force that creates a substantial risk of causing death or
26 serious bodily injury.”).

27 In addition to force that injures or creates a risk of injury to a person, force that results in
28 property damage may also constitute a seizure that could violate the Fourth Amendment.
29 Although a search or an entry may be lawful, “excessive or unnecessary destruction of property
30 in the course of a search may violate the Fourth Amendment.” *United States v. Ramirez*, 523
31 U.S. 65, 71 (1998); see also *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (“A ‘seizure’ of
32 property occurs when there is some meaningful interference with an individual’s possessory
33 interests in that property.”); *Foreman v. Beckwith*, 260 F. Supp. 2d 500, 505 (D. Conn. 2003)
34 (“when officers act unreasonably in damaging property during the execution of a search warrant,
35 they may be subject to liability for that damage.”). However, courts recognize that some property
36 damage may be necessary for the officers to perform a lawful search. See, e.g., *Dalia v. United*
37 *States*, 441 U.S. 238, 258 (1979) (“officers executing search warrants on occasion must damage
38 property in order to perform their duty.”).

39 Both federal constitutional rulings and state statutes and rulings also reflect the view
40 expressed in this Section that all uses of force must be justified by a lawful objective. At a

1 minimum, all police uses of force prior to conviction must satisfy the standards set by the U.S.
2 Constitution in the Fourth, Fifth, and Fourteenth Amendments, as interpreted by the decisions of
3 the U.S. Supreme Court and lower federal courts. Those rulings indicate that force is permissible
4 only when it is used to accomplish lawful police objectives. See, e.g., *Scott v. Harris*, 550 U.S.
5 372, 383 (2007) (focusing on the “threat to the public” that the officer was seeking to eliminate);
6 *Graham v. Connor*, 490 U.S. 386, 396 (1989) (including as one of the factors in the Fourth
7 Amendment analysis whether there was an “immediate threat to the safety of the officers”).

8 Most states also have statutes governing the use of force. They typically mirror this
9 Section by setting out permissible uses of force in relation to lawful justifications. See, e.g., CAL.
10 PENAL CODE § 196; FLA. STAT. § 776.05; MISS. CODE ANN. § 97-3-15. Others define the scope
11 of permissible force through common-law defenses to suits and criminal proceedings against
12 police officers for excessive force. See, e.g., *Gnadt v. Commonwealth*, 497 S.E.2d 887 (Va. Ct.
13 App. 1998) (finding that police officer use of force is not a battery so long as it is justified).
14 Though states may set standards that exceed constitutional minimums, and state statutes differ
15 somewhat in their details, state laws more explicitly than constitutional law emphasize that force
16 must be necessary to achieve an arrest or other law-enforcement end, an emphasis reiterated in
17 this Section. See, e.g., CONN. GEN. STAT. § 53a-22(b) (“[A] peace officer . . . is justified in using
18 physical force upon another person when and to the extent that he or she reasonably believes
19 such to be necessary to: (1) Effect an arrest or prevent the escape from custody of a person whom
20 he or she reasonably believes to have committed an offense, unless he or she knows that the
21 arrest or custody is unauthorized; or (2) defend himself or herself or a third person from the use
22 or imminent use of physical force while effecting or attempting to effect an arrest or while
23 preventing or attempting to prevent an escape.”); HAW. REV. STAT. § 703-307(1) (“[T]he use of
24 force upon or toward the person of another is justifiable when the actor is making or assisting in
25 making an arrest and the actor believes that such force is immediately necessary to effect a
26 lawful arrest.”); 720 ILL. COMP. STAT. 5/7-5(a) (“A peace officer . . . is justified in the use of any
27 force which he reasonably believes to be necessary to . . . defend himself or another from bodily
28 harm while making the arrest.”). See also *Reynolds v. Griffith*, 30 S.E.2d 81, 83 (W. Va. 1944)
29 (“It is also well settled that officers, in making arrests, may not legally do more than is necessary
30 to bring the person sought to be arrested within the officer’s control.”); *Ortega v. State*, 966 P.2d
31 961, 966 (Wyo. 1998) (approving jury instruction that states “[I]f the officer uses force in excess
32 of what is reasonable and necessary to effect compliance, then he cannot be deemed to be
33 engaged in the lawful performance of his duties.”); Restatement Second, Torts § 131, Comment *f*
34 (AM. LAW INST. 1965) (“The use of force intended or likely to cause death for the purpose of
35 arresting another for treason or for a felony is not privileged unless the actor reasonably believes
36 that it is impossible to effect the arrest by any other and less dangerous means.”).

1 § 5.03. Minimum Force Necessary

In instances in which force is used, officers should use the minimum force necessary to perform their duties safely. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.

2 Comment:

3 *a. Minimum force.* As noted in § 5.01, these Sections assert principles to which agencies
4 and their policies should adhere, rather than standards for legal liability. They adopt the view that
5 use-of-force policies should be more specific and informative than the general “reasonableness”
6 standard applied pursuant to the U.S. Supreme Court’s constitutional precedents, though these
7 Principles may also contribute to courts’ understanding of appropriate constitutional limits on the
8 use of force. Thus, agency policies should require officers to use only the minimum force that is
9 necessary under the circumstances. Force cannot be considered necessary if a practical, less
10 harmful alternative means exists for achieving the same law-enforcement ends. Force should not
11 be used simply to resolve a situation more quickly, unless the extended delay would risk the
12 safety of the subject, officers, or others, or if it would risk damage to property or would
13 significantly interfere with other legitimate law-enforcement objectives. Nor should force be
14 used before a suspect manifests an imminent threat, when alternatives to force are feasible, or
15 after a suspect no longer threatens a law-enforcement objective.

16 Officers often make decisions about using force with less than perfect information, in
17 situations that are changing rapidly and are dangerous to the officers’ own lives and to the lives
18 of members of the community, and in situations risking psychological harm and the destruction
19 of property. By “necessary force,” this Section refers to the minimum amount of force that a
20 well-trained and properly equipped officer would need to use in a situation to achieve one of the
21 legitimate objectives of force stated in section § 5.02, taking into account the conditions in which
22 the decision is made and the opportunities for reevaluation. Necessary force is that which is
23 justified in the present or immediate moment. Force is unnecessary if it is carried out either
24 before a legitimate objective is threatened or after a threat to a legitimate objective is resolved.
25 Therefore, force is not to be used to retaliate for prior wrongdoing (such as resistance or flight)
26 by a suspect, or to deter the suspect from resisting or fleeing in the future. Nor may force be used
27 for longer than is necessary. Officers should reevaluate whether continuing to use force is
28 necessary throughout an incident, if it is feasible and safe to do so.

1 *b. Training and supervision.* Officers will have difficulty determining the minimum force
2 necessary unless they are trained adequately, equipped properly, and guided by policy and
3 supervision. Law-enforcement agencies and governments play a critical role in ensuring that the
4 use of force by officers is appropriate, because they are best positioned to ensure that these
5 conditions are met.

6 Training should be designed to prepare officers and agencies to work to minimize the use
7 of physical force prior to the moment when force is applied. As § 5.04 suggests, this includes,
8 but is not limited to, using less harmful means of applying force when feasible (e.g., less-lethal
9 weapons); using strategies to de-escalate interactions that could lead to the use of force; and
10 making tactical decisions in furthering law-enforcement goals that are likely to obviate the need
11 to use physical force (e.g., collecting additional information; using multiple officers to respond to
12 a call; using specially trained officers and collaborations between officers and community
13 partners to respond in situations involving emotionally disturbed persons; or situating officers to
14 make them less vulnerable to physical threat). Training, in order to be effective, should be
15 repeated and ongoing, and it should be linked to supervision, through internal guidance and
16 discipline of officers.

