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## Lexipol's Fight Against Police Reform

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*We are in the midst of a critically important moment in police reform. National and local attention is fixed on how to reduce the number of people killed and injured by the police. One approach—which has been recognized for decades to reduce police killings—is to limit police power to use force.*

*This Article is the first to uncover how an often-overlooked private company, Lexipol LLC, has become one of the most powerful voices pushing against reform of use-of-force standards. Founded in 2003, Lexipol now writes police policies and trainings for over one-fifth of American law enforcement agencies. As this Article documents, Lexipol has refused to incorporate common reform proposals into the policies it writes for its subscribers, including a use-of-force matrix, policies requiring de-escalation, or bright-line rules prohibiting chokeholds and shooting into cars. Lexipol has also taken an active advocacy role in opposition to proposed reforms of police use-of-force standards, pushing, instead, for departments to hew closely to Graham v. Connor's "objectively reasonable" standard. Finally, when use-of-force reforms have been enacted, Lexipol has attempted to minimize their impact.*

*Local governments, police departments, and insurers have long viewed Lexipol as a critically important partner in keeping policies lawful and up to date. This Article makes clear that they should take a closer look. Lexipol's aggressive efforts to retain wide officer discretion to use force may ultimately expose officers and agencies to liability instead of shielding them from it. It is time for advocacy groups seeking policing improvements to train their sights on Lexipol. Unless and until Lexipol changes its approach, the company should be viewed as a barrier to reform.*

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## INTRODUCTION

George Floyd's tragic murder by former Minneapolis Police officer Derek Chauvin sparked nationwide protest and renewed debate about the future of police violence and reform. Advocates, courts, legislators, and public figures from across the country, all over the world, and every political stripe began calling for wide ranging changes to police practices. Although many different proposals have been advanced, one common theme—echoed in many organizations' platforms and in bills proposed in the House and Senate—is the need to reform police departments' use-of-force policies.<sup>1</sup>

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1. For discussion of calls for use-of-force policy reform, see *infra* Part I.B.

Today, there are almost 18,000 law enforcement agencies across the country,<sup>2</sup> yet no national standard governing their use of force.<sup>3</sup> The only national legal guidance about what police use-of-force policies should contain comes from the U.S. Supreme Court's seminal 1989 decision, *Graham v. Connor*, which interpreted the Fourth Amendment to require that officers' force be "objectively reasonable" under the totality of the circumstances known to the officer at the time.<sup>4</sup> *Graham* has been widely criticized for not offering sufficient guidance to officers and creating no clear limits on the extent of officers' power.<sup>5</sup>

Proposed reforms to police use-of-force policies coalesce around several basic principles that move beyond the *Graham* standard.<sup>6</sup> As we develop in Part I of this Article, at the most basic level, reformers argue that police policies must be more stringent than *Graham*, authorizing force only if necessary and prohibiting certain types of potentially lethal force such as chokeholds and shooting into cars. Those seeking to reduce police violence also agree that police policies should require that officers make efforts to de-escalate situations that could result in force and adopt a continuum that instructs officers to use the least force possible under the circumstances. To promote accountability for police violence, reformers also favor comprehensive reporting requirements, including mandated reporting when use of force does not result in physical injury. Finally, commentators have stressed the importance of training officers to serve as guardians instead of warriors—focused not on the use of force against citizens but on protecting them from harm. Decades of research have demonstrated that more restrictive use-of-force policies and associated trainings can reduce police violence.<sup>7</sup>

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2. For information about the number of law enforcement agencies across the country, see FED. BUREAU INVESTIGATION, U.S. DEP'T OF JUST., SUMMARY OF THE UNIFORM CRIME REPORTING (UCR) PROGRAM, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/about-ucr/aboutucrmain\\_final.pdf](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/about-ucr/aboutucrmain_final.pdf) [https://perma.cc/97MY-DGZY].

3. For discussion of the lack of national standards for use of force, see *infra* Part I.A.

4. 490 U.S. 386, 397 (1989).

5. See, e.g., Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1505 (2016) (explaining that the *Graham* framework and other caselaw amounts to a "Privileges and Immunities Clause for police officers"); Rachel Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119 (2008) (arguing that Supreme Court decisions "regulating the use of force by police officers is deeply impoverished"); Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 526 (2021) (explaining that the *Graham* factors "have limited analytical value" and "offer[] no guidance on what type of force or how much force officers can legitimately use in any given situation"); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1044 n.93 (1995) ("One searches in vain for any body of case law that gives [the *Graham*] standard some content.").

6. See *infra* Part I.C (describing these proposed reforms).

7. See *infra* notes 86–91, 97–101, 107–08, 116–21, 124–27, 136–39 and accompanying text (describing reductions on uses of force (without threatening officer safety) correlated with restrictive use-of-force policies, de-escalation policies, use-of-force continuums, policies prohibiting certain dangerous policies, policies mandating reporting, and "guardian" style—as opposed to "warrior" style—trainings).

In the months following George Floyd's murder, some law enforcement agencies embraced these proposed reforms.<sup>8</sup> Other law enforcement unions and organizations resisted calls for reform, arguing instead that proposed changes to use-of-force policies are unnecessary or would be harmful to law enforcement.<sup>9</sup>

One of the most powerful voices pushing against reform to use-of-force standards is an entity unfamiliar to many: a private, for-profit corporation called Lexipol LLC that contracts with law enforcement agencies to write their law enforcement manuals and training modules.<sup>10</sup> Founded in 2003, Lexipol began as a provider of policies for law enforcement agencies in Southern California. Since then, Lexipol has rapidly expanded its footprint and now writes police policies and trainings for over 3500 law enforcement agencies in thirty-five states.<sup>11</sup>

In a prior article, we offered the first in-depth analysis of Lexipol's rise to prominence and power in police policymaking.<sup>12</sup> We found that Lexipol offers a service that many local governments consider valuable—particularly those without the resources to craft and update police policies on their own. But we also raised several concerns about the way in which Lexipol crafts and disseminates its policies. Top among those concerns is the fact that Lexipol appears to view its products primarily as a means of reducing legal liability.<sup>13</sup>

Since the dawn of the police professionalism movement, police policies and training have been understood as a means of limiting officer discretion—not reducing liability exposure. In theory, these two interests can go hand in hand—improving officer behavior can lead to less misconduct and, thus, fewer lawsuits and payouts. But Lexipol's approach to reducing liability risk can sit in tension with longstanding efforts to restrain officers' discretion through police policies. As we noted in our 2017 article, Lexipol had opposed calls to craft police policies that went beyond the standard in *Graham* or place any hard limits on police officers' power to use force, arguing that such limits could jeopardize law enforcement's position in litigation.<sup>14</sup>

Now, in this moment of unprecedented attention to police violence and reform, policies that preserve maximum officer discretion are under fire. And Lexipol is fighting back. Lexipol has advertised itself to police departments in impartial terms—as a company that provides “state-specific law enforcement policies that are

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8. See *infra* notes 144–45 and accompanying text (describing local governments' adoption of use-of-force policy reforms).

9. See *infra* notes 146–48 and accompanying text (describing resistance to use-of-force policy reform).

10. For a description of Lexipol's history, products, and influence, see Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891 (2018).

11. Press Release, Lexipol, Lexipol and Praetorian Digital Merge, Creating Comprehensive Content, Training and Policy Platform for Public Safety, (Feb. 8, 2019), <https://www.globenewswire.com/news-release/2019/02/08/1714214/0/en/Lexipol-and-Praetorian-Digital-Merge-Creating-Comprehensive-Content-Training-and-Policy-Platform-for-Public-Safety.html> [<https://perma.cc/T3XQ-MVJS>].

12. See generally Eagly & Schwartz, *supra* note 10.

13. *Id.* at 916.

14. *Id.* at 925–26.

updated in response to new state and federal laws and court decisions.”<sup>15</sup> Lexipol claims its policies are authored in consultation with a wide range of groups, including law enforcement and civil rights groups, to produce policies that conform with the law and best practices.<sup>16</sup> Yet, despite its purported neutrality as a provider of police policies, Lexipol has been actively engaged in efforts to oppose and undermine use-of-force policy reforms.

As this Article documents, Lexipol has opposed reforms in several ways. First, Lexipol has declined to adopt common reform proposals, including a use-of-force matrix, policies requiring de-escalation, or bright-line rules prohibiting certain types of behavior—like chokeholds and shooting into cars. Instead, Lexipol has chosen to hew its policies closely to *Graham*'s “objectively reasonable” standard.<sup>17</sup>

Second, our research reveals that Lexipol has taken an active role in opposition to proposed reforms of police use-of-force standards. Their advocacy extends far beyond the policies and trainings it provides its subscribers. Indeed, Lexipol has disseminated its anti-reform message in blogposts, white papers, informational webinars, and other materials provided to labor unions and political organizations.<sup>18</sup> In 2018, Lexipol acquired a law enforcement training and news entity called PoliceOne—now rebranded as “Police1 by Lexipol”—which includes original content and news aggregated from other sources.<sup>19</sup> The messaging on Police1 is consistent with Lexipol's blogposts, webinars, policies, and trainings. In each forum, Lexipol espouses the view that police officers need maximum discretion to use force and that reforms advanced by advocates and lawmakers would undermine this need to maximize police discretion.

Third, our research shows that Lexipol has attempted to minimize the efficacy of use-of-force reforms when they are enacted. To illustrate this observation, we analyze Lexipol's engagement with a law recently passed in California that allows police to use force only when necessary.<sup>20</sup> Lexipol advocated against the bill when it was being considered, and its leadership claimed that they were instrumental in efforts to add language to the bill that made it less restrictive. Although California's legislature, its Commission on Police Officer Standards and Training, and advocacy groups have recognized the enacted law as limiting police powers in meaningful

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15. *Law Enforcement*, LEXIPOL, <https://www.lexipol.com/industries/law-enforcement/> [<https://perma.cc/U5N2-UJZD>].

