

POLICE And Use Of Force

Damon E. Martin
J.D., National University

ABSTRACT

In recent months, various media outlets have shown incidents of force by law enforcement. The response of these publicized use of force encounters has been on the one extreme calls for changes in how police use force to the other extreme of days of civil unrest in places like Ferguson, Missouri following Officer Darren Wilson's shooting of an unarmed African-American, Michael Brown. A grand jury and later the U.S. Department of Justice concluded that Officer Wilson's use of force was not excessive. These findings nonetheless haven't helped change the perception by many Americans that the use of force by law enforcement, particularly against African-Americans, is often times unjustified (Buchanan, Fessenden, Lai, Park, Parlapiano, Tse, Wallace, ...Yourish, 2015). On April 12, 2015, police officers in Baltimore, Maryland arrested Freddie Gray for allegedly possessing a switchblade. During the arrest and while being transported in a police van, Mr. Gray fell into a coma, was transported to a trauma center and died a few days later. The six officers were initially suspended with pay, pending an investigation. It was later discovered that the Officers did not properly secure Mr. Gray inside the van, in violation of police policy. Baltimore's City Attorney, Marilyn Mosby, announced that she was going to file and has since filed criminal charges against the six (6) officers alleging that Mr. Gray died as a result of a "rough ride" tactic in which a person is thrown about the interior of a police vehicle as s/he is handcuffed and unable to protect themselves from deliberately abrupt driving (BBC, 2015). The cost of these cases and others like it is staggering. The expense to prosecute police officers is an enormous budgetary strain. Likewise, the cost of defending a police officer's actions in a civil suit is also incredible. The number of lawsuits filed against a particular police department can indicate that department's commitment to "good policing". For example, according to the Christopher Commission taxpayers in the City of Los Angeles spent 67.5 million dollars between 1991 and 1995 to resolve lawsuits brought by victims of police abuse. Monies used to settle civil actions resulting from improper use of force is money that is not available to do things like pay teachers or improve roads. The significant civil settlements are the result of a combination of items including overzealous plaintiff attorneys, poor hiring, unwarranted promotion and inefficient training practices of law enforcement agencies. Further, there is a strong possibility that the result of police use of force, whether legal or not, is an eruption in violence and destruction of property as was played out in American cities such as Ferguson and Baltimore. In many cases, the police and police agencies support their officer's use of force and determine it is lawful. Conversely, many members of the local community believe the force used to be excessive and justified (particularly, in recent cases, when the suspect was unarmed or a minor armed with only a toy gun). These events are polarizing and further cause tension and public distrust of police. Too often, the police are fearful of the community they serve and the community is fearful of the police assigned to that community. These tensions and overall feelings that a change is required reached to the highest office. In 2014, President Obama announced a series of reforms in response to the police shooting of unarmed black teenager Michael Brown in Ferguson, Missouri. The shooting of this unarmed African-American teen caused weeks of civil unrest (Buchanan et al., 2015).

KEYWORDS: law enforcement, excessive force, ethnicity, cellphones, media coverage

INTRODUCTION

It is beyond dispute that police officers have a dangerous and complicated job. Every year, a police officer loses his or her life during a routine traffic stop or responding to an emergency call. There's inherent risk in being a police officer. This, in part, is what makes the job attractive to some officers. Unfortunately, while police officers too often police officers assume a great deal of risks, too often police officers present a risk to the communities they serve. In 2015 1,100 people were killed by members of law enforcement in the United States (Robert F. Kennedy Human Rights, 2015). Deadly force is the most extreme use of force. There is an accepted use of force spectrum. On one extreme of the spectrum is deadly force and on the other extreme there are non-lethal uses of force. A non-lethal use of force can be an Officer's use of a Taser. Lower down on the use of force spectrum can be where an Officer uses his baton, fists or boot. Still further down is where an Officer makes verbal threats. Whether or not the Officer's use of force is legal has to be judged on a case-by-case basis. When or how or how much force an Officer uses will depend on that Officer's training and experience. An Officer's training and experience will greatly dictate the Officer's reaction to the scenario the Officer is presented with. Police use of force, particularly in recent months, has been under severe and almost nightly criticism by the media. This paper will examine if race plays a role in whether or not a police officer chooses to use force against a person. And this paper will examine the role of cell phone cameras and social media in revealing excessive police use of force and eliciting nationwide reactions to it. Lastly, this paper will examine two (2) of the more popular solutions to the perceived rise in police use of force.