17 Effective reporting and investigation of uses of force are crucial to supervision. All uses
18 of weapons and of deadly force, whether injury results or not, should be reported immediately by
19 officers to their supervisors or other agency officials and investigated. Written policy should set
20 out the use-of-force investigative process step by step, including the roles of supervisors.

21 *c. Written policy.* Rather than providing detailed provisions that legislatures or agencies
22 should adopt, these Sections state principles to which legislation and agency policies should
23 adhere. Consistent with § 1.03, use-of-force policies should be written, adopted in advance of
24 agency action, and made available to the public, and they should be as detailed as necessary to
25 ensure compliance with these principles. Given how critical the use of force is in policing, it is
26 especially important that there be written policies on the use of force, and that those policies be
27 concise and accessible to officers and to the public. Training on the use of force should be
28 tailored to the specific policies of the agency. Though many agencies make their policies on the
29 use of force public, a minority do not, sometimes out of concern that doing so could provide
30 tactical advantage to criminals who engage with officers. Agencies can accommodate this
31 concern by making the written policies for using force and deadly force available, but keeping

1 supplementary tactical guidance nonpublic. For example, specific tactics used by Special
2 Weapons and Tactics (SWAT) teams may be set out in nonpublic material, while general
3 guidance on when such teams may be used and for what purposes may be set out in policy that is
4 public. See generally § 1.04 (discussing the line between disclosure for transparency and secrecy
5 to protect tactical advantages). Such nonpublic guidance is often provided in the form of internal,
6 agency Standard Operating Procedures.

REPORTERS' NOTE

7 At a minimum, all police uses of force must satisfy the standards set by the U.S.
8 Constitution in the Fourth, Fifth, and Fourteenth Amendments, as interpreted by the decisions of
9 the U.S. Supreme Court and lower federal courts. Police uses of force directed at suspects during
10 investigation and arrest are seizures, governed by the Fourth Amendment command that
11 government seizures cannot be “unreasonable.” See *Graham v. Connor*, 490 U.S. 386, 394
12 (1989). As interpreted by the U.S. Supreme Court, this is an objective, but open-ended standard,
13 one that “allow[s] for the fact that police officers are often forced to make split-second
14 judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount
15 of force that is necessary in a particular situation.” 490 U.S. at 396-397. “[T]he question is
16 whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances
17 confronting them.” *Id.* at 397. The Court has held that a use of deadly force, in particular, is
18 reasonable if “the officer has probable cause to believe that the suspect poses a significant threat
19 of death or serious physical injury to the officer or others.” *Tennessee v. Garner*, 471 U.S. 1, 3
20 (1985). More generally, the Court’s *Graham* decision states that the constitutional
21 reasonableness of a use of force must be evaluated from an objective perspective in light of the
22 totality of the circumstances of the particular case, “including the severity of the crime at issue,
23 whether the suspect poses an immediate threat to the safety of the officers or others, and whether
24 he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, *supra* at 396.
25 Thus, *Graham* recognizes that officers must have discretion to exercise force appropriately.
26 More recently, in 2007, the Court further emphasized the fact-specific nature of the
27 constitutional inquiry, emphasizing that the Fourth Amendment does not provide any “magical
28 on/off switch that triggers rigid preconditions” for the use of reasonable force. *Scott v. Harris*,
29 550 U.S. 372, 382 (2007).

30 Refining the constitutional standard for the use of force is challenging, and lower courts
31 have often struggled to apply the standard to new weaponry and diverse situations. Thus, they
32 have sometimes disagreed on questions such as whether and how to incorporate conduct of the
33 officer just prior to the use of force (or “pre-seizure conduct”) into the constitutional analysis.
34 Compare *Marion v. City of Corydon*, 559 F.3d 700, 705 (7th Cir. 2009) (“Pre-seizure police

1 conduct cannot serve as a basis for liability under the Fourth Amendment; we limit our analysis
2 to force used when a seizure occurs.”), and *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir.
3 1992) (“[P]reseizure conduct is not subject to Fourth Amendment scrutiny.”), with *St. Hilaire v.*
4 *City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995) (“court[s] should examine the actions of the
5 government officials leading up to the seizure”), *Bella v. Chamberlain*, 24 F.3d 1251, 1256 & n.7
6 (10th Cir. 1994) (“Obviously, events immediately connected with the actual seizure are taken
7 into account in determining whether the seizure is reasonable.”), and *Estate of Starks v. Enyart*, 5
8 F.3d 230, 234 (7th Cir. 1993) (holding that an officer violates the Fourth Amendment if he
9 “unreasonably create[s] an encounter” in which an individual would be “unable to react in order
10 to avoid presenting a deadly threat to [the officer]”). See generally Aaron Kimber, Note,
11 *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer’s Pre-Seizure Conduct*
12 *in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651 (2004). Most important to this
13 Section, courts differ in characterizing the constitutional significance of using the minimum
14 force reasonably available. Compare *Griffith v. Coburn*, 473 F.3d 650, 658 (6th Cir. 2007)
15 (requiring officers to effectuate seizures using “the least intrusive means reasonably available”)
16 (quoting *United States v. Sanders*, 719 F.2d 882, 887 (6th Cir. 1983)), with *Wilkinson v. Torres*,
17 610 F.3d 546, 551 (9th Cir. 2010) (holding the “availability of a less-intrusive alternative will not
18 render conduct unreasonable”), and *Reynolds v. County of San Diego*, 84 F.3d 1162 (9th Cir.
19 1996) (finding that opinions of a police-tactics expert did not support finding that police conduct
20 was unreasonable). Note, however, that those constitutional rulings are concerned in the first
21 instance with whether officers and agencies may be held liable in constitutional-tort suits brought
22 under 42 U.S.C. § 1983 and *not* with whether particular uses of force, or use-of-force policies or
23 practices, are desirable as a matter of policy. This latter distinction, between a constitutional
24 baseline developed in the context of determining liability and what is desirable as a matter of
25 policy for regulating the use of force *ex ante*, cannot be stressed strongly enough.

26 Constitutional rulings and agency policies reflect the view of necessity expressed in this
27 Section. See, e.g., *Harris*, 550 U.S. at 383 (emphasizing the “actual and imminent threat” to
28 pedestrians and to the officer); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (asking whether force
29 was “necessary to prevent escape”); *Lolli v. County of Orange*, 351 F.3d 410, 417 (9th Cir.
30 2003) (stating that “a jury could conclude that little to no force was necessary or justified here.”);
31 U.S. CUSTOMS AND BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES AND PROCEDURES
32 HANDBOOK 3 (2014),
33 <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf> (stating that
34 agents may use deadly force “only when necessary”); Dept. of Justice, Commentary Regarding
35 the Use of Deadly Force in Non-Custodial Situations (Oct. 17, 1995),
36 [https://www.justice.gov/ag/attorney-general-october-17-1995-memorandum-resolution-14-](https://www.justice.gov/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-1)
37 [attachment-1](https://www.justice.gov/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-1) (“[T]he touchstone of the Department’s policy regarding the use of deadly force
38 is necessity. Use of deadly force must be objectively reasonable under all the circumstances
39 known to the officer at the time. The necessity to use deadly force arises when all other available
40 means of preventing imminent and grave danger to officers or other persons have failed or would

1 be likely to fail.”). The Restatement Second of Torts expresses this view of necessity in the
2 context of the use of deadly force. See Restatement Second, Torts § 131, Comment *f* (AM. LAW
3 INST. 1965) (“The use of force intended or likely to cause death for the purpose of arresting
4 another for treason or for a felony is not privileged unless the actor reasonably believes that it is
5 impossible to effect the arrest by any other and less dangerous means.”).