16. See Eagly & Schwartz, *supra* note 10, at 903 (describing Lexipol's representation that it seeks input from a range of sources, including civil rights groups like the ACLU).

17. See, e.g., LEXIPOL, *Policy 300—Use of Force*, in ANAHEIM PD POLICY MANUAL, <https://www.anaheim.net/DocumentCenter/View/29459/APD-Policy-Manual> (last updated Aug. 27, 2020) [<https://perma.cc/K72F-8NA3>].

18. See *infra* Part II.B (describing Lexipol's dissemination of this message).

19. See Press Release, Police1 by Lexipol, PoliceOne and Lexipol Merge, Creating Comprehensive Content, Training and Policy Platform for Law Enforcement (Feb. 8, 2019), <https://www.policeone.com/police-products/training/online-training/press-releases/policeone-and-lexipol-merge-creating-comprehensive-content-training-and-policy-platform-for-law-enforcement-d718pPRW26Vqq9ZT/> [<https://perma.cc/SKK4-JLS5>].

20. See Assemb. 392, 2019–2020 Leg., Reg. Sess. (Cal. 2019). For further discussion of state-level reforms to use-of-force policies, see *infra* Part III.

ways, Lexipol has advised its members that nothing has changed in California and that police departments can continue to rely on the *Graham v. Connor* standard.<sup>21</sup>

Understanding Lexipol's opposition to reform is critically important in this moment. Lexipol's rejection of most use-of-force policy reforms means that its 3500 subscribers, almost one-fifth of law enforcement agencies across the country, will be less likely to adopt these reforms. Lexipol's anti-reform message, which is communicated on its website, blogs, and promotional arms like Police1, also serves as ammunition for state and local governments across the country reticent to adopt more restrictive policies. And Lexipol's involvement in the implementation of reforms once adopted threatens to undermine their spirit and impact.

In this transformative moment in American policing, calls to reform should—and do—go far beyond changes to use-of-force policies and trainings. Activists and scholars also seek to defund and dismantle the police, to invest public safety dollars into Black communities, and to address ongoing and systemic racism in the criminal justice system and society more generally.<sup>22</sup> We agree that an ambitious vision to rethink the institution of policing is necessary and recognize the crucial work of those who have begun this task.<sup>23</sup> Nevertheless, so long as any future public safety system includes some officials authorized to use force, Lexipol LLC will undoubtedly seek to play a role in shaping their powers.

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21. See *infra* Part II.C (describing Lexipol's efforts to minimize the effects of the California bill, both before and after its passage); see also *infra* Part III.B (describing Lexipol's role in the implementation of an executive order in New York).

22. See, e.g., #DefundThePolice, BLACK LIVES MATTER (May 30, 2020), <https://blacklivesmatter.com/defundthepolice/> [<https://perma.cc/WY5A-BM44>] (sharing a petition calling for a national defunding of the police in order to reinvest that money into Black communities and resources for them to thrive); #8TOABOLITION, <https://www.8toabolition.com/> [<https://perma.cc/7U9Y-PDP2>] (discussing that the claims of the 8 Can't Wait Campaign of reducing police killings is false and misleading and do not reflect the needs of criminalized communities); see also Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017) (discussing how “legal estrangement” offers a more nuanced lens through which scholars and policy makers can understand and respond to current problems of policing); Christy E. Lopez, Opinion, *Defund the Police? Here's What That Really Means*, WASH. POST (June 7, 2020), <https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means/> [<https://perma.cc/9G7D-QSE2>] (explaining how defunding the police means shrinking the scope of police responsibilities and shifting safety measurements to better equipped entities while investing more in community resources).

23. See, e.g., Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. (June 15, 2020), <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/> [<https://perma.cc/8ZBV-5RYU>]; Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016); Brian Highsmith, *On Reimagining State and Local Budgets in an Abolitionist Moment*, LAW & POL. ECON. BLOG (June 15, 2020), <https://lpeblog.org/2020/06/15/on-reimagining-state-and-local-budgets-in-an-abolitionist-moment/> [<https://perma.cc/P9U5-XS4L>]; Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/H68E-MBP9>]; Jocelyn Simonson, *Power Over Policing*, BOS. REV. (June 8, 2020), <http://bostonreview.net/law-justice/jocelyn-simonson-power-over-policing> [<https://perma.cc/ESG6-QR39>].

Lexipol's dominant role in police policymaking should be cause for real concern. As this Article reveals, Lexipol has taken a retrograde position in its use-of-force policies, advocated against proposed use-of-force reforms, and endeavored to undermine reforms that are enacted. Lexipol is not a reliable partner for federal, state, and local governments, or for community members and other advocates interested in advancing police reform.

The remainder of this Article proceeds in three Parts. Part I describes the current landscape of police use-of-force policies and six types of use-of-force reforms that have shaped current calls for change. Part II analyzes Lexipol's resistance to these calls for reform and their efforts to diminish the impact of these reforms once enacted, as revealed in their use-of-force policies and trainings, webinars, blog posts, and other public statements. Finally, Part III considers the implications of our findings for local governments, police departments, community organizations, and proponents of reform.

### I. POLICE USE-OF-FORCE POLICIES AND CALLS FOR REFORM

Before discussing Lexipol's efforts to oppose current calls for use-of-force policy reforms, it is important first to introduce what those calls for reform are and their history and evolution. For more than half a century, police department policies have been viewed as a critically important tool to constrain police officers' discretion.<sup>24</sup> The Supreme Court's decisions interpreting the Fourth Amendment describe the outer limits of police authority.<sup>25</sup> However, experts agree that internal policies and training are necessary to give law enforcement more guidance than the Supreme Court's decisions offer, teach officers how to go about exercising their authority, and clarify when officers should refrain from acting.<sup>26</sup> In the use-of-force context, experts have argued that this kind of internal police regulation is particularly crucial.<sup>27</sup>

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24. See, e.g., Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 904 (1962) (“[C]riminal law enforcement can often be improved substantially by the imposition of legal procedures and standards upon the exercise of discretion.”); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 423 (1974) (arguing that policies should “direct and confine police discretion”); Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 725 (1974) (“My central idea is that police practices should no longer be exempt from the kind of judicial review that is usual for other administrative agencies.”).

25. See *infra* Part I.A.

26. See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1858–62 (2015) (describing the realization in the 1950s “that policing was shot through with discretion” and efforts to constrain discretion through democratically designed rules and policies); Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1128 (1967) (explaining that police policies give an officer “more detailed guidance to . . . decide upon the action he ought to take in dealing with the wide range of situations which he confronts and exercising the broad authority with which he is invested”); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 521–22 (2015) (explaining that “[l]aw enforcement officials have tremendous discretion to determine the amount and style of policing that occurs in their jurisdiction,” and that police policies distribute the benefits and burdens on policing “by making policy”).

27. See, e.g., SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT,



As recently as 1960 most local police and sheriffs did not yet have a policy on use of force, but today almost all jurisdictions have at least some written policy in place.<sup>28</sup> However, departments have not uniformly embraced restrictive use-of-force policies, despite evidence that these types of policies can save lives.<sup>29</sup> Instead, many departments' policies hew to the broad constitutional standard articulated in the Supreme Court's decision in *Graham v. Connor*—a standard that, experts agree, imposes no meaningful limits on police powers.<sup>30</sup>

For decades, advocates have pushed for more restrictive use-of-force policies.<sup>31</sup> The intensity of those calls increased after national attention was brought to the killing of several African American men by police, including Michael Brown in Ferguson, Missouri, and Eric Garner in New York in 2014,<sup>32</sup> Freddie Gray in Baltimore in 2015,<sup>33</sup> and Philando Castile in St. Paul, Minnesota, in 2016.<sup>34</sup> The murder of George Floyd by former Minneapolis officer Derek Chauvin in 2020,<sup>35</sup> followed by the 2021 killing of Daunte Wright in a Minneapolis suburb further energized protest and advocacy about police violence.<sup>36</sup>

EVALUATING POLICE USES OF FORCE 124 (2020) (“The goal of all police agencies is to form policies and provide training to assist officers in making critical and sometimes life-and-death decisions in the field—without the opportunity to seek advice, consult a manual, or ask a supervisor.”); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 244–90, 291 (2017) (“To the extent that police agencies rely on Supreme Court rulings to inform use-of-force and tactics training, we view such approaches as ill advised.”); see also *infra* notes 54–57.

28. DAVID ALAN SKLANSKY, *A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE* 93, 106 (2021).

29. See *infra* notes 86–91, 97–101, 107–08, 116–21, 124–27, 136–39 and accompanying text (describing research showing that limitations on officers' discretion in the use-of-force context have reduced shootings and other uses of force).

30. For scholarship criticizing the Supreme Court's use-of-force doctrine on this ground, see *supra* note 5.

31. See *infra* Part I.B.

32. *Eric Garner, Michael Brown Cases Spark 'Legitimate Concerns' About US Policing—UN Experts*, UNITED NATIONS (Dec. 5, 2014), <https://news.un.org/en/story/2014/12/485482-eric-garner-michael-brown-cases-spark-legitimate-concerns-about-us-policing-un> [https://perma.cc/B2AZ-UHWF].