USE OF FORCE

Police use of force is a delicate subject. There is a range of permitted force. Force, can range from a command issued by an Officer, to an Officer placing a person in a "hold," to an Officer's use of deadly force. An Officer's use of force will depend on the circumstances she is facing, her background and training and the amount of resistance the person is presenting. Clearly a person who is complying with an Officer's commands should not expect to experience any use of force other the Officer's commands. Where a person is complying, an Officer would not be permitted to use any force. An Officer is permitted only to use force to gain compliance. An Officer is not permitted to use force to "punish." In a scenario where a person is complying with an Officer's commands, then the use of deadly force is not permitted. An Officer is expected to employ techniques to deescalate any encounter before force is required. This again will depend on the scenario the Officer is faced with. The tragic shooting of Tamir Rice, a 12 year-old boy, provides an excellent but unfortunate opportunity to examine police use of force and the ability to deescalate before using force.

A citizen reported to the police that a "male black was sitting on a swing in a park "pointing a gun at people." In response to the citizen's report, two Officers arrived on the scene. Within two seconds of their arrival, Officer Timothy Loehman, a 26-year-old in training, shot and killed Tamir. The Officers stated that Rice reached toward his waist where the replica gun was (Kuns, 2015). When an Officer reasonably believes that he is facing deadly force, he would be permitted to use deadly force. In this case, Officer Loehman believed that he was facing

deadly force when he claimed Tamir reached in his waist band for the replica gun. However, many citizens in Cleveland, Ohio believed that the Officers failed to take any steps to deescalate the situation before using deadly force. Tamir's family argued that in only 2 seconds it is difficult if not impossible to get a full grasp of the situation. The use of deadly force was out of policy and therefore illegal. It is important to keep in mind that the police never faced deadly force as the 12 year-old boy had only a replica gun. It is also important to remember that an Officer is asked to make a split second life and death decision and it is difficult in that short amount of time to determine whether or not a gun is real or fake. A Grand Jury was convened, was presented evidence and elected to not indict Officer Loehman. This is a tragic loss of life, especially since Tamir was only 12 years-old and was playing with a toy gun. What is also particularly tragic is that the citizen who called in to make the complaint about Tamir pointing a fake gun at people also stated that he believed Tamir to be a juvenile and the gun to be fake. This information was never provided to the responding officers. This case gained national attention not only for the reasons previously stated but also because Officer Loehman was deemed an emotionally unstable recruit and unfit for duty while an Officer with the Independence, Ohio police force (Ninth Circuit Jury Instruction Committee [NCJIC] , 2007). That determination apparently didn't preclude him for gaining employment in another precinct.