6 Though no state expressly requires (as this Section does) that force be limited to the
7 minimum force that is necessary, many agencies require that deadly force be used “only when
8 necessary.” See, e.g., UTAH CODE ANN § 76-2-404; U.S. CUSTOMS AND BORDER PROTECTION,
9 USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK 3 (2014),
10 <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>; Los Angeles
11 Police Dept. Manual § 556, Use of Force,
12 http://www.lapdonline.org/lapd_manual/volume_1.htm#556; New York City Police Dept. Patrol
13 Guide § 203-12 Deadly Physical Force (Aug. 2013),
14 <http://www.nyc.gov/html/ccrb/downloads/pdf/pg203-12-deadly-physical-force.pdf>; Philadelphia
15 Police Dept. Directive 10.1, Use of Force – Involving the Discharge of Firearms (Sept. 18,
16 2015), <https://www.phillypolice.com/assets/directives/PPD-Directive-10.1.pdf>. See also SAMUEL
17 WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY 51 (2005) (describing minimum-force
18 policies as the “prevailing standard”). Many also require that the minimum force necessary be
19 used in non-deadly situations. See, e.g., DeKalb County Police Dept. Employee Manual 4-6
20 (2014), <http://www.dekalbcountyga.gov/sites/default/files/EmployeeManual.pdf> stating in
21 addition to the need to use minimal force in deadly force situations, that “[w]hen non-lethal force
22 is utilized, officers should only use that force which is minimal and reasonable to effect control
23 of a non-compliant subject.”); Metropolitan Police General Order RAR - 901.07 (Aug. 12, 2016),
24 https://go.mpdconline.com/GO/GO_901_07.pdf. Thus, many agencies, including most of the
25 largest agencies and federal agencies, reflect the approach proposed in this Section, mandating
26 that officers use only the minimum necessary force and no more. See WALKER, *supra*, at 51;
27 Brandon L. Garrett & Seth W. Stoughton, *A Tactical Fourth Amendment*, 102 VA. L. REV. ___
28 (forthcoming 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754759 (surveying the
29 50 largest local law-enforcement agencies’ use-of-force policies). This is also consistent with
30 recommendations in the President’s Task Force on Twenty-First Century Policing and the Police
31 Executive Research Forum’s use-of-force principles. See FINAL REPORT OF THE PRESIDENT’S
32 TASK FORCE ON 21ST CENTURY POLICING 45 (2015),
33 http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf (“Law enforcement officers’
34 goal should be to avoid use of force if at all possible, even when it is allowed by law and by
35 policy.”); Police Executive Research Forum, Use of Force: Taking Policing to a Higher Standard
36 (Jan. 29, 2016), <https://www.themarshallproject.org/documents/2701999-30guidingprinciples>
37 (“Agency use-of-force policies should go beyond the legal standard of ‘objective reasonableness’
38 . . . This . . . should be seen as ‘necessary but not sufficient,’ because it does not provide police
39 with sufficient guidance on use of force.”).

1 Constitutional rulings and state law also reflect the view of imminence expressed in this
2 Section. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989) (including as one of the factors
3 in the Fourth Amendment analysis whether there was an “immediate threat to the safety of the
4 officers” and whether the person was “actively resisting”); *Estate of Armstrong ex rel.*
5 *Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 905 (4th Cir. 2016) (“[A] police officer may *only*
6 use serious injurious force, like a taser, when an objectively reasonable officer would conclude
7 that the circumstances present a risk of immediate danger that could be mitigated by the use of
8 force.”); *Galvan v. City of San Antonio*, 435 F. App’x 309, 311 (5th Cir. 2010) (noting how
9 officers “reacted with measured and ascending responses—verbal warnings, pepper spray, hand-
10 and arm-manipulation techniques, and then the use of a Taser”; and “did not use force until [the
11 plaintiff’s husband] attacked [an officer].”).

12 Although agencies often incorporate *Graham’s* reasonableness standard into their written
13 use-of-force policies, they frequently also provide agency rules and procedures for using force
14 that are far more detailed than the constitutional standard, and often more restrictive with respect
15 to when force may be used. See, e.g., *Denver Police Dept. Use of Force Policy 105.00* (Mar.
16 2010) (requiring that use of force not only be reasonable but also be necessary and that officers
17 do not precipitate the use of force by engaging in unreasonable actions); *Chicago Police*
18 *Department General Order, G03-02-02, Force Options* (Jan. 1, 2016) (stating that, as a matter of
19 policy, officers “will de-escalate and use Force Mitigation principles whenever possible and
20 appropriate, before resorting to force and to reduce the need for force.”),
21 at [http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-9001-
22 1d970b87782d543f.pdf?hl=true](http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-9001-1d970b87782d543f.pdf?hl=true). See also Samuel Walker, *The New Paradigm of Police*
23 *Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST.
24 LOUIS U. PUB. L. REV. 3, 33-34 (2003) (describing varying provisions of Department of Justice
25 settlements with municipalities, frequently regarding when officers may use force).

26 Disagreements exist among policing executives about how and to what degree
27 departmental policy should supplement the constitutional “reasonableness” standard. In
28 advocating for changes to agency policies concerning the use of force, the Police Executive
29 Research Forum (PERF) expressly encouraged law-enforcement agencies to adopt “a higher
30 standard than the legal requirements of *Graham v. Connor*.” Use of Force: Taking Policing to a
31 Higher Standard, *supra*. On the other hand, some organizations have expressed real concern
32 about departing from federal constitutional standards. Most prominently, in response to a PERF
33 report, the Fraternal Order of Police and the International Association of Chiefs of Police (IACP)
34 released a statement rejecting any “calls to require law enforcement agencies to unilaterally, and
35 haphazardly, establish use-of-force guidelines that exceed the ‘objectively reasonable’ standard
36 set forth by the U.S. Supreme Court” and arguing that any reforms be “carefully researched and
37 evidence-based.” IACP Statement on Use of Force (Feb. 7, 2016),
38 <http://lawofficer.com/2016/02/iacp-statement-on-use-of-force/>. The subsequent National
39 Consensus Policy on Use of Force released by the IACP in January 2017 does not merely restate
40 the constitutional reasonableness baseline, however, it also includes important guidance and

1 statements concerning de-escalation, verbal warnings, warning shots, ongoing training, and other
2 subjects discussed in these Principles. See International Association of Chiefs of Police, National
3 Consensus Policy on Use of Force, *supra*.

4 These Principles adopt the view of those organizations and individuals who believe that
5 agency use-of-force policies should be more specific and informative than the general
6 constitutional “reasonableness” standard. Constitutional litigation typically focuses on a case-by-
7 case analysis of an individual officer’s actions, rather than the presence or the quality of
8 municipal policy or practice regarding use of force. Moreover, constitutional cases often avoid
9 reaching determinations regarding the use of force through application of various immunity or
10 justiciability doctrines. See *Pearson v. Callahan*, 555 U.S. 223 (2009) (holding that courts may
11 address qualified-immunity defenses without addressing the merits of whether officers violated
12 constitutional rights); *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (holding that an
13 individual violation must be found first before policy or practice can be relevant); *City of Los*
14 *Angeles v. Lyons*, 461 U.S. 95, 105-106 (1983) (limiting standard to enjoin police policy in the
15 context of use of force).