33. John Woodrow Cox, Lynh Bui & DeNeen L. Brown, *Who Was Freddie Gray? How Did He Die? And What Led to the Mistrial in Baltimore?*, WASH. POST (Dec. 16, 2015), [https://www.washingtonpost.com/local/who-was-freddie-gray-and-how-did-his-death-lead-to-a-mistrial-in-baltimore/2015/12/16/b08df7ce-a433-11e5-9c4e-be37f66848bb\\_story.html](https://www.washingtonpost.com/local/who-was-freddie-gray-and-how-did-his-death-lead-to-a-mistrial-in-baltimore/2015/12/16/b08df7ce-a433-11e5-9c4e-be37f66848bb_story.html) [https://perma.cc/2Z5X-A7J9].

34. Phil Helsel, Shamar Walters & Alastair Jamieson, *Philando Castle Shooting in Falcon Heights, Minnesota, Sparks Protests*, NBC NEWS (July 7, 2016, 12:35 PM), <https://www.nbcnews.com/news/us-news/philando-castile-shooting-falcon-heights-minnesota-sparks-protests-n605051> [https://perma.cc/Z43A-G3WC].

35. Ronald Tyler & Suzanne A. Luban, *Police Use of Force, Training, and a Way Forward After the Death of George Floyd*, SLS BLOGS: LEGAL AGGREGATE (June 4, 2020), <https://law.stanford.edu/2020/06/04/police-use-of-force-training-and-a-way-forward-after-the-death-of-george-floyd/> [https://perma.cc/55E2-HSYP].

36. *What to Know About the Death of Daunte Wright*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/article/daunte-wright-death-minnesota.html>

In this Part, we begin by introducing what has come to be understood as the constitutional baseline for officers' power to use force: the Supreme Court's decision in *Graham v. Connor*.<sup>37</sup> We then discuss criticisms of the *Graham* standard and, finally, describe specific proposals to change police policy to limit police use of force.

#### A. The Constitutional Baseline for Police Use of Force

Beyond federal constitutional law, there are currently no national standards concerning what a use-of-force policy should contain. As a result, the Supreme Court's interpretation of the Fourth Amendment, which is widely recognized as an indeterminate framework for police use of force, plays an outsized role in current police use-of-force policies.

Although the Supreme Court has interpreted the constitutional limits of police power to use force in multiple opinions, its seminal decision in this area is *Graham v. Connor*.<sup>38</sup> The case was brought by Dethorne Graham, a Black man with diabetes, who was beaten and injured by police conducting an investigatory stop while Graham was having an insulin reaction.<sup>39</sup> In its 1989 decision, the Supreme Court clarified that the Fourth Amendment and its "reasonableness" standard should decide excessive force claims brought against law enforcement.

In evaluating the reasonableness of police violence, the Court found that the reasonableness inquiry "is an objective one" and specified that the officers' actions must be judged "in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."<sup>40</sup> The Court discussed a number of different factors to consider when assessing the objective reasonableness of uses of force, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."<sup>41</sup> The Court also advised lower courts assessing the constitutionality of officers' behavior that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation" and instructed them that "'reasonableness' . . . must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."<sup>42</sup>

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[<https://perma.cc/HGG9-FQ2N>].

37. 490 U.S. 386 (1989).

38. *Id.* For discussions of the Supreme Court's other key decisions concerning excessive force claims brought under the Fourth Amendment, see Harmon, *supra* note 5, at 1128–40 (describing *Tennessee v. Garner* and *Scott v. Harris*, as well as *Graham*); Garrett & Stoughton, *supra* note 27, at 222–37 (describing *Garner* and *Graham*). Because police department use-of-force policies are so reliant on the Court's decision in *Graham*, it is the focus for our analysis here.

39. *Graham*, 490 U.S. at 388.

40. *Id.* at 397.

41. *Id.* at 396.

42. *Id.* at 396–97.

Commentators have criticized the *Graham* standard for offering inadequate guidance to officers about the limits of their power to use force. As Rachel Harmon has explained, the Supreme Court's use-of-force jurisprudence is "deeply problematic."<sup>43</sup> She writes:

It provides unprincipled, indeterminate, and sometimes simply misleading guidance to lower courts, police officers, jurors, and members of the public because it fails to articulate a systematic conceptual framework for assessing police uses of force. . . . [I]t does not answer adequately the most basic questions about police uses of force: when a police officer may use force against a citizen, how much force he may use, and what kinds of force are permissible.<sup>44</sup>

Brandon Garrett and Seth Stoughton echo these concerns, explaining that the Supreme Court's "totality of the circumstances" approach to the constitutionality of police uses of force in *Graham* is "not only poorly suited for police training, but actually counterproductive, confounding efforts to draft clear use-of-force policies" and "providing little meaningful guidance to police officers."<sup>45</sup>

Because there are no national standards for use of force, there is significant variation across police department use-of-force policies.<sup>46</sup> Yet, even with this variation, a common theme in use-of-force policies is that they tend to hew closely to *Graham*. In 2016, Garrett and Stoughton reviewed use-of-force policies in the fifty largest policing agencies across the country. They observed wide variation, but also found the "[t]he Supreme Court's Fourth Amendment doctrine exerts real pull on . . . police policies" with "[a]bout half" of the policies they reviewed "rel[ying] on language from *Graham* and the Supreme Court's Fourth Amendment cases."<sup>47</sup> Similarly, in 2017, Osagie Obasogie and Zachary Newman conducted a qualitative content analysis of use-of-force policies in the twenty largest U.S. cities.<sup>48</sup> They found that many policies did not restrict police activity or offer guidance for use of force beyond the minimum standard of *Graham*. The authors concluded that such policies failed to "delimit police power in a meaningful way and [also failed to]

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43. Harmon, *supra* note 5, at 1127.

44. *Id.* (emphasis omitted).

45. Garrett & Stoughton, *supra* note 27, at 217–18.

46. *See, e.g., id.* at 280 (finding that "even the largest agencies, which one might expect to be the most sophisticated and attentive to best practices, have widely varying force policies, many of which are quite minimalistic"); WILLIAM TERRILL, EUGENE A. PAOLINE III & JASON INGRAM, FINAL TECHNICAL REPORT DRAFT: ASSESSING POLICE USE OF FORCE POLICY AND OUTCOMES iii–iv (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/237794.pdf> [<https://perma.cc/N53Z-NGHC>] (finding a wide range of policies in a random study of 1000 policing agencies, and concluding that "it was difficult to identify a standard practice that is used by police departments across the country," observing that agencies "pick and choose, and tweak and adapt, in a multitude of ways—all, unfortunately, with no empirical evidence as to which approach is best or even better than any other").

47. Garrett & Stoughton, *supra* note 27, at 285.

48. Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, 43 AM. J.L. & MED. 279 (2017).

promote public health.”<sup>49</sup> Despite the lack of guidance in *Graham*, the decision plays an outsized role in police department policies.

### B. The Movement to Limit Police Power to Use Force

There have long been calls by government officials and advocates to reform police policies in ways that restrict police power to use force. These calls for reform began in the mid-1960s, when police shootings and violence prompted protests across the United States, including in Watts, Harlem, Detroit, and Newark.<sup>50</sup> Although some understood the police as an institution designed to reduce street crime, critics increasingly pointed out the role of the police as an institution of racial oppression and control.<sup>51</sup> At the time, officers had few limits on their power to use deadly force.<sup>52</sup>

In the wake of public outcry, President Lyndon B. Johnson established a National Advisory Commission on Civil Disorders. The Commission’s final report concluded that “[w]hite racism is essentially responsible for the explosive mixture which has been accumulating in our cities.”<sup>53</sup> The report recommended that police develop clear guidelines on when to use force, including nonlethal force.<sup>54</sup> Just one year earlier, the President’s Commission on Law Enforcement and Administration of Justice led by Harvard Law Professor James Vorenberg published a report recommending that police departments “develop and enunciate policies that give police personnel specific guidance for common situations requiring exercise of police discretion.”<sup>55</sup> According to the Vorenberg Commission, use of force was a key area where policy development was needed: it warned that “too much force” should not be used in the context of public demonstrations and that “comprehensive regulation” should limit the use of firearms to situations of imminent and serious danger.<sup>56</sup> Scholars during this period also joined in the growing call to reduce and constrain police use of violence.<sup>57</sup> Law enforcement agencies across the country, heeding these calls, began

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49. *Id.* at 287.

50. See James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165, 166 (1988). For a masterful exploration of these and other events, and their characterization as rebellions, see ELIZABETH HINTON, *AMERICA ON FIRE* (2021).

51. James Q. Wilson, *What Makes a Better Policeman*, ATL. MONTHLY, Mar. 1969, at 129.

52. See Friedman & Ponomarenko, *supra* note 26, at 1858–62 (describing the lack of constraints on officers’ power to use force during this period).

53. NAT’L ADVISORY COMM’N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 91 (1967).

54. *Id.* at 176–77.

55. PRESIDENT’S COMM’N ON L. ENF’T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 104 (1967).

56. *Id.* at 118–19; see also AM. BAR ASS’N, STANDARDS RELATING TO THE URBAN POLICE FUNCTION (1973) (recognizing the importance of police rulemaking on enforcement methods).