An Officer's proper use of force is governed by police policy and State and Federal law. For example, according to the International Association of Chiefs of Police, the use of force is described as the "amount of effort required by police to compel compliance by an unwilling subject" (International Association of Chiefs of Police [IACP], 2001, p. 66). If an Officer has Probable Cause to arrest a person, the Officer is permitted to use the amount of force necessary to place that person under arrest. The Fourth Amendment to the U.S. Constitution has been interpreted to mean that a police officer may only use such force as is "objectively reasonable" under all of the circumstances. In other plainer language, a Grand Jury or Criminal or Civil Jury would be told and instructed that they are to judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight (Ninth Circuit Jury Instruction Committee [NCJIC] , 2007). A reasonable officer should follow, as best he can, his training and experience. This is the standard by which an officer's use of force will be judged. Again, in the Tamir case some Cleveland citizens believe that due to Officer Loehman's mental instability, he omitted multiple stages in the Use-of-Force Continuum (Kuns, 2015). Officers are trained to know that at the low end of the continuum is an Officer's presence. This will work to deter a crime from occurring and diffuse a situation because most people don't want to be arrested. The next stage on the continuum is using verbal commands. An officer would start by using a calm voice and giving non-threatening commands. The officer may increase the tone and volume in order to gain more immediate compliance. In Tamir's case some have argued that one or both of the Officers could have given verbal commands in 2 seconds rather than shoot 2 seconds. The commands we often see on television are put your hands up or get down on your knees. If these commands were given to Tamir, some argue that he may still be alive. Officers are asked to make split second decisions that can preserve a life or end it. The facts in the Tamir shooting were presented to a Grand Jury by a prosecutor. The Grand Jury, in electing to not indict Office Loehman, obviously came to the conclusion that armed with the information of a male black pointing a gun at people and within 2 seconds of arriving at the park seeing a male black reach towards his waistband where the gun was later found, was a justified use of force. For many in Cleveland and in particular the Rice

family, 2 seconds seemed too brief to assess a threat and react to it. The Grand Jury was most likely instructed that they were not permitted to judge Officer Loehman's actions with hindsight vision. Rather, they were to judge Officer Loehman's actions based on what a reasonable officer would have done in Officer Loehman's shoes.

RACE OF SUSPECT

In 2016, it is without reasonable dispute that police brutality is still disproportionately directed at people of color. According to a report by the Bureau of Justice Statistics, some 4,813 people died in the process of being arrested between the years of 2003 through 2009. Of that figure, some 57% people were Black, non-Hispanic and Hispanic. Thus, the majority of people killed were people of color (BJS, 2011). Nearly 1 in 3 African-Americans killed by the police in 2015 were identified as unarmed. Unarmed African-Americans were killed at 5 times the rate of unarmed whites in 2015. The same BJS research indicates that some 39% of the arrestees who died in the process of an arrest were identified as White, non-Hispanic. What frustrates many in the African-American community is that only 9 of the 102 cases of White Officers using deadly force against African-Americans resulted in the Officer being charged with a crime (BJS, 2011). There was not a conviction, but rather a prosecutor electing to bring charges or even a grand jury issuing an indictment.

Perhaps the most shocking example of a White Officer using deadly force against an unarmed African-American is the video of the killing of Walter Scott. Caucasian Officer Michael T. Slager in North Charleston, S.C. fatally shot unarmed African-American male Walter L. Scott in the back, claiming he was in fear of his life. The shooting resulted from Officer Slager stopping Mr. Scott for a broken taillight. Mr. Scott was initially stopped for a minor traffic violation. The contact escalated to the video showing Mr. Scott running away from Officer Slager and Officer Slager shooting at Mr. Scott 8 times, fatally killing him. The shooting took place as Mr. Scott was 15-20 feet away from Officer Slager and running away from him (Schmidt & Apuzzo, 2015). An Officer is permitted to use deadly force when faced with deadly force. Officer Slager stated that he was in fear of his life when he fatally shot Mr. Scott. It is the belief of many, in order to avoid criminal prosecution, police officers need only assert that they were in fear of their lives to justify the use of force (even if the use of force was against unarmed African-Americans). The reason for not prosecuting has been different in every case. But too often the Officer asserts that he was in fear of his life or that the now deceased suspect reached for the Officer's gun and the Officer shot the person in self-defense. The Officer is alive to tell his version of events. However, the suspect is deceased and unable to tell his side. With no video of the incident and no other witnesses to support or contradict an Officer's recount of the events, a prosecutor may be left with no other option but to elect to not prosecute the Officer as the prosecutor does not have evidence beyond reasonable doubt needed to obtain a guilty verdict. When police officers time and time again assert that they shot an unarmed person because of being in fear of their lives or because the person was going for the Officer's gun and the result is no prosecution against the Officer, it sends the clear message to the police. The same message is also being sent the African-American and Hispanic communities: their lives don't matter.