16 The constitutional standard does not speak to how uses of force should be investigated,
17 tracked, or subjected to internal discipline. Nor does the constitutional standard speak to specific
18 types of weapons or tactical situations that officers may face, ranging from mass demonstrations,
19 to emotionally disturbed persons, to juveniles. Agencies cannot expect a coherent body of policy
20 or even guidance on those subjects from the courts; they must themselves define clear and
21 effective standards. See Lorie Fridell, Steve James & Michael Berkow, *Taking the Straw Man to*
22 *the Ground: Arguments in Support of the Linear Use-of-Force Continuum*, POLICE CHIEF, Dec.
23 2011, at 78 (arguing that use-of-force continuum policies better inform officers than “the vague
24 term ‘reasonableness’”); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761
25 (2012) (arguing that constitutional standards articulated by courts are inadequate by themselves
26 to guide appropriate police conduct); see also Seth W. Stoughton, *Policing Facts*, 88 TUL. L.
27 REV. 847, 864-869 (2014). Modern agencies adopt policies in order to provide detailed guidance
28 to officers. Simply instructing officers to use their discretion to act reasonably is insufficient for
29 this purpose. See, e.g., SAMUEL WALKER, *THE POLICE IN AMERICA* 225 (1999) (describing use-
30 of-force policy and training). Indeed, courts may themselves give some weight to those policies.
31 *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) (“Although these ‘police department
32 guidelines do not create a constitutional right,’ they are relevant to the analysis of
33 constitutionally excessive force.”)

34 In addition, these Principles reflect the view that police officials require more detailed
35 policy and training on the use of force in order to supervise officers effectively. The U.S.
36 Supreme Court has itself recognized that law-enforcement policies, training, and supervision are
37 critical to ensuring that the Fourth Amendment is observed: “Police departments and prosecutors
38 have an obligation to instill this understanding in officers, and to discipline those found to have
39 violated the Constitution.” *Malley v. Briggs*, 475 U.S. 335, 345 n.9 (1986); see also International
40 Association of Chiefs of Police, National Consensus Policy on Use of Force, at 5 (describing the

1 need for annual training on an agency’s use of force policy and “regular and periodic training”
2 on techniques such as de-escalation and use of less-lethal force).

3 **§ 5.04. De-escalation and Force Avoidance**

4 **Agencies should require, through written policy, that officers actively seek to avoid**
5 **using force whenever possible and appropriate by employing techniques such as de-**
6 **escalation. Agencies should reinforce this Principle through written policies, training,**
7 **supervision, and reporting and review of use-of-force incidents.**

8 **Comment:**

9 *a. De-escalation and force-avoidance tactics.* This Section adopts the view that agencies should
10 require officers to avoid using force and to de-escalate if they can do so without endangering
11 themselves or others both before and during encounters. Although other Sections concerning the
12 use of force are directed primarily to officers, the framing of this Section is intended to
13 emphasize that achieving the objective of avoiding unnecessary force demands (in particular)
14 institutional as well as individual efforts. In approaching situations in which force might become
15 necessary, agencies can provide officers on the scene with additional information, they can send
16 resources, and they can facilitate communications among officers. Such techniques can provide
17 additional time for officers to assess a situation, reduce the threat an individual poses, and ensure
18 that law enforcement can achieve its goals without the use of force. Examples of techniques that
19 can be used to de-escalate or avoid the use of force include: tactical repositioning to increase
20 distance or cover; containing the scene in order to reduce the threat to members of the public;
21 and avoiding acts and instructions that are likely to lead individuals to present a risk of serious
22 harm to a police officer.

23 Although officers should seek to minimize the use of force against all individuals, some
24 subpopulations may require special efforts to limit the use of force. For example, officers may
25 require special training to avoid using force against mentally ill individuals who do not
26 immediately follow law-enforcement instructions. In light of recent research regarding implicit
27 biases, indicating that African American men may be perceived as more threatening than their
28 white peers, agencies may also need to consider special efforts to reduce the risk of
29 disproportionate force against African American men. If force is used against some individuals

1 under circumstances in which steps would be taken to avoid force against others, then adequate
2 steps to minimize force have not been taken.

3 Policies, training, and supervision, including performance measures, positive incentives,
4 and discipline, should reinforce use of force-avoidance and de-escalation techniques, and
5 training should be provided to all law-enforcement officers on an ongoing and repeated basis.

6 Many agencies include such techniques in existing policies. Although law-enforcement
7 groups are themselves divided on whether agencies should depart from the constitutional
8 standard, which does not specifically mandate de-escalation and force-avoidance techniques,
9 these Principles endorse the use of tactics to avoid the need to use force, in order to protect the
10 lives of officers and citizens. In general, officers should be routinely equipped with less-lethal
11 tools, and they should be trained to use a range of techniques to defuse situations and avoid the
12 need to use force when it is possible to do so. Complying with this Section does not necessitate
13 detailed written policies laying out every technique that can be used to minimize or avoid force.
14 Rather, much of this Section can and will be implemented through training, supervision, and an
15 agency's broader commitment to reducing harm in policing.

REPORTERS' NOTE

16 The primary goal of this Section is to encourage agencies to adopt policies and practices
17 that minimize the force used by officers. Agencies vary in their adoption of force-minimization
18 techniques and in the specificity with which they detail these techniques in policy. In general,
19 many agencies include de-escalation, minimization, and force-avoidance tactics in policy. See,
20 e.g., POLICE EXECUTIVE RESEARCH FORUM, AN INTEGRATED APPROACH TO DE-ESCALATION AND
21 MINIMIZING USE OF FORCE (2012),
22 [http://www.policeforum.org/assets/docs/Critical_Issues_Series/an%20integrated%20approach%
23 20to%20de-escalation%20and%20minimizing%20use%20of%20force%202012.pdf](http://www.policeforum.org/assets/docs/Critical_Issues_Series/an%20integrated%20approach%20to%20de-escalation%20and%20minimizing%20use%20of%20force%202012.pdf); David
24 Griffith, *De-Escalation Training: Learning to Back Off*, POLICE, March 2, 2016,
25 [http://www.policemag.com/channel/careers-training/articles/2016/03/de-escalation-training-
26 learning-to-back-off.aspx](http://www.policemag.com/channel/careers-training/articles/2016/03/de-escalation-training-learning-to-back-off.aspx); Brandon L. Garrett & Seth W. Stoughton, *A Tactical Fourth*
27 *Amendment*, 102 VA. L. REV. ___ (forthcoming 2017),
28 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754759, at Part II.C (surveying large
29 agencies and finding that most include de-escalation and force-avoidance tactics in policy).
30 Some agencies have quite detailed policies on this subject, while other agencies quite concisely
31 note that minimization should be used. See Seattle Police Manual, Use of Force Policy § 8.100.3
32 (2013); compare Newark Police Dept. General Order 63-2 (Mar. 4, 2013) (officers “are charged
33 with the responsibility of using minimum force necessary to affect [sic] a lawful arrest.”). This

1 Section recognizes that the specificity of the policy may be dictated by agency-specific
2 conditions. Nevertheless, only by explicitly requiring that officers minimize the use of force can
3 departments sufficiently prioritize the use of strategies obviating the need for force. This
4 approach adopts language from the International Association of Chiefs of Police, National
5 Consensus Policy on Use of Force, which states that “[a]n officer shall use de-escalation
6 techniques and other alternatives to higher levels of force consistent with his or her training
7 whenever possible and appropriate before resorting to force and to reduce the need for force,”
8 International Association of Chiefs of Police, National Consensus Policy on Use of Force, at 3, at
9 [http://www.iacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.p](http://www.iacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf)
10 [df](http://www.iacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf), and conforms with the President’s Task Force on Twenty-First Century Policing, which states
11 that “[b]asic recruit training must also include tactical and operations training on lethal and
12 nonlethal use of force with an emphasis on de-escalation and tactical retreat skills.” See FINAL
13 REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 57 (2015),
14 http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf; see also Police Executive
15 Research Forum, Use of Force: Taking Policing to a Higher Standard 5 (Jan. 29, 2016),
16 <https://www.themarshallproject.org/documents/2701999-30guidingprinciples> (“The Critical
17 Decision-Making Model provides a new way to approach critical incidents,” describing a
18 decisionmaking framework for “critical incidents and other tactical situations”); International
19 Association of Chiefs of Police, National Consensus Policy on Use of Force, at 3 (stating that
20 “Whenever possible and when such delay will not compromise the safety of the officer or
21 another and will not result in the destruction of evidence, escape of a suspect, or commission of a
22 crime, an officer shall allow an individual time and opportunity to submit to verbal commands
23 before force is used.”).