57. See, e.g., Davis, *supra* note 24 (arguing in favor of police policies that eliminate “unnecessary police discretion” and confine, structure, and check necessary police discretion); James J. Fyfe, *Observations on Police Deadly Force*, 27 CRIME & DELINQ. 376, 388 (1981) (recommending that police departments “institute clear policy guidelines to limit the use of deadly force”); Lawrence W. Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 VAND. L. REV. 71 (1980); KENNETH CULP DAVIS, POLICE DISCRETION (1975)

developing use-of-force policies and tactics and employing less-lethal force, including tasers and pepper spray.<sup>58</sup>

The beating of Rodney King in 1991 prompted congressional interest in structural police reform and led Congress to authorize the U.S. Department of Justice (DOJ) to investigate and sue police departments for systemic constitutional violations.<sup>59</sup> Use-of-force policies were an early focus of these DOJ investigations,<sup>60</sup> and restrictions on use of force became a signature component of DOJ consent decrees.<sup>61</sup> Improved use-of-force policies were one of the cornerstones of a package of reforms promoted by the DOJ to improve the integrity of policing.<sup>62</sup>

Following the 2014 killing of Michael Brown in Ferguson, Missouri, and several other high-profile killings of African American men during that same period, politicians, police organizations, academics, and activists renewed calls to restrict police power to use force. A commission established by the governor of Missouri issued a report concluding that racial inequity continued to be an ongoing root cause of the problems and that policies and trainings should be revised to “authorize only the minimal amount of force necessary.”<sup>63</sup> Furthermore, the Ferguson Commission warned, “[w]hen citizens are treated with more force than their actions merit, then their rights have been violated.”<sup>64</sup> During this same period, President Obama formed a Commission on 21st Century Policing.<sup>65</sup> Obama’s Commission found that “clear

(studying selective enforcement of the criminal law in Chicago and setting out a framework for checking police discretion); GREGORY HOWARD WILLIAMS, *THE LAW AND POLITICS OF POLICE DISCRETION* (1984) (studying how to address problems presented by expansive police discretion); see also Jerry V. Wilson, *Deadly Force*, *POLICE CHIEF*, Dec. 1972, at 44.

58. For discussion of the development of police tactics, see Garrett & Stoughton, *supra* note 27, at 244–49. For some examples of the development of police department guidance regarding the use of force, see STOUGHTON, NOBLE & ALPERT, *supra* note 27, at 107–09 (describing the development of early use of force continua by the Los Angeles Police Department).

59. See Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, 3207–15 (2014) (tracing the passage of Section 14141 in 1994, which authorizes DOJ investigations of police departments).

60. See Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. § 12601 (formerly 42 U.S.C. § 14141) (authorizing the Attorney General to conduct investigations and file civil litigation to eliminate a “pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States”).

61. See U.S. DEP’T OF JUST., *PRINCIPLES FOR PROMOTING POLICE INTEGRITY 3* (2001), <https://www.ojp.gov/pdffiles1/ojp/186189.pdf> [<https://perma.cc/96LF-P8D2>]. For further discussion of DOJ litigation against local police departments for unconstitutional use of force, see Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOJ Consent Decrees*, 51 *WAKE FOREST L. REV.* 793 (2016).

62. See U.S. DEP’T OF JUST., *supra* note 61.

63. THE FERGUSON COMM’N, *FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY* 26, 158 (2015), [https://3680or2khmk3bzkp33juica1-wpengine.netdna-ssl.com/wp-content/uploads/2015/09/101415\\_FergusonCommissionReport.pdf](https://3680or2khmk3bzkp33juica1-wpengine.netdna-ssl.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf) [<https://perma.cc/8B35-8Y7X>].

64. *Id.* at 26.

65. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING* 5 (2015),

and comprehensive policies on the use of force (including training on the importance of de-escalation)” were essential and that such policies should adopt a “‘sanctity of life’ philosophy.”<sup>66</sup> The DOJ also investigated the Ferguson Police Department and concluded it should revise its policies to require the least amount of force necessary, increase training on use of force, and reorient toward de-escalation.<sup>67</sup>

At around the same time, two influential law enforcement groups issued reports recommending baseline standards for police use-of-force policies. In 2016, the Police Executive Research Forum (PERF), a police research and policy organization, published thirty recommended changes for use-of-force policies.<sup>68</sup> These recommendations, which were the product of eighteen months of research, fieldwork, and discussion, emphasized the importance of developing best policies, practices, and training on use-of-force issues.<sup>69</sup> In 2017, the International Association of Chiefs of Police (IACP), a membership-based nonprofit organization of influential police leaders, published what they described as a National Consensus Policy on use of force.<sup>70</sup> The goal of the project was to create a set of national guidelines on use of force to help police evaluate their own policies.<sup>71</sup>

Following the killing of George Floyd in May 2020, advocacy groups and legislators focused with renewed intensity on police use-of-force policies as a primary target for reform. The Justice in Policing Act, passed in the House of Representatives in 2020 and again in 2021, would have eliminated federal funding

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[https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [https://perma.cc/LU8B-246K].

66. *Id.* at 2, 19.

67. C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 92–93 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [https://perma.cc/HM2A-CB8L].

68. POLICE EXEC. RSCH. F., GUIDING PRINCIPLES ON USE OF FORCE 33–71 (2016), <https://www.policeforum.org/assets/30%20guiding%20principles.pdf> [https://perma.cc/4SDW-B9D3] [hereinafter GUIDING PRINCIPLES ON USE OF FORCE]; *About PERF*, POLICE EXEC. RSCH. F., <https://www.policeforum.org/about-us> [https://perma.cc/V7UR-X4SG]. See generally Samuel Walker, “Not Dead Yet”: *The National Police Crisis, a New Conversation About Policing, and the Prospects for Accountability-Related Police Reform*, 2018 U. ILL. L. REV. 1777 (2018) (examining the positions of PERF, the President’s Task Force, the Department of Justice, and other influential groups in recent efforts to reform police policymaking).

69. GUIDING PRINCIPLES ON USE OF FORCE, *supra* note 68, at 33–49.

70. INT’L ASS’N OF CHIEFS OF POLICE, NATIONAL CONSENSUS POLICY AND DISCUSSION PAPER ON USE OF FORCE (2017), <https://www.theiacp.org/resources/document/national-consensus-discussion-paper-on-use-of-force-and-consensus-policy> [https://perma.cc/ZYA9-RZ3T] (follow “Download PDF” hyperlink).

71. *Id.* at 2. The IACP’s report is considered to be a response to the PERF report and recommends use-of-force policies that are less restrictive than those recommended in the PERF report. For further discussion of the differences between the reports, see Samuel Walker, “Consensus” *Use of Force Policy by 11 Police Groups Takes Two Steps Backwards, Two Steps Forward*, SAMUEL WALKER C.L., POLICING & CRIM. JUST., <https://samuelwalker.net/2017/01/consensus-use-force-policy-11-police-groups-takes-two-steps-backwards-two-steps-forward> [https://perma.cc/ZY9D-WJTG].

for jurisdictions that did not prohibit the use of chokeholds.<sup>72</sup> Reporters for the American Law Institute’s Principles of the Law of Policing, a group of legal experts that drafts general principles to govern policing, proposed creating a national use-of-force standard that would make clear, among other things, “that lethal force should be a last resort.”<sup>73</sup> National advocacy groups, including the Advancement Project, Color of Change, Communities United Against Police Brutality, the Leadership Conference on Civil and Human Rights, the NAACP Legal Defense Fund, and the National Association Against Police Brutality, pressed for use-of-force policies more restrictive than *Graham* and bright-line rules prohibiting chokeholds and shooting into cars, among other reforms.<sup>74</sup> Even some law enforcement organizations, including the Law Enforcement Action Partnership and some California police unions, called for use-of-force reform following the killing of George Floyd.<sup>75</sup>

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72. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 363 (2020); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 363 (2021).

73. BARRY FRIEDMAN, BRANDON L. GARRETT, RACHEL HARMON, CHRISTY E. LOPEZ, TRACEY L. MEARES, MARIA PONOMARENKO, CHRISTOPHER SLOBOGIN & TOM R. TYLER, CHANGING THE LAW TO CHANGE POLICING: FIRST STEPS 2 (2020), [https://law.yale.edu/sites/default/files/area/center/justice/document/change\\_to\\_change\\_final.pdf](https://law.yale.edu/sites/default/files/area/center/justice/document/change_to_change_final.pdf) [<https://perma.cc/VP2N-3UHK>].

74. See, e.g., *The Change We Need: 5 Issues that Should Be Part of Efforts to Reform Policing in Local Communities*, ADVANCEMENT PROJECT, <https://advancementproject.org/the-change-we-need-5-issues-that-should-be-part-of-efforts-to-reform-policing-in-local-communities/> [<https://perma.cc/MX22-ANXU>] (recommending policies to “prohibit acts such as neck holds, head strikes with a hard object, and using force against persons in handcuffs”); *LDF Releases Policing Reform Demands to Federal Elected Officials, Governors, Mayors, and Police Chiefs*, LEGAL DEF. FUND (June 5, 2020), <https://www.naacpldf.org/press-release/ldf-releases-policing-reform-demands-to-federal-elected-officials-governors-mayors-and-police-chiefs> [<https://perma.cc/G69S-T62C>] (demanding that the federal government adopt a standard that “requires the use of force to be used only when necessary as a last resort” and “[p]rohibit all police neck hold maneuvers, including chokeholds and carotid control holds”); Letter from Leadership Conf. on Civ. and Hum. Rts. to House and Senate Leadership (June 1, 2020), [http://civilrightsdocs.info/pdf/policy/letters/2020/Coalition\\_Letter\\_to\\_House\\_and\\_Senate\\_Leadership\\_on\\_Federal\\_Policing\\_Priorities\\_Final\\_6.1.20.pdf](http://civilrightsdocs.info/pdf/policy/letters/2020/Coalition_Letter_to_House_and_Senate_Leadership_on_Federal_Policing_Priorities_Final_6.1.20.pdf) [<https://perma.cc/X6S3-ZBHX>] (demanding “mandatory de-escalation training for all officers” and urging Congress to pass legislation prohibiting chokeholds); CMTYS. UNITED AGAINST POLICE BRUTALITY, WHAT WILL IT TAKE TO END POLICE VIOLENCE?: RECOMMENDATIONS FOR REFORM, [https://d3n8a8pro7vhmx.cloudfront.net/cuapb/pages/1/attachments/original/1591595256/WHAT\\_WILL\\_IT\\_TAKE\\_TO\\_END\\_POLICE\\_VIOLENCE\\_with\\_Appendices.pdf?1591595256](https://d3n8a8pro7vhmx.cloudfront.net/cuapb/pages/1/attachments/original/1591595256/WHAT_WILL_IT_TAKE_TO_END_POLICE_VIOLENCE_with_Appendices.pdf?1591595256) [<https://perma.cc/YD5K-WSR7>] (calling for a restriction of the use of deadly force except as a last resort, and for a ban on chokeholds and other lethal restraint methods); *Moving to Action Dismantling Institutional Racism & Ending Police Misconduct: 20 Policy Demands*, NAT’L ASS’N AGAINST POLICE BRUTALITY, <https://www.naapb.org/> [<https://perma.cc/R3M6-X7A6>] (calling for mandatory de-escalation and standardized use-of-force policies).