On February 12, 2015, the current F.B.I. Director James B. Comey in a speech given at Georgetown University, commented on the significant research that shows that all people have unconscious racial biases (Schmidt, 2015). All people includes police officers. If police officers

have an unconscious racial bias and work in areas where the majority of the people they arrest are from one particular racial or ethnic group, it is not surprising that they naturally become jaded or their racial biases become reinforced by what they experience. In his speech, Director Comey called for an honest discussion about race and the attitudes of law enforcement. Director Comey believes that Officers who work neighborhoods where African-Americans commit crimes at a high rate develop a cynicism that shades their attitudes about race (Schmidt, 2015). Director Comey's statement seems to bolster and substantiate the complaints of many African-Americans that they are being racially profiled and victimized by the police.

CELL PHONE USE

The rise of every day citizens using their cell phone to record police conduct is on the rise. The media rightfully or wrongfully has used the cell phone videos to try the police in the court of public opinion. A cell phone recorded a police officer attempting to arrest an African-American teenager in McKinney, TX who was wearing a bathing suit. The arresting officer was recorded slamming the teenaged girl to the grass and pressing his knee into her spine. The footage also recorded Officer Eric Casebolt pointing his service pistol at other unarmed teenagers. The cell phone footage resulted in the Officer Casebolt's resignation after the footage went viral with immediate backlash (Filming Cops, 2015). A Cell phone video footage of a school resource officer Ben Fields showed him pulling a teenage girl from a desk, pushing her on the ground and taking her into custody. Richard County Sheriff Leon Lott stated that Officer Lott has been suspended without pay pending an investigation. The video is disturbing as the desk is seen and heard being slammed to the floor. These two videos display Caucasian Officers using what some describe as excessive of force as against unarmed African-American teens (Stelloh & Connor, 2015). The media showed a California Highway Patrol (C.H.P.) officer on his knees crouching over a mentally ill woman brutally punching her repeatedly in her face. The result was a \$1,500,000 settlement, the termination of the C.H.P. Officer and possible criminal charges against him (Abdollah, 2014). Again, that is 1.5 million dollars not being allocated to maintain California's roads, highways or for any other public use.

Director Comey in the above mentioned speech at Georgetown, stated that many Officers have reported not wanting to exit their cruisers (do their job) because so many people are now filming their actions and uploading the footage to the internet or turning the footage over to local media outlets. Director Comey calls this the "YouTube effect," wherein the police are becoming stars in the next viral video (Schmidt, 2015). The reality of police not wanting to do their jobs would seem to further support the need for more surveillance of law enforcement. It seems difficult to garner support for less police oversight when cell phones have recorded police use of force that has later been determined to be excessive or officers refusing to respond altogether. Director Comey stated that the police feel under siege by young people and their cell phones from the moment they step out of their cruisers. The fact that young people may be taunting the police is reprehensible. But the fact that Officers are being filmed is just a fact of present day life.

SOLUTIONS

What are some possible solutions? The American Civil Liberties Union (A.C.L.U.) has weighed in on police use of force. The A.C.L.U. believes that one possible solution or at least a