24 As Comment *a* suggests, efforts to minimize force are especially critical when interacting
25 with groups against whom force has often been used disproportionately, such as African
26 American men. Jon Swaine et al., *The Counted: People Killed by Police in the US*, THE
27 GUARDIAN, [http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-](http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database)
28 [killings-us-database](http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database); Christine Eith & Matthew R. Durose, U.S. Dep’t of Justice, CONTACTS
29 BETWEEN POLICE AND THE PUBLIC, 2008, at 12 (2011); Federal Bureau of Investigation, Uniform
30 Crime Reporting Program Data: Supplementary Homicide Reports, 2012 (2012), at
31 <http://www.icpsr.umich.edu/icpsrweb/RCMD/studies/35023>; Roland G. Fryer, Jr., *An Empirical*
32 *Analysis of Racial Differences in Police Use of Force* (Working Paper, 2016),
33 [http://scholar.harvard.edu/fryer/publications/empirical-analysis-racial-differences-police-use-](http://scholar.harvard.edu/fryer/publications/empirical-analysis-racial-differences-police-use-force)
34 [force](http://scholar.harvard.edu/fryer/publications/empirical-analysis-racial-differences-police-use-force); Center for Policing Equity, The Science of Justice: Race, Arrests, and Police Use of Force
35 (July 8, 2016), at [http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-](http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf)
36 [UoF_2016-07-08-1130.pdf](http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf). Though addressing the disproportionate use of force is a complex
37 task, training and policy to ensure de-escalation and force avoidance are essential to it.

38 Agencies should also collaborate as necessary before and during crisis situations in order
39 to enable officers to avoid or minimize force. In many jurisdictions, collaboration now occurs
40 between police and mental-health-service providers in order to improve response to persons with

1 mental-health problems, using a model called the Crisis Intervention Team approach. Amy C.
2 Watson and Anjali J. Fulambarker, *The Crisis Intervention Team Model of Police Response to*
3 *Mental Health Crises: A Primer for Mental Health Practitioners*, 8 BEST PRACT. MENT. HEALTH
4 71 (Dec. 2012), at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3769782/>; Randolph Dupont,
5 Maj. Sam Cochran, Sarah Pillsbury, Crisis Intervention Team: Core Elements (Sept. 2007),
6 at <http://cit.memphis.edu/pdf/CoreElements.pdf>. This type of collaboration, and Crisis
7 Intervention Training, has been endorsed by the President’s Task Force on Twenty-First Century
8 Policing. See FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 43-
9 44 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

10 Resource constraints make it difficult for all law-enforcement agencies to offer high-
11 quality training on many specialized techniques for minimizing force. Indeed, many believe that
12 effective training must involve reality-based training, interactive role-play scenarios, and field
13 training, which require far more resources than simply instructing officers on a written policy or
14 procedure, or providing just “shoot/don’t shoot” training that does not address techniques that
15 can minimize or avoid the need to use force. Mark R. McCoy, *Teaching Style and the*
16 *Application of Adult Learning Principles by Police Instructors*, 29 POLICING 77 (2006); see also
17 *Zuchel v. Denver*, 997 F.2d 730, 739 (10th Cir. 1993) (noting expert testimony concluding that
18 training films are viewed “quite often as video games,” and that field exercises and “role-play
19 situations” are “much more effective”); International Association of Chiefs of Police, National
20 Consensus Policy on Use of Force, at 4 (describing need for “regular and periodic” training
21 designed to “provide techniques for the use of and reinforce the importance of deescalation” and
22 “simulate actual shooting situations and conditions” and to “enhance officers’ discretion and
23 judgment in using less-lethal and deadly force.”). It will be crucial for jurisdictions to provide
24 additional resources for agencies to participate in training efforts. Moreover, agencies should
25 think broadly about the kinds of training that may lead to force minimization.

26 Finally, as noted in Comment *a*, supervision can play a critical role in promoting force
27 avoidance and minimization. Such supervision should include not only additional training and
28 disciplinary consequences for officers who use unnecessary force or violate procedure, but also
29 professional rewards and commendations for officers who resolve conflicts in ways that avoid
30 the need to use force.

31 § 5.05. Proportional Use of Force

32 **Officers should not use more force than is proportional to the legitimate law-**
33 **enforcement objective at stake. In furtherance of this objective:**

34 **(a) deadly force should not be used except in response to an immediate threat**
35 **of serious physical harm or death to officers, or a significant threat of serious**
36 **physical harm or death to others;**

1 **(b) non-deadly force should not be used if its impact is likely to be out of**
2 **proportion to the threat of harm to officers or others or to the extent of property**
3 **damage threatened. When non-deadly force is used to carry out a search or seizure**
4 **(including an arrest or detention), such force only may be used as is proportionate**
5 **to the threat posed in performing the search or seizure, and to the societal interest at**
6 **stake in seeing that the search or seizure is performed.**

7 **Comment:**

8 *a. Policy.* Proportionality requires that any use of force correspond to the risk of harm the
9 officer encounters, as well as to the seriousness of the legitimate law-enforcement objective that
10 is being served by its use. This requirement of proportionality operates in addition to the
11 requirement of necessity. It means that even when force is necessary to achieve a legitimate law-
12 enforcement end, its use may be impermissible if the harm it would cause is disproportionate to
13 the end that officers seek to achieve. Thus, the proportionality principle demands that law-
14 enforcement interests go unserved if achieving them would impose undue harm. As the U.S.
15 Supreme Court has noted, “It is not better that all felony suspects die than that they escape.”
16 *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Thus, when an officer faces a minor threat to the
17 officer’s safety, force should not be disproportionate to the physical harm that is threatened.
18 When an officer faces resistance or a threat to the success of an arrest, search, or other law-
19 enforcement activity justifying the use of force, force should not be disproportionate either to the
20 threat or to the significance to the public interest in the specific activity that the officer is using
21 force to achieve. Where engaging in a law-enforcement activity, such as an arrest, may result in a
22 use of force out of proportion to the societal interest in the activity, officers should look for
23 alternatives to the activity in order to minimize the likelihood of disproportionate force.

24 As noted in § 5.01, this Section is not intended to create a liability rule for policing.
25 Accordingly, it states the objective that force should be proportional to the interests at stake. In
26 practice, officers will not always be able to calibrate the use of force precisely to the degree of
27 threat they face or to the significance of the public interest, and liability rules should reflect that
28 fact.

29 Subsection (a) limits deadly force to those situations in which an officer is confronted
30 with an immediate threat of serious harm or death to himself or a significant threat to the public.
31 Thus, this Section permits stopping a resisting or escaping suspect only if he or she poses such a

1 threat. The Section does not take for granted that a person suspected of a crime involving force
2 or the threat of force inevitably poses such a threat. This is consistent with the reasoning of
3 *Garner*, which states that “[w]here the suspect poses no immediate threat to the officer and no
4 threat to others, the harm resulting from failing to apprehend him does not justify the use of
5 deadly force to do so,” *Garner*, 471 U.S. at 11, but it would limit dicta in both *Garner* and *Scott*
6 *v. Harris* that suggests that deadly force may be used against *any* suspect fleeing a crime in
7 which violence was used or threatened, on the ground that such a suspect always poses a
8 sufficient threat to society to justify such force. *Scott v. Harris*, 550 U.S. 372, 382 n. 9; *Garner*,
9 471 U.S. at 10-11. In addition, pursuant to this Section, force should not be used against
10 individuals who pose a threat only to themselves or to property.