75. See, e.g., *National Policing Recommendations*, L. ENF’T ACTION P’SHIP (June 3, 2020), <https://lawenforcementactionpartnership.org/national-policing-recommendations> [<https://perma.cc/9JCM-4SLY>] (recommending that police use-of-force policies go beyond the *Graham* threshold and require de-escalation and intervention, and prohibit maneuvers that restrict blood flow to the brain without legal force justification); L.A. POLICE PROTECTIVE

Perhaps the most influential group taking part in the recent debate over use-of-force policies is Campaign Zero, a policy-driven, data-driven platform created in 2015 with the goal of reducing police violence.<sup>76</sup> The organization consulted with experts to identify a package of eight recommended policies, popularly referred to as “8 Can’t Wait.”<sup>77</sup> Campaign Zero has also offered evidence that these eight policies can save lives: Based on an analysis of use-of-force policies in 100 of the largest jurisdictions across the country, it found that departments with more of these eight recommended policies had fewer police killings than jurisdictions with fewer, measured per capita and by numbers of arrests.<sup>78</sup> Campaign Zero also found that officers were less frequently assaulted and killed in jurisdictions with more restrictive use-of-force policies.<sup>79</sup>

### C. Specific Proposals for Reform

Although the exact recommendations for reform of use-of-force policies have varied, generally speaking they fall into six categories. This subsection summarizes each type of reform, provides examples of states or localities that have adopted such a change, and describes available evidence of the impact of these policies.<sup>80</sup> We will return to these six types of reform in Part II when we describe Lexipol’s resistance to them.

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LEAGUE, S.F. OFFICERS ASS’N & SAN JOSÉ POLICE OFFICERS’ ASS’N, [https://mcusercontent.com/6a0707887484bfcead01dcf9d/files/2d22b0f5-f07e-4f24-b2e3-340157b97944/BAN0006491356\\_01\\_hr\\_1\\_.pdf](https://mcusercontent.com/6a0707887484bfcead01dcf9d/files/2d22b0f5-f07e-4f24-b2e3-340157b97944/BAN0006491356_01_hr_1_.pdf) [<https://perma.cc/QAF2-LMZ9>] (publishing a full-page newspaper advertisement to call for “[a] national use-of-force standard that emphasizes a reverence for life, de-escalation, a duty to intercede, proportional responses to dangerous incidents and strong accountability”).

76. CAMPAIGN ZERO, <https://www.joincampaignzero.org> [<https://perma.cc/XCA2-L3AQ>].

77. See generally Campaign Zero, #8CantWait, #8CANTWAIT, <https://8cantwait.org/> [<https://perma.cc/Z4J9-2CKA>].

78. Samuel Sinyangwe, Examining the Role of Use of Force Policies in Ending Police Violence (Sept. 20, 2016) (unpublished draft), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841872](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841872) [<https://perma.cc/YG48-4N7C>]. The data supporting these reductions in killings have been questioned. See, e.g., Cherrell Brown & Philip V. McHarris, #8cantwait Is Based on Faulty Data Science, MEDIUM (June 5, 2020), <https://medium.com/@8cantwait.faulty/8cantwait-is-based-on-faulty-data-science-a4e0b85fae40> [<https://perma.cc/58UZ-3M4G>]. For a thoughtful response and contextualization of Campaign Zero’s findings by the author of the study, see Samuel Sinyangwe (@samswey), TWITTER (June 6, 2020), <https://twitter.com/samswey/status/1269298269055856641?s=20> [<https://perma.cc/X5N5-WNG6>].

79. Sinyangwe, *supra* note 78, at 4.

80. Although we favor more restrictive use-of-force policies, we do not take a position here about whether this collection of policy reforms is optimal, which reforms are most important, or precisely how changes to policy language should be crafted. Our goal, instead, is to describe in general terms the types of use-of-force policy reforms that advocates have advanced in recent years and to summarize existing evidence that these policies can have a positive impact.



### 1. Replace *Graham*

First, there is a widely held view that the Supreme Court's constitutional standards provide inadequate guidance for officers about their power to use force.<sup>81</sup> As a result, the Police Executive Research Forum, Law Enforcement Action Partnership, Campaign Zero, Communities United Against Police Brutality, and the NAACP Legal Defense Fund have each recommended policies more restrictive than *Graham*.<sup>82</sup>

Several states have passed legislation restricting officers' uses of force to situations when it is "necessary."<sup>83</sup> Although the language of these statutes differ, their goal appears to be the same: to replace the *Graham* standard, which allows police to use force when it is objectively reasonable under the totality of the circumstances, with laws that allow force only when "necessary" or "as a last resort."<sup>84</sup> Seattle and San Francisco's police departments have adopted similarly restrictive standards.<sup>85</sup>

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81. See *supra* notes 43–45 and accompanying text (describing this criticism of *Graham*).

82. See *supra* notes 70, 74–76.

83. See, e.g., Assemb. 392, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (allowing deadly force "when the officer reasonably believes, based on the totality of the circumstances, that deadly force is necessary to defend against an imminent threat of death or serious bodily injury"); S. 20-217, 72nd Gen. Assemb., Reg. Sess. (Colo. 2020) (allowing "deadly physical force to make an arrest only when all other means of apprehension are unreasonable given the circumstances"); H.R. 6462, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021) (allowing deadly physical force only when the officer "has reasonably determined that there are no available reasonable alternatives"); S. 71, 2021 Leg., Reg. Sess. (Md. 2021) (allowing force only when "under the totality of the circumstances, the force is necessary and proportional"); H.R. 1, 91st Leg., 2d Spec. Sess. (Minn. 2020) (allowing deadly force only "if an objectively reasonable officer would believe, based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight, that such force is necessary"); H.R. 145, 2020-2021 Leg., Reg. Sess. (Vt. 2021) (allowing deadly force "only when, based on the totality of the circumstances, such force is objectively reasonable and necessary"); H.R. 1310, 67th Leg., Reg. Sess. (Wash. 2021) (allowing force only when "necessary to . . . protect against an imminent threat of bodily injury to the peace officer, another person, or the person against whom force is being used").

84. See *supra* note 83. For one possible definition of what constitutes "necessary" force, see POLICING PROJECT, NYU SCH. L., COMPREHENSIVE USE OF FORCE STATUTE [https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/605e079e43da3703cf0265d2/1616775070741/Comprehensive+Use+of+Force+Statute\\_3.24.21+for+website.pdf](https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/605e079e43da3703cf0265d2/1616775070741/Comprehensive+Use+of+Force+Statute_3.24.21+for+website.pdf) [<https://perma.cc/A3DE-A96Y>] (defining physical force as necessary "when there are no reasonable alternative means to effect the lawful objective and avoid the use of force, including non-force tactics or techniques that are intended to stabilize the situation and reduce the immediacy of the threat, such as distance, cover, containment, tactical repositioning, requesting additional officers, and surveillance; verbal communication or de-escalation; and the deployment of specialized equipment or resources, such as officers trained in crisis intervention, or mental health professionals. An alternative to the use of physical force may be a reasonable alternative even if it extends the overall duration of the interaction.").

85. *California Set to Pass Landmark Legislation to Save Lives, Reduce the Number of Police Shootings*, ACLU S. CAL. (July 8, 2019), <https://www.aclusocal.org/en/press-releases/california-set-pass-landmark-legislation-save-lives-reduce-number-police-shootings>

There is evidence suggesting that this type of restrictive use-of-force standard can save lives. After adopting such a standard, Seattle reported a “significant reduction” in the number of force incidents without a decrease in officer or civilian safety.<sup>86</sup> San Francisco also reported a decline in force incidents, including fewer police shootings.<sup>87</sup> Evidence from Seattle and San Francisco is consistent with studies showing that more restrictive use-of-force policies, while hardly a cure-all, are associated with a reduction in police killings and other violence.<sup>88</sup> Large police departments, including New York City, Oakland, and Philadelphia, implemented more restrictive use-of-force policies in the late 1960s and early 1970s, and studies found that these more restrictive policies significantly reduced injuries and killings by police.<sup>89</sup> Similar studies in Atlanta, Georgia, and Kansas City, Missouri, in the 1980s found police shootings decreased after implementation of more restrictive deadly force guidelines.<sup>90</sup> Another study found a sixteen percent reduction nationwide in fatal police shootings after the Supreme Court’s 1985 decision in *Tennessee v. Garner*, which held it unconstitutional to shoot a person fleeing arrest who was not a threat to the officers or others.<sup>91</sup>

These studies—and those we reference throughout the remainder of this Subpart—do not definitively show that enacting restrictive use-of-force policies will necessarily reduce police uses of force and killings. Even if more restrictive policies

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[<https://perma.cc/44YE-4VMM>] (describing use-of-force policies in Seattle and San Francisco).