step in the right direction is to require that all police officers have and wear body cameras (American Civil Liberties Union [ACLU], 2015). The cameras will record an Officer's contact with the public and use of force. This idea has caught on and is being implemented in places like Los Angeles, CA. There are some hurdles that must be overcome that aren't always discussed when it comes to body cameras. The first obvious hurdle is the cost. Who will pay this cost? The other issue that merits some discussion is what the cost savings be for body cameras. For example, a suspect claims an Officer used excessive force during the arrest. The suspect threatens to or even files a civil lawsuit. The video footage is shown to the suspect or his attorney. If the footage supports the Officer's version of the events, the suspect may well dismiss his lawsuit or not have his suit saving tax payers millions of dollars it would have otherwise spent litigating this case and many others. Likewise, the footage shows that the Officer's version is not accurate. This could also impact cost as it may be more cost effective to try to reach a settlement at that point rather than again spending unnecessary attorney's fees and court time. The cost-benefit analysis may support incurring a huge expense in training and equipping police officers with body cameras with the hopes of saving money later on due to not having to defend frivolous lawsuits and fighting meritorious lawsuits. The other problem with body cameras is creating and enforcing clear guidelines that govern under what circumstances an Officer can turn off the camera. For example, what if the Officer is working undercover? What if the Officer is interviewing a minor or talking with an informant? Should the Officer have those communications recorded and if they are recorded are they subject to be disclosed to a defendant should charges be filed against him? Allowing an Officer discretion to turn on and off his body camera raises the possibility of abuse and may further cause friction between the police and the public as the public may feel that the police are hiding or covering up the bad acts by turning off, destroying or hiding the footage. This concern has merit. Laquan McDonald, on October 20, 2014, was shot 16 times by a white police officer Jason Van Dyke when Mr. McDonald allegedly refused to drop a 17 inch folding pocket knife according to Chicago police officers. The events leading up to (but not the actual shooting) were likely captured by a local Burger King's surveillance cameras. Burger King confirmed that Chicago police viewed and deleted the video of the police shooting of Laquan McDonald. After the shooting, according to Jay Darshame, the District Manager for Burger King said four to five police officers entered the restaurant and asked to view the video and were given the password for accessing the equipment. Three hours later they left. The very next day an investigator from the independent Police Review Authority asked to view the security footage and it was discovered that 86 minutes of video was missing (Kuns, 2015). The facts of this incident are disturbing. The McDonald family's concerns or distrust of Officer Van Dyke's recount of the events and shooting is more questionable due to the fact that 86 minutes of the Burger King footage has simply gone missing. The unexplainable disappearance of an hour of footage validates the concern of citizens about the police being given discretion to turn on and off their body cameras. The ability to turn on and off cameras is like the deletion of video footage and will forever raise the question: what are you hiding?

These and other difficult issues will have to be addressed before body worn cameras can and perhaps should be implemented or required nationwide. Similar to body-worn cameras is the idea of dash camera in all police vehicles. Again, cost and the power to turn them off are issues of discussion. Another issue is the reluctance of many Officers to wearing body cameras or patrolling in police cruisers with dash cameras. Some Officers have reported that they feel

they are being “Monday Morning Quarterbacked.” The video doesn’t often show the complete picture and may only record a portion of the contact without recording the events that led up to the use of force or the events that immediately followed. Many Officers -rightfully so- feel that the footage, particularly if released to the public, will be taken out of context and the Officers will be tried in the Court of public opinion. Some Officers have reported fear that the footage from the dash camera, if released to the public may cause, other community uprisings like that of Ferguson. Those are legitimate concerns. Many prosecutors are reluctant to release video footage for the fear that, if released, video showing a police officer shooting an unarmed person after which a prosecutor elects not to file charges against the police officer will result in further mistrust of the justice system. The public will have no stomach for listening to the reasons why the prosecutor did not file charges in light of video evidence. But what is also equally legitimate about requiring the use of dash cameras or body cameras is that these cameras may help to exonerate an Officer if accused of wrongful conduct and these cameras may provide footage of criminal conduct to justify a conviction or help support the actions that the Officer took. The public should be mindful that there are many other professions where professionals are recorded. Sports athletes have their every decision on the field or on the court subject to criticism on a nightly basis. Some surgeons, lawmakers and lawyers have their decisions recorded and are subjected to later criticism. It bears noting here that, in the case of Walter Scott, the footage from the dash camera belonging to the vehicle issued to the Officer in question is the linchpin evidence supporting his termination and now prosecution. Another possible solution may be to require Officers to have more diversity training. Cars and other machines need periodic updates and maintenance. So does the human brain and even more so the brain of a police officer.