11 The proportionality principle is implicit in many agency policies, use-of-force matrices,
12 and narrative descriptions of force options that are used in training or policy. Nevertheless,
13 departments should make explicit that officers may use greater force only when the significance
14 of the public interest justifies it. Moreover, department policies often do not expressly
15 acknowledge that where the harms of force are disproportionate to the public goal the use of
16 force serves, police officers should permit the goal to go unserved. For example, where the
17 public interest is in enforcing a minor criminal law, it may be better to permit a suspect to escape
18 than to use force in a way that risks great harm to the suspect or third parties.

19 The U.S. Supreme Court’s ruling in *Garner* and other constitutional cases makes clear
20 the need to limit deadly force to situations in which officers or civilians face a serious or deadly
21 threat from a suspect. The Supreme Court has not expressly extended the principle of
22 proportionality to the use of force by officers more generally, but doing so is consistent with the
23 Court’s approach to the use of force generally, which requires that courts “balance the nature
24 and quality of the intrusion on the individual’s Fourth Amendment interests against the
25 importance of the governmental interests alleged to justify the intrusion.” *Scott v. Harris*, 550
26 U.S. 372, 383 (2007) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

27 *b. Policies barring or limiting certain uses of force.* Some uses of force are almost
28 invariably disproportionate and for that reason should be barred. Many agencies already prohibit
29 firing warning shots or firing at or from moving vehicles except in situations in which the
30 officers or others face an imminent and unavoidable threat of death or serious injury. Similarly,

1 agencies commonly bar or limit the use of hog-tying, chokeholds, neck restraints, and other
2 restraints that pose a heightened danger of asphyxiation.

3 Agencies also provide and train officers in using intermediate weapons that assist in
4 forcing compliance and restraining individuals, but are less likely to cause death, in order to
5 permit officers to use proportional force. Officers should be equipped with some less-lethal tools
6 for using force.

7 *c. Public interests.* Proportionality demands different responses in different law-
8 enforcement situations, depending on the public interests at stake and the risks of harm and
9 indignity. Physical harms to individuals are not the only harms that must be taken into account.
10 The use of force can damage or destroy property. It can also cause psychological damage to
11 individuals. All this should also be considered in evaluating the proportionality of force. This
12 evaluation must also recognize that different populations are differently susceptible to harm from
13 the use of force: vulnerable individuals such as juveniles, the disabled, the mentally ill, and the
14 elderly may be at special risk. Thus, the harms of a use of force may be proportional to the law-
15 enforcement goal it serves when used against one member of the public, but disproportionate to
16 the same goal when used against someone more vulnerable to harm.

17 *d. Duty to render aid.* Proportionality requires caring for those against whom force is
18 used, once a situation is sufficiently under control. Agencies should instruct and require officers
19 to render necessary medical aid to those against whom force is utilized as soon as is practicable
20 following imposition of such force.

REPORTERS' NOTE

21 Proportionality is an important component of a harm-minimization use-of-force strategy.
22 The proportionality principle is plainly visible in the U.S. Supreme Court's admonition, "It is not
23 better that all felony suspects die than that they escape." *Tennessee v. Garner*, 471 U.S. 1, 11
24 (1989); see, e.g., *Scott v. Harris*, 550 U.S. 372, 378 (2007) (emphasizing the "great risk of
25 serious injury" posed by car chase); *Giles v. Kearney*, 516 F. Supp. 2d 362, 368-369 (D. Del.
26 2007) (finding that "amount of force" an officer used was reasonable because it was
27 "proportionate"). Nonetheless, state laws on use of force do not adopt a proportionality principle
28 beyond limiting the use of deadly force. Most states directly incorporate the language of *Garner*
29 into their statutes on the use of deadly force. See, e.g., N.H. REV. STAT. § 627:5. But some states
30 have not even updated their deadly force laws to reflect the Supreme Court's decision in *Garner*.
31 See, e.g., CAL. PENAL CODE § 196; FLA. STAT. § 776.05; MISS. CODE ANN.
32 § 97-3-15; N.Y. PENAL LAW § 35.30; 13 VT. STAT. ANN. § 2305. And none of the states

1 incorporate a proportionality principle with respect to the use of non-deadly force, despite
2 widespread acceptance of such a principle by law-enforcement agencies.

3 The U.S. Supreme Court’s decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), supports
4 limiting the use of deadly force to those circumstances in which the suspect poses a threat of
5 harm to the officer or to others. However, the Court also suggested by implication that any
6 person suspected of having committed a crime involving violence or the threat of violence poses
7 such a threat. See *Garner*, 471 U.S. at 11-12 (“Where the officer has probable cause to believe
8 that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not
9 constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect
10 threatens the officer with a weapon or there is probable cause to believe that he has committed a
11 crime involving the infliction or threatened infliction of serious physical harm, deadly force may
12 be used if necessary to prevent escape, and if, where feasible, some warning has been given.”).
13 The Court itself interpreted *Garner* this way in *Scott v. Harris*, 550 U.S. 372, 382 n. 9 (reading
14 *Garner* to permit deadly force against a suspect who has committed a crime simply because “his
15 mere being at large poses an inherent danger to society”). However, the Court did not explain or
16 support the assumption that probable cause that one has committed one crime involving violence
17 or the threat of violence is sufficiently predictive of an ongoing threat to the public to justify
18 permitting deadly force against such suspects, and the assertion seems problematic in light of
19 contemporary concerns about the use of deadly force. See Rachel A. Harmon, *Why Arrest?*, 115
20 Mich. L. Rev. 307 (2016). One can imagine circumstances in which the commission of a violent
21 crime—for example a crime of passion directed at a particular individual—implies nothing about
22 an ongoing threat. Nor does it appear from *Garner* that the Court considered carefully the
23 implications of its assertion.

24 Many agencies have explicitly incorporated a concept of proportionality into their use-of-
25 force policies, particularly with respect to the use of deadly force. See, e.g., Maryland Police and
26 Correctional Training Commissions, *Model Policies for Law Enforcement in Maryland* 27 (Sept.
27 27, 2007), <http://mdle.net/pdf/mopoman07.pdf>; Dallas Police Dept. General Order 901.00,
28 Response Continuum – Philosophy (June 3, 2015),
29 <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569ad58a0e4c1148e6b1079b/1452987794280/Dallas+Use+of+Force+Policy.pdf>; San Antonio Police Dept. General Manual,
30 Procedure 501 – Use of Force 1 (Nov. 10, 2015) (stating force may be used “on an ascending
31 scale of the officer’s presence, verbal communications, open/empty hands control, physical
32 force, intermediate weapon and deadly force, according to and proportional with the
33 circumstances of the situation.”), <https://www.sanantonio.gov/Portals/0/Files/SAPD/501-UseOfForce-11-10-15.pdf>; Seattle Police Manual, Use of Force Policy § 8.000.4 (2013),
34 <https://www.seattle.gov/police-manual/title-8---use-of-force/8000---use-of-force-core-principles>.