86. *Id.*

87. *Id.*

88. *See, e.g.,* WILLIAM A. GELLER & MICHAEL S. SCOTT, *DEADLY FORCE: WHAT WE KNOW: A PRACTITIONER’S DESK REFERENCE ON POLICE-INVOLVED SHOOTINGS* (1992) (analyzing data on the prevalence of police-involved shootings and strategies for reducing these incidents); James J. Fyfe, *Administrative Interventions on Police Shooting Discretion: An Empirical Examination*, 7 J. CRIM. JUST. 309 (1979) (examining the effects of more restrictive guidelines on shooting frequencies, patterns, and consequences in New York in 1972); Jay T. Jennings & Meghan E. Rubado, *Preventing the Use of Deadly Force: The Relationship Between Police Agency Policies and Rates of Officer-Involved Gun Deaths*, 77 PUB. ADMIN. REV. 217 (2017) (finding that police agencies that require officers to file a report when they point their guns have significantly lower rates of fatal shootings by officers); Albert J. Reiss, Jr., *Controlling Police Use of Deadly Force*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 122 (1980) (establishing the importance of controlling the use of deadly force by the police by restricting opportunities for the legitimate use of force); Gerald F. Uelmen, *Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County*, 6 LOY. L.A. L. REV. 1, 48 (1973) (finding “a strong correlation between the restrictiveness of policy and the number of shooting incidents reported” in a study of police policies and uses of force in law enforcement agencies in Los Angeles County).

89. Michael D. White, *Assessing the Impact of Administrative Policy on Use of Deadly Force by On- and Off-Duty Police*, 24 EVAL. REV. 295, 296 (2000).

90. Stephen A. Bishopp, David A. Klinger & Robert G. Morris, *An Examination of the Effect of a Policy Change on Police Use of TASERS*, 26 CRIM. JUST. POL’Y REV. 727, 729–30 (2015); *see also* Mark Blumberg, *Controlling Police Use of Deadly Force: Assessing Two Decades of Progress*, in *CRITICAL ISSUES IN POLICING* 442 (Roger G. Dunham & Geoffrey P. Alpert eds., 1989).

91. Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 241 (1994).

are enacted, they may not make much of a difference if officers are not trained in these new policies, supervisors do not communicate the importance of these policies to their subordinates, or there are no disciplinary consequences for officers who fail to follow them. Moreover, there are other factors, beyond use-of-force policies, that may influence the frequency with which officers use force, including social and political forces within the police department and community they serve. Yet the research that has been conducted over the past several decades does consistently suggest that more restrictive use-of-force policies are correlated with reduced police killings, but not with increases in crime, harm to officers, or other types of negative effects.

## 2. De-Escalation

Another key recommendation for reform of use-of-force policies is to adopt de-escalation policies and training. De-escalation teaches that taking steps to defuse a situation can prevent it from reaching a point where there is a risk of death or harm to anyone, including to law enforcement officers.<sup>92</sup> De-escalation has been defined by the IACP's National Consensus Policy as:

Taking action or communicating verbally or non-verbally during a potential force encounter in an attempt to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the force necessary.<sup>93</sup>

After Ferguson, de-escalation training was endorsed by the President's Task Force on 21st Century Policing.<sup>94</sup> One of PERF's guiding principles on use of force is that agencies adopt a de-escalation policy,<sup>95</sup> and Campaign Zero has made requiring officers to de-escalate situations one of eight key recommendations for restrictions in police uses of force.<sup>96</sup>

Growing calls for police policies that require officers to de-escalate situations are supported by evidence that de-escalation can in fact reduce police violence. The San Francisco Police Department found that forty-five percent of police shootings over a

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92. GUIDING PRINCIPLES ON USE OF FORCE, *supra* note 68, at 21.

93. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 70, at 2.

94. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 65, at 20–21.

95. GUIDING PRINCIPLES ON USE OF FORCE, *supra* note 68, at 40. PERF also published an earlier report on the importance of de-escalation as part of its critical issues in policing series. POLICE EXEC. RSCH. F., AN INTEGRATED APPROACH TO DE-ESCALATION AND MINIMIZING USE OF FORCE (2012), [https://www.calea.org/sites/default/files/PERF%20UOF%20De-Escalation\\_v5.pdf](https://www.calea.org/sites/default/files/PERF%20UOF%20De-Escalation_v5.pdf) [<https://perma.cc/DB46-2LAF>] (explaining that the goal of de-escalation “is to prevent injuries to everyone—the subject, the public, and police officers”).

96. DERAY MCKESSON, SAMUEL SINYANGWE, JOHNETTA ELZIE & BRITTANY PACKNETT, CAMPAIGN ZERO, POLICE USE OF FORCE POLICY ANALYSIS 3 (2016), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/57e1b5cc2994ca4ac1d97700/1474409936835/Police+Use+of+Force+Report.pdf> [<https://perma.cc/XVB3-25LY>].

five-year period occurred within one minute of officers arriving.<sup>97</sup> As Assistant Chief Toney Chaplin explains, the number of shootings “falls off a cliff with each minute that you stall these things out. If we create this time and distance, . . . we save lives.”<sup>98</sup> The Dallas Police Department has also been heralded as a case study in why emphasizing de-escalation techniques positively affects police conduct.<sup>99</sup> One year after instituting de-escalation training, the department saw an eighteen percent decrease in use of force.<sup>100</sup> Additionally, within four years, excessive force complaints had dropped by sixty-four percent.<sup>101</sup>

### 3. Use-of-Force Continuum

Reformers have consistently advocated that law enforcement adopt use-of-force continuums to encourage officers only to use an amount of force that is proportional to the circumstances.<sup>102</sup> A use-of-force continuum—also sometimes referred to as a matrix—is a standard that gives police officers guidelines on how much force is appropriate for different situations.<sup>103</sup> For example, as the National Institute of Justice has outlined, a use-of-force continuum may indicate that if an officer is engaging in a verbal exchange, the officer may use nonphysical forms of force, such as issuing “calm, nonthreatening commands.”<sup>104</sup> Campaign Zero’s Police Use of Force Project includes “develop[ing] a Force Continuum that limits the types of force and/or weapons that can be used to respond to specific types of resistance” among the top eight priorities for police use-of-force policy reform.<sup>105</sup>

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97. Curtis Gilbert, *Not Trained to Not Kill*, APM REPORTS (May 5, 2017), <https://www.apmreports.org/story/2017/05/05/police-de-escalation-training> [<https://perma.cc/P2PC-JQJ3>].

98. *Id.*

99. See, e.g., U.S. COMM’N ON C.R., POLICE USE OF FORCE: AN EXAMINATION OF MODERN POLICING PRACTICES 117 (2018); Rachel Abanou, *De-Escalating Police Encounters*, 27 S. CAL. REV. L. & SOC. JUST. 239, 249–50 (2018); Drake Baer, *The Dallas Police Force Is Evidence that ‘De-escalation’ Policing Works*, CUT (July 8, 2016), <https://www.thecut.com/2016/07/deescalation-policing-works.html> [<https://perma.cc/D8NQ-J7ST>].

100. Gilbert, *supra* note 97.

101. U.S. COMM’N ON C.R., *supra* note 99.

102. See *infra* notes 103–04 and accompanying text. Note, however, that some organizations are more ambivalent about rigid use-of-force matrices. The Police Executive Research Forum, for example, argues that matrices are too rigid and prefers models that encourage “finding the most effective and safest response that is proportional to the threat.” GUIDING PRINCIPLES ON USE OF FORCE, *supra* note 68, at 20.

103. STOUGHTON, NOBLE & ALPERT, *supra* note 27, at 106–10 (describing a “continuum” or “matrix” as “the oldest and most popular” use-of-force guideline adopted by police departments). Continuums can be contrasted with bright-line rules, discussed *infra*, which draw categorical distinctions between violence and nonviolence. See generally SKLANSKY, *supra* note 28, at 107 (critiquing use-of-force continuums as lacking a “sharp line dividing violence from nonviolence”).

104. *The Use-of-Force Continuum*, NAT’L INST. OF JUST. (Aug. 3, 2009), <https://nij.ojp.gov/topics/articles/use-force-continuum> [<https://perma.cc/J2T7-7SB2>].

105. *Police Use of Force Project*, CAMPAIGN ZERO, <http://useofforceproject.org/#project>

More than eighty percent of 641 law enforcement agencies surveyed in 2006 and 2007 reported having a use-of-force continuum, although they varied in design and in the way that they ranked different types of force and resistance.<sup>106</sup> Given this variation, it is particularly difficult to measure the impact of use-of-force continuums on police behavior. But research does suggest that limiting officers' discretion to use force through use-of-force continuums can reduce police violence. For example, a 2008 study of the Orlando Police Department found that overall taser deployments decreased after the department updated its use-of-force continuum to allow for taser use only in active resistance situations.<sup>107</sup> The study additionally found that, although officers perceived an increased risk of harm to themselves due to the policy change, the decrease in taser use actually increased the safety of both officers and civilians.<sup>108</sup>

#### 4. Bright-Line Rules, Such as Prohibiting Chokeholds and Shooting at Moving Vehicles

Another set of proposals would prohibit dangerous activities outright rather than leave them to officer discretion. For example, PERF recommends that “[s]hooting at vehicles must be prohibited.”<sup>109</sup> Campaign Zero’s 8 Can’t Wait agenda includes both ending chokeholds and neck restraints and also shooting into moving vehicles.<sup>110</sup> Other groups, including the Advancement Project, the Leadership Conference on Civil and Human Rights, and the Law Enforcement Action Partnership, have also called for bright-line rules to reduce use of force, such as prohibiting “neck holds, head strikes with a hard object, and using force against persons in handcuffs.”<sup>111</sup>

In response to the killing of George Floyd, legislators at the federal and state levels took action to ban chokeholds. The George Floyd Justice in Policing Act, passed by the U.S. House of Representatives in June of 2020 and again in May of 2021, would have encouraged chokehold bans and eliminated no-knock warrants in drug cases, among other provisions.<sup>112</sup> In the year following Floyd’s murder, at least seventeen state legislatures—including California, Colorado, Illinois, Minnesota, Nevada, Oregon, Virginia, and Washington—banned or restricted chokeholds and other neck restraints.<sup>113</sup> Local police departments enacted these types of bans as well. Within

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[<https://perma.cc/F3EG-WHWN>].