Many police officers joined the “force” with a desire to do good. Diversity Training will remind officers of his or her original motivations and force the officers to come to grips with his or her own racial biases and in order to address those. Director Comey, in the same speech at Georgetown University said tensions could be eased if the police got to know those they were charged to protect. “It’s hard to hate up close.” A perfect example of this is a video that has gone viral wherein a Caucasian officer responded to a complaint of young African-American males playing basketball in the street. The Officer approached them and rather surprisingly briefly played a game with the young men. The Officer told the young men to have fun, be safe and watch out for traffic (Bitette, 2016).

Reference Page

Abdollah, T. (2014, September 25). *Woman hit by California officer gets \$1.5 million*. Retrieved from <http://news.yahoo.com/woman-hit-california-officer-gets-1-5-million-074742550.html>

American Civil Liberties Union. (2015). *Fighting Police Abuse: Action Manual*. Retrieved from <https://www.aclu.org/fighting-police-abuse-community-action-manual>

BBC. (2015, September 1). *Freddie Gray case: Six officers to be tried separately*. Retrieved from <http://www.bbc.com/news/world-us-canada-34131423>

Bitette, N. (2016, January 22). *Florida police officer surprises 'loud' teens by joining them in game of pick-up basketball*. Retrieved from <http://www.nydailynews.com/sports/watch-surprises-loud-teens-game-basketball-article-1.2506140>

BJS (2011). *Arrest-Related Deaths, 2003-2009 – Statistical Tables*. Washington, D.C.: U.S. Department of Justice, Office of Justice Programs.

Buchanan, L. Fessenden, F., Lai, R., Park, H., Parlapiano, A., Tse, A., Wallace, T., ... Yourish, D. (2015, August 10). *What Happened in Ferguson?* Retrieved from <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>

Filming Cops (2015, June 13). *Police Attack Girl in Bikini, Pull Gun on Teens at Pool Party*. Retrieved from <http://www.filmingcops.com/police-assault-girl-in-bikini-pull-gun-on-teens>

International Association of Chiefs of Police. (2001). *Police Use of Force in America* (1st ed.).

Alexandria, Virginia.

Kuns, K. (2015, November 24). *Burger King Confirms Chicago Police Deleted Video of McDonald Shooting*. Retrieved from <http://www.crooksandliars.com/2015/11/burger-king-confirms-chicago-police>

Ninth Circuit Jury Instruction Committee. (2007). *Manual of model Civil Jury Instructions* (USDC - 9.22 Particular Rights - 4th Amendment Unreasonable Seizure of Person – Excessive Use of Force). Retrieved from <http://www3.ce9.uscourts.gov/jury-instructions/node/160>

Robert F. Kennedy Human Rights . (2015, December 23). *Excessive Use of Force by Police Against Black Americans in the United States*. Retrieved from http://rfkcenter.org/media/filer_public/02/1d/021d31a2-19a5-48c6-b62c-7804cd3b7f9f/submission_to_unwgepad_re_excessive_use_of_force_by_police_against_black_americans_1.pdf

Schmidt, M. S. (2015, October 29). *James B. Comey, Unlike Other F.B.I. Directors, Takes On Controversial Issues*. Retrieved from http://www.nytimes.com/2015/10/30/us/politics/james-b-comey-fbi-director-says-focus-on-brutality-brings-less-police-enforcement.html?_r=0

Schmidt, M. S., Apuzzo, M. (2015, April 7). *South Carolina Officer Is Charged With Murder of Walter Scott*. Retrieved from <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>

Stelloh, T., & Connor, T. (2015, October 27). *Video shows cop body-slamming high school girl in SC classroom*. Retrieved from <http://http://www.msnbc.com/msnbc/video-appears-show-cop-body-slamming-student-sc>

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