35 See also POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE
36 38 (2016), <http://www.policeforum.org/assets/30%20guiding%20principles.pdf> (“Police use of
37 force must meet the test of proportionality”).
38
39

1 In addition, many other departments utilize use-of-force matrices or tables in training
2 officers, which are structured to dictate that officers use only proportional kinds and amounts of
3 force. See, e.g., WILLIAM TERRILL, EUGENE A. PAOLINE III & JASON INGRAM, FINAL TECHNICAL
4 REPORT DRAFT: ASSESSING POLICE USE OF FORCE POLICY AND OUTCOMES 16-17 (2011),
5 <https://www.ncjrs.gov/pdffiles1/nij/grants/237794.pdf> (finding that a “substantial majority of
6 police agencies” use a “force continuum structure” typically using a linear design); National
7 Institute of Justice, Office of Justice Programs, The Use-of-Force Continuum,
8 <http://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/continuum.aspx>
9 (Aug. 4, 2009). These tools often specify categories of less-lethal force that must be used prior to
10 the use of lethal force and link these to categories of suspect actions, such as resistance. For a
11 catalogue of use-of-force spectrums used by departments, and an analysis of the relative
12 effectiveness of these spectrums in guiding uses of force, see Joel H. Garner & Christopher D.
13 Maxwell, *Measuring the Amount of Force Used By and Against the Police in Six Jurisdictions*,
14 in NATIONAL INSTITUTE OF JUSTICE, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND
15 LOCAL DATA 37 (1999). For visual models of use-of-force continuums, see INT’L ASS’N OF
16 CHIEFS OF POLICE, PROTECTING CIVIL RIGHTS: A LEADERSHIP GUIDE FOR STATE, LOCAL, AND
17 TRIBAL LAW ENFORCEMENT 116 (2006); National Institute of Justice, The Use-of-Force
18 Continuum, *supra*.

19 Though these matrices and visual representations highlight the concept of proportional
20 uses of force, they focus on the correspondence between officer conduct and suspect resistance.
21 This focus misses other components of a full proportionality analysis. Thus, these tools typically
22 do not consider whether some law-enforcement interests simply are not worth the harm
23 necessary to achieve them in light of larger law-enforcement and public goals. They focus on
24 bodily harm, rather than the full range of harms that individuals suffer as a result of the use of
25 force, such as emotional harm and damage to property. They often do not address the specific
26 issues that arise when officers respond to vulnerable individuals, such as the mentally ill,
27 disabled individuals, and juveniles. See, e.g., Jeffrey S. Golden, *De-escalating Juvenile*
28 *Aggression*, POLICE CHIEF, May 2004, at 30,
29 [https://www.researchgate.net/profile/Jeff_Golden/publication/256374548_Deescalating_Juvenile](https://www.researchgate.net/profile/Jeff_Golden/publication/256374548_Deescalating_Juvenile_Aggression/links/00b7d522629f647565000000/Deescalating-Juvenile-Aggression.pdf)
30 [Aggression/links/00b7d522629f647565000000/Deescalating-Juvenile-Aggression.pdf](https://www.researchgate.net/profile/Jeff_Golden/publication/256374548_Deescalating_Juvenile-Aggression/links/00b7d522629f647565000000/Deescalating-Juvenile-Aggression.pdf). They
31 may or may not acknowledge that different rules are required in specific contexts, such as mass
32 protests, vehicle pursuits, or domestic-violence situations. Thus, policies should move beyond
33 the limited concept of proportionality reflected in existing tools to take account of these varied
34 factors.

35 Many agencies, as noted, bar specific uses of force that are invariably disproportionate.
36 See, e.g., New York City Police Dept., Patrol Guide § 203-11 (Aug. 1, 2013),
37 <http://www.nyc.gov/html/ccrb/downloads/pdf/pg203-11-use-of-force.pdf> [[http://perma.cc/PR2Y-](http://perma.cc/PR2Y-YYUK)
38 [YYUK](http://perma.cc/PR2Y-YYUK)] (prohibiting the use of chokeholds); Michael Avery, *Unreasonable Seizures of*
39 *Unreasonable People: Defining the Totality of the Circumstances Relevant to Assessing the*
40 *Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261,

1 314-315 (2003); Brian Roach, Kelsey Echols & Aaron Burnett, *Excited Delirium and the Dual*
2 *Response: Preventing In-Custody Deaths*, FBI L. ENFORCEMENT BULL., July 2014,
3 [https://leb.fbi.gov/2014/july/excited-delirium-and-the-dual-response-preventing-in-custody-](https://leb.fbi.gov/2014/july/excited-delirium-and-the-dual-response-preventing-in-custody-deaths)
4 [deaths](https://leb.fbi.gov/2014/july/excited-delirium-and-the-dual-response-preventing-in-custody-deaths). In addition, many agencies provide officers with less-lethal weapons pursuant to policy,
5 and they provide training on those weapons. WILLIAM TERRILL, EUGENE A. PAOLINE III & JASON
6 INGRAM, FINAL TECHNICAL REPORT DRAFT: ASSESSING POLICE USE OF FORCE POLICY AND
7 OUTCOMES 19 (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/237794.pdf> (noting that many
8 agencies treat electronic-control weapons and chemical sprays “on their own distinct level of
9 force.”); see also POLICE EXECUTIVE RESEARCH FORUM, 2011 ELECTRONIC CONTROL WEAPON
10 GUIDELINES (2011),
11 [http://www.policeforum.org/assets/docs/Free_Online_Documents/Use_of_Force/electronic%20c](http://www.policeforum.org/assets/docs/Free_Online_Documents/Use_of_Force/electronic%20control%20weapon%20guidelines%202011.pdf)
12 [ontrol%20weapon%20guidelines%202011.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Use_of_Force/electronic%20control%20weapon%20guidelines%202011.pdf); POLICE EXECUTIVE RESEARCH FORUM, GUIDING
13 PRINCIPLES ON USE OF FORCE 10 (2016),
14 <http://www.policeforum.org/assets/30%20guiding%20principles.pdf> (comparing hours of recruit
15 training provided for different types of weapons).

16 Training is important to ensure that proportionality principles are applied in the use-of-
17 force context. Already, departments train on proportionality through use-of-force continua. Many
18 officers also receive training in use of firearms, batons, pressure-point control, ground fighting,
19 and other types of use-of-force strategies. See Brian A. Reaves, *State and Local Law*
20 *Enforcement Training Academies*, 2006, at 4, 9, 14 (2009),
21 <http://www.bjs.gov/content/pub/pdf/slleta06.pdf>. Officers likewise should be trained to decide
22 which techniques are proportional to the threat they are facing, in accordance with their use-of-
23 force continuum. See PROTECTING CIVIL RIGHTS, *supra*, at 119; see also POLICE EXECUTIVE
24 RESEARCH FORUM, RE-ENGINEERING TRAINING ON POLICE USE OF FORCE 46-47 (2015),
25 <http://www.policeforum.org/assets/reengineeringtraining1.pdf>. All agencies should consider
26 providing additional training on proportionality in use of lethal and nonlethal force. The IACP
27 recommends training on use of force, and specifically less-lethal types of force, and, without
28 endorsing a proportionality principle explicitly, the IACP counsels use where available of
29 “alternatives to higher levels of force,” and also notes that deadly force “should not be used
30 against persons whose actions are a threat only to themselves or property.” International
31 Association of Chiefs of Police, *National Consensus Policy on Use of Force*, at 3-4.

32 The Police Executive Research Forum (PERF) has also advocated for a proportionality
33 approach to use of force, stating that departments should adopt policies holding themselves to a
34 proportional approach higher than the legal standard laid out by the U.S. Supreme Court. See
35 POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE (2016),
36 <http://www.policeforum.org/assets/30%20guiding%20principles.pdf>. Several organizations have
37 criticized the PERF report’s approach to proportionality. Most controversially, the PERF report
38 states that: “Proportionality [] requires officers to consider how their actions will be viewed by
39 their own agencies and by the general public, given the circumstances.” *Id.* at 21. This Section
40 departs from this aspect of PERF’s definition of “proportionality,” which incorporates the

1 perspective of the public. This Section reflects a more traditional understanding of
2 proportionality, one that is consistent with common-law public-authority defenses and
3 constitutional reasonableness, while also taking into account public interests. See Rachel A.
4 Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1178-1183 (2008)
5 (discussing role of proportionality in police uses of force). It is therefore not subject to the same
6 set of critiques or controversies as the PERF report. This Section nevertheless shares the
7 conclusion that U.S. Supreme Court principles do not adequately address proportionality.
8 Moreover, agencies may be well advised to carefully consider perspectives of the public and the
9 community when considering policy and training on the use of force. See GUIDING PRINCIPLES
10 ON USE OF FORCE, supra, at 8, 21; Rachel A. Harmon, *Federal Programs and the Real Costs of*
11 *Policing*, 90 N.Y.U. L. REV. 870, 872 (2015) (describing the harms from the use of and threat of
12 force and advocating that they be considered in making police policy).