106. William Terrill & Eugene A. Paoline, III, *Examining Less Lethal Force Policy and the Force Continuum: Results from a National Use-of-Force Study*, 16 POLICE Q. 38, 44–45 (2012).

107. Previously, the Orlando Police Department allowed tasers to be used at a lower, passive resistance force level. Michael E. Miller, *Examining the Effect of Organizational Policy Change on Taser Utilizations* 15, 94, 99 (2008) (Ph.D. dissertation, University of Central Florida), <http://purl.fcla.edu/fcla/etd/CFE0002150> [<https://perma.cc/849Y-J54B>].

108. *Id.* at 119. For other research about the impact of more restrictive policies on less-lethal uses of force, see CAL. DEP’T JUST., SACRAMENTO POLICE DEPARTMENT: REPORT & RECOMMENDATIONS 84–85 (2019), <https://oag.ca.gov/system/files/attachments/press-docs/spd-report.pdf> [<https://perma.cc/FR4X-2V8U>].

109. GUIDING PRINCIPLES ON USE OF FORCE, *supra* note 68, at 44.

110. Campaign Zero, *supra* note 77.

111. ADVANCEMENT PROJECT, *supra* note 74.

112. See George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

113. Farnoush Amiri, Colleen Slevin & Camille Fassett, *Floyd Killing Prompts Some*

only a few months of George Floyd's killing, at least thirty-two of the nation's sixty-five largest police departments banned or placed restrictions on the use of neck restraints by their officers.<sup>114</sup> Some police departments have also issued policies banning or restricting foot pursuits and shooting into cars, although less action has been taken at the state and federal level to limit these types of dangerous activities.<sup>115</sup>

Research suggests that when police departments adopt these types of restrictions, officers reduce their reliance on lethal force. For instance, when the New York Police Department (NYPD) banned shooting into moving vehicles in 1972, it immediately saw a "sharp reduction" in the use of lethal force and a thirty-three percent reduction in shooting incidents after one year.<sup>116</sup> Within two years of the policy change, the number of lethal shootings had dropped by fifty percent.<sup>117</sup> Importantly, after the prohibition was adopted, NYPD officer safety was not adversely impacted: in fact, injuries and deaths of officers declined significantly after the policy change.<sup>118</sup> A 2016 review of the Orlando Police Department's fatal shootings found that thirty percent of its shootings for the previous decade involved officers shooting at moving vehicles.<sup>119</sup> One year after implementing restrictions on shooting into moving vehicles in June 2016, the department had had no fatal shootings involving a moving

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*States to Limit or Ban Chokeholds*, AP NEWS (May 23, 2021), <https://apnews.com/article/george-floyd-business-police-reform-death-of-george-floyd-government-and-politics-d706c72d068ee4898878415565b4e49a> [<https://perma.cc/97ZE-GZBR>].

114. Kimberly Kindy, Kevin Schaul & Ted Mellnik, *Half of the Nation's Largest Police Departments Have Banned or Limited Neck Restraints Since June*, WASH. POST (Sept. 6, 2020), <https://www.washingtonpost.com/graphics/2020/national/police-use-of-force-chokehold-carotid-ban/> [<https://perma.cc/MR3T-8JQX>]; see also, e.g., DENVER POLICE DEP'T, OPERATIONS MANUAL § 105.00, [https://www.denvergov.org/content/dam/denvergov/Portals/720/documents/OperationsManual/OMSBook/OM\\_Book.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/720/documents/OperationsManual/OMSBook/OM_Book.pdf) [<https://perma.cc/G5NZ-R9CV>] (banning chokeholds and carotid restraints with no exceptions).

115. See, e.g., Grace Hauck, *Chicago Revises Foot Chase Policy After Fatal Police Shootings of Adam Toledo, Anthony Alvarez*, USA TODAY (May 27, 2021, 3:41 PM), <https://www.usatoday.com/story/news/nation/2021/05/27/chicago-police-unveil-new-foot-chase-policy-following-fatal-shootings/7465607002/> [<https://perma.cc/NDQ4-ULKG>] (describing new limitations on foot pursuits implemented by the Chicago Police Department); David A. Graham, *Why Do Police Keep Shooting Into Moving Cars?*, ATLANTIC (May 21, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/andrew-brown-police-shootings-moving-vehicles/618938/> [<https://perma.cc/59P9-W949>] (describing policies by many departments to prohibit or discourage shooting into moving cars, evidence that suggests these types of bans reduce police killings, and the continued challenges of getting officers to follow these policies).

116. Sharon R. Fairley, *The Police Encounter with a Fleeing Motorist: Dilemma or Debacle?*, 52 U.C. DAVIS L. REV. ONLINE 155, 202 n.293 (2018) (quoting GUIDING PRINCIPLES ON USE OF FORCE, *supra* note 68, at 15).

117. Wesley Lowery, Lindsey Bever & Katie Mettler, *Police Have Killed Nearly 200 People Who Were in Moving Vehicles Since 2015, Including 15-Year-Old Jordan Edwards*, WASH. POST (May 3, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/05/03/police-have-killed-nearly-200-people-who-were-in-moving-vehicles-since-2015-including-15-year-old-jordan-edwards/> [<https://perma.cc/992B-AENF>].

118. See Fairley, *supra* note 116.

119. Lowery et al., *supra* note 117.

vehicle.<sup>120</sup> Similar policies changes in the Philadelphia and Miami Police Departments have also been associated with fewer police shootings and no increased threat to officer safety.<sup>121</sup>

### 5. Comprehensive Report Writing

Another important goal of reformers has been to require comprehensive reporting of force incidents. Advocates urge police departments to require reporting, not just of deadly force, but of all use of force, as well as attempted or threatened use of force. President Obama's Task Force recommended that agencies engage in comprehensive reporting, including of nonlethal use of force.<sup>122</sup> Campaign Zero has included requiring comprehensive reporting in its top eight policies that set common-sense limits on police use of force.<sup>123</sup>

Law enforcement agencies have seen success in decreasing use-of-force incidents after requiring officers to report different levels of force. In 2015, NYPD saw a historic low in police weapon discharges after the department mandated officers to document any use of force.<sup>124</sup> The San Francisco Police Department saw a nineteen percent decrease in gun pointing at civilians approximately one year after implementing a policy requiring officers to report every time officers point their firearm at a person.<sup>125</sup> A more extensive study of police-involved shooting deaths between 2000 and 2015 found that mandated reporting of any firearm use would reduce civilian deaths.<sup>126</sup> The researchers estimated that if the ten agencies with the highest civilian death rates had required officers to report every weapon drawn, at least forty fewer people would have died.<sup>127</sup>

### 6. Favoring Peacemaker over Warrior-Style Training

Reformers have become increasingly aware that a key issue regarding use of force is that police officers are trained to escalate conflict and rely too readily on deadly force.<sup>128</sup> This type of training, which emphasizes threats to officer survival, has been

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120. *Id.* The 2016 Orlando Police Department policy was not a complete ban on shooting into moving vehicles and allowed officers to still fire their weapons if the individual was “threatening the officer with deadly force with a weapon other than the vehicle.” David Harris, *Orlando Police Change Policy of Officers Shooting into Moving Vehicles*, ORLANDO SENTINEL (Sept. 8, 2016, 10:09 AM), <https://www.orlandosentinel.com/news/breaking-news/os-orlando-police-shooting-vehicle-policy-20160906-story.html> [<https://perma.cc/4PJJ-PDMQ>].

121. GUIDING PRINCIPLES ON USE OF FORCE, *supra* note 68, at 47.

122. *See* PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 65, at 21–22.

123. Campaign Zero, *supra* note 77.

124. Abanonu, *supra* note 99, at 249.

125. Vivian Ho, *SF Police Too Quick to Go for Their Guns, Critics Say*, S.F. CHRON. (May 27, 2017, 6:44 PM), <https://www.sfchronicle.com/crime/article/SF-police-too-quick-to-go-for-their-guns-critics-11178630.php> [<https://perma.cc/GF22-NGJH>].