13 § 5.06. Instructions and Warnings

14 **Officers should provide clear instructions and warnings whenever feasible before**
15 **using force. Agencies should promote this goal through written policies, training,**
16 **supervision, and reporting and review of use-of-force incidents.**

17 **Comment:**

18 *a. Instructions and warnings.* Whenever possible, officers should provide clear
19 instructions to individuals, should make clear if a call for conduct is a request or a command, and
20 should indicate the consequences of refusing to comply with a mandatory order. A verbal
21 warning about force should incorporate these elements in a statement that indicates that force
22 will be used unless a subject complies with a specific command.

23 Verbal warnings may be inadequate for communicating with individuals who do not
24 speak English or are unable to hear or to understand the warnings. If an officer suspects that a
25 verbal warning would not be understood, the officer should seek to communicate in nonverbal
26 ways, to the degree circumstances allow. However, gun shots should not be used to communicate
27 a nonverbal warning.

28 Although federal constitutional law does not always require the use of a warning, it does
29 recognize that warnings are relevant to whether force is reasonable under the law. Specifically,
30 the U.S. Supreme Court held in *Tennessee v. Garner*, 471 U.S. 1 (1985), that warnings should be
31 given “where feasible” before using deadly force against a fleeing suspect, and lower federal
32 courts have examined whether warnings were provided, both as to deadly and non-deadly force.
33 While it is common for agencies to recommend that officers provide warnings when feasible

1 before using deadly force, echoing *Garner*, some agencies neglect to provide clear requirements
2 in policy or training on the subject, and still more neglect to provide requirements that such
3 warnings be used for non-deadly types of force. Warnings are often feasible and advisable when
4 intermediate or lesser types of force are used, and sound policy should require (and training
5 should emphasize) that warnings be used when possible to avert the need to use force.

6 In addition to warnings, when feasible, officers should give individuals who may be
7 subjected to force clear instructions about what conduct the officer considers essential to avoid
8 force, and should do so in a way that conveys the mandatory nature of the order and the
9 consequences of refusing to comply.

REPORTERS' NOTE

10 The U.S. Supreme Court held in *Tennessee v. Garner* that warnings should be given
11 “where feasible” before using deadly force against a fleeing suspect. See *Tennessee v. Garner*,
12 471 U.S. 1, 12 (1985); *Bryan v. MacPherson*, 630 F.3d 805, 831, 833 (9th Cir. 2010) (finding
13 failure to warn the plaintiff before tasing her “militate[s] against finding [the
14 defendant’s] use of force reasonable”); *Casey v. City of Federal Heights*, 509 F.3d 1278, 1285
15 (10th Cir. 2007) (finding “[t]he absence of any warning” before the officer deployed her taser
16 “makes the circumstances of this case especially troubling”); see also *Jones v. Wild*, 244 F.
17 App’x 532, 533 (4th Cir. 2007) (noting that officer “gave a verbal warning prior to releasing”
18 police dog); *Estate of Martinez v. City of Fed. Way*, 105 F. App’x 897, 899 (9th Cir. 2004)
19 (finding no liability, explaining that “[v]erbal warnings are not feasible when lives are in
20 immediate danger and every second matters”); see also International Association of Chiefs of
21 Police, National Consensus Policy on Use of Force, at 4 (“Where feasible, the officer shall
22 identify himself or herself as a law enforcement officer and warn of his or her intent to use
23 deadly force.”).

24 Clear officer instructions and warnings help to reduce the need for use of force by
25 preventing miscommunication that can lead to escalation. See, e.g., Dept. of Justice,
26 Commentary Regarding the Use of Deadly Force in Non-Custodial Situations (Oct. 17, 1995),
27 [https://www.justice.gov/ag/attorney-general-october-17-1995-memorandum-resolution-14-
28 attachment-1](https://www.justice.gov/ag/attorney-general-october-17-1995-memorandum-resolution-14-attachment-1); Minn. Dept. of Public Safety, Use of Force and Deadly Force Model Policy (Oct.
29 2011), [https://dps.mn.gov/entity/post/model-policies-learning-objectives/Documents/Use-of-
30 Force-Deadly-Force-Model-Policy.doc](https://dps.mn.gov/entity/post/model-policies-learning-objectives/Documents/Use-of-Force-Deadly-Force-Model-Policy.doc); Emily N. Schwarzkopf et al., *Command Types Used in
31 Police Encounters*, 8 L. ENFORCEMENT EXECUTIVE F. 99 (2008). Instructions and warnings play
32 an important role in preventing escalation and ensuring compliance. A person who is clearly told
33 that force will be used if they do not comply, and given a clear path to avoid force, is more likely
34 to comply. See, e.g., Dept. of Justice, Commentary, *supra* (“Implicit in this requirement is the

1 concept that officers will give the subject an opportunity to submit to such command unless
2 danger is increased thereby.”).

3 Most state statutes and case law do not expressly require warning prior to the use of
4 force. Some state statutes demand that the officer make his intent to arrest and the reason for the
5 arrest known to the arrestee when he or she makes an arrest. See, e.g., 11 DEL. C.
6 § 467(b)(1). Despite this lack of support at the state-law level, law-enforcement agencies
7 typically require that a warning be given where feasible, tracking the language used in *Garner*
8 and in the lower federal courts. Agency policies reflect this need to provide warnings and this
9 Section reflects consensus among agencies. See, e.g., Chicago Police Dept. General Order G03-
10 02-01, The Use of Force Model (2012),
11 [http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-
cec11383d806e05f.html](http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-
cec11383d806e05f.html); Fort Worth Police Dept., General Order Revision (June 30, 2008); New
12 Orleans Police Dept. Operations Manual, Chapter 1.3 (Dec. 6, 2015),
13 [http://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-1-3-Use-of-
Force.pdf/](http://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-1-3-Use-of-
Force.pdf/) (“Officers shall use verbal advisements, warnings, and persuasion, when possible,
14 before resorting to force”); New York City Police Dept., Deadly Physical Force, Procedure No:
15 203-12, (8/01/2013), [http://www.nyc.gov/html/ccrb/downloads/pdf/pg203-12-deadly-physical-
force.pdf](http://www.nyc.gov/html/ccrb/downloads/pdf/pg203-12-deadly-physical-
force.pdf); U.S. CUSTOMS AND BORDER PROTECTION, USE OF FORCE POLICY, GUIDELINES AND
16 PROCEDURES HANDBOOK 3 (2014),
17 <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf> (requiring
18 warnings “if feasible” before use of force); see also Brandon L. Garrett & Seth W. Stoughton, *A*
19 *Tactical Fourth Amendment*, 102 VA. L. REV. __ (forthcoming 2017),
20 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754759 (describing how most large
21 agencies encourage or require the use of verbal warnings before using deadly force, but
22 somewhat fewer do so regarding non-deadly types of force). Similarly, many agencies prohibit
23 the use of warning shots. See, e.g., COMMISSION ON ACCREDITATION FOR LAW ENFORCEMENT
24 AGENCIES, CALEA STANDARDS FOR LAW ENFORCEMENT AGENCIES 1.3.3 (“Generally, warning
25 shots should be prohibited due to the potential for harm. If permitted, the circumstances under
26 which they are utilized should be narrowly defined.”); see also International Association of
27 Chiefs of Police, National Consensus Policy on Use of Force, at 4 (stating that “[w]arning shots
28 are inherently dangerous” and recommending limitations on their use).