126. Jennings & Rubado, *supra* note 88, at 222.

127. *Id.*

128. For example, in a recent study of police training videos, Ion Meyn identified how trainings urged officers to “always bring deadly force” to their encounters and to not hesitate to use higher levels of force. Ion Meyn, *The Invisible Rules that Govern Use of Force*, 2021

referred to as “warrior-style training.”<sup>129</sup> Warrior training focuses on preparing officers to kill, promotes the use of violence when arresting suspects, and warns officers that those “killed in the line of duty use less force than their peers.”<sup>130</sup>

The “warrior” mentality is embedded into police officers from the first day of training.<sup>131</sup> Officers are taught that “everyone they meet may have a plan to kill them” and to shoot before a threat is fully in front of them because waiting until the last minute may be too late.<sup>132</sup> In one example of warrior training that received considerable public scrutiny, the Kentucky State Police Department quoted Adolf Hitler advocating violence, and urged officers to “always fight to the death.”<sup>133</sup> A PowerPoint slide included in the training instructed Kentucky police officers to be “ruthless killer[s]” and to “meet violence with greater violence.”<sup>134</sup> This kind of fear-based training emphasizes compliance over cooperation and “promotes an adversarial style of policing that estranges the public and contributes to unnecessary conflict and violence.”<sup>135</sup>

A 2020 study surveyed patrol officers in two distinct U.S. police departments—a midsize city in the Southeast and a larger city in the Southwest—to determine whether “warrior” training results in measurable differences in attitude or behavior of participating officers.<sup>136</sup> The researchers compared the “warrior approach” to

Wis. L. REV. 593, 621 (quoting *Reality Training: Staying in the Fight*, POLICE1 BY LEXIPOL (Apr. 13, 2018), <https://www.police1.com/dave-smith/videos/reality-training-staying-in-the-fight-KRq8uc0VwUeRO4sF/> [<https://perma.cc/AN6Y-8ZRK>]).

129. See Seth W. Stoughton, *How Police Training Contributes to Avoidable Deaths*, ATLANTIC (Dec. 12, 2014), <https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681> [<https://perma.cc/2HQB-5L88>].

130. Kimberly Kindy, *Creating Guardians, Calming Warriors: A New Style of Training for Police Recruits Emphasizes Techniques to Better De-Escalate Conflict Situations*, WASH. POST (Dec. 10, 2015), <https://www.washingtonpost.com/sf/investigative/2015/12/10/new-style-of-police-training-aims-to-produce-guardians-not-warriors> [<https://perma.cc/JBE7-6UEC>].

131. See SUE RAHR & STEPHEN K. RICE, FROM WARRIORS TO GUARDIANS: RECOMMITTING AMERICAN POLICE CULTURE TO DEMOCRATIC IDEALS 4 (2015) (explaining that the “seeds” of a warrior culture “are planted during recruit training, when some recruits are trained in an academy environment that is modeled after military boot camp, a model designed to produce a warrior ready for battle and ready to follow orders and rules without question”); see also Seth Stoughton, *Law Enforcement’s “Warrior” Problem*, 128 HARV. L. REV. F. 225, 228 (2015) [hereinafter Stoughton, *Warrior*]; Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 639 (2016) [hereinafter Stoughton, *Principled Policing*].

132. Stoughton, *Warrior*, *supra* note 131 (emphasis omitted).

133. Nicholas Bogel-Burroughs, *Kentucky Police Training Quoted Hitler and Urged ‘Ruthless’ Violence*, N.Y. TIMES (Oct. 31, 2020), <https://www.nytimes.com/2020/10/31/us/kentucky-state-police-hitler.html?searchResultPosition=1> [<https://perma.cc/WA6X-BMXX>].

134. Satchel Walton & Cooper Walton, *KSP Training Slideshow Quotes Hitler, Advocates ‘Ruthless’ Violence*, MANUAL REDEYE (Oct. 30, 2020), <https://manualredeye.com/90096/news/local/police-training-hitler-presentation/> [<https://perma.cc/76EV-WF72>] (containing a copy of the PowerPoint training).

135. Stoughton, *Principled Policing*, *supra* note 131, at 651, 654.

136. Kyle McLean, Scott E. Wolfe, Jeff Rojek, Geoffrey P. Alpert & Michael R. Smith, *Police Officers as Warriors or Guardians: Empirical Reality or Intriguing Rhetoric?*, 37 JUST.



training that prioritized officer protection and crime fighting with a “guardian approach” to training that prioritized societal protection and building community relationships.<sup>137</sup> The study found that guardian officers had stronger communication priorities during interactions with civilians, while warrior officers exhibited stronger physical control priorities.<sup>138</sup> Overall, their results suggest that guardian-oriented officers were less likely, and warrior-oriented officers more likely, to use force when inappropriate or unnecessary.<sup>139</sup>

Although debates about warrior-style trainings have gone on for some time, they intensified after it was discovered that the officer who killed Philando Castile during a routine traffic stop in Minneapolis had attended a popular two-day police training called “The Bulletproof Warrior.”<sup>140</sup> Instead of warrior-style training, reformers are calling on departments to emphasize the role of police officers as peacemakers or guardians. The goal of this new type of training is to emphasize that officers should “treat people humanely,” “show them respect,” and “avoid causing unnecessary indignity.”<sup>141</sup> In one important example of such a reform, Minnesota adopted an outright ban on “warrior-style training” following George Floyd’s murder.<sup>142</sup> The Minnesota law defines “warrior-style” training as training “that is intended to increase a peace officer’s likelihood or willingness to use deadly force in encounters with community members.”<sup>143</sup>

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Presumably inspired by advocacy and evidence that restrictive use-of-force policies reduce police killings, government officials in cities across the country have called on their police departments to revise their police policies. Indeed, the 8 Can’t Wait campaign has identified 352 law enforcement departments and nineteen states that have adopted one or more of the campaign’s use-of-force policy priorities since June of 2020.<sup>144</sup> Yet, despite this historically unprecedented push to reform law enforcement use-of-force policies, these types of reform efforts are also meeting

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Q. 1096 (2020).

137. *Id.* at 1098.

138. *Id.* at 1112.

139. *Id.* at 1113.

140. Bryan Schatz, “Are You Prepared to Kill Somebody?” *A Day with One of America’s Most Popular Police Trainers*, MOTHER JONES (Mar./Apr. 2017), <https://www.motherjones.com/politics/2017/02/dave-grossman-training-police-militarization/> [<https://perma.cc/W8A3-7F2B>].

141. Kindy, *supra* note 130 (quoting Seth Stoughton).

142. Ivan Pereira, *Minnesota Leaders Ban Chokeholds, ‘Warrior Training’ in Comprehensive Police Reform Bill*, ABC NEWS (July 21, 2020, 2:44 PM), <https://abcnews.go.com/US/minnesota-leaders-ban-chokeholds-warrior-training-comprehensive-police/story?id=71894416> [<https://perma.cc/X4LK-N8NU>].

143. *Id.*

144. See Email from Katie Ryan, Campaign Zero, to Joanna Schwartz (Oct. 14, 2021, 11:54 AM) (on file with authors); Campaign Zero, *supra* note 77 (listing nineteen states that have adopted laws that include one or more of 8 Can’t Wait’s priority policies).

some resistance.<sup>145</sup> As we now describe in Part II, one of the most powerful forces resisting reform to use-of-force standards is Lexipol LLC.

## II. LEXIPOL'S OPPOSITION TO RESTRICTING POLICE POWER

Advocates and researchers agree that restricting police officers' discretion to use force will save lives. But these reforms are facing opposition by some unions and law enforcement groups arguing that officers need to retain the massive discretion offered by *Graham*.<sup>146</sup> In lawsuits, legislative testimony, letters to government leaders, and newsletters issued to their members, these groups have argued that prohibiting chokeholds and changing the constitutional standard for excessive force will make it more difficult for police to do their jobs and will threaten officer and public safety.<sup>147</sup>

One of the most powerful opponents of use-of-force policy reform is Lexipol LLC, a private company that crafts police policies and trainings for almost one-third of law enforcement agencies across the country. Lexipol describes itself in promotional materials as a risk management provider that creates policies and trainings that comply with federal and state legal requirements, as well as best practices. Lexipol claims that it employs "a rigorous yet collaborative development and review process to ensure diverse perspectives—internal and external to our

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145. See *infra* notes 146–48 and accompanying text.

146. See, e.g., INT'L ASS'N OF CHIEFS OF POLICE, USE OF FORCE POSITION PAPER: LEGISLATIVE CONSIDERATIONS AND RECOMMENDATIONS 5 (May 2019), [https://www.theiacp.org/sites/default/files/2019-05/Use%20of%20Force%20Task%20Force%20Recommendations\\_Final%20Draft.pdf](https://www.theiacp.org/sites/default/files/2019-05/Use%20of%20Force%20Task%20Force%20Recommendations_Final%20Draft.pdf) [<https://perma.cc/DT5Z-8PTJ>] ("The IACP opposes any effort to alter the *Graham v. Connor* standard. Any proposed legislation requiring police use of force only when 'necessary' is presuming a level of officer influence over circumstances that does not exist and strives to create a level of perfection that cannot possibly be obtained.").

147. See, e.g., Complaint at 4, 21, Police Benevolent Ass'n of New York v. City of New York, No. 653624/2020 (filed Aug. 5, 2020) (suing the City of New York for a newly enacted chokehold ban, arguing that the ban "threatens both police and public safety" and "inflicts a severe and unwarranted chilling effect on the ordinary performance of police duties of apprehensions and arrests"); Letter from William J. Johnson, Exec. Dir., Nat'l Ass'n of Police Orgs., to Rep. Jerrold Nadler, Chair, Comm. on the Judiciary, and Rep. Jim Jordan, Ranking Member, Comm. on the Judiciary (June 15, 2020), [http://www.napo.org/files/5015/9259/5171/NAPO\\_Letter\\_Justice\\_in\\_Policing\\_Act.pdf](http://www.napo.org/files/5015/9259/5171/NAPO_Letter_Justice_in_Policing_Act.pdf) [<https://perma.cc/9A3D-LU9D>] (expressing concern about proposed changes to *Graham* in the Justice in Policing Act because it "will have a chilling effect on the men and women in uniform"); Letter from Patrick Yoes, Nat'l President, Fraternal Ord. of Police, and Chief Steven R. Casstevens, President, Int'l Ass'n of Chiefs of Police, to Att'y Gen. William Barr (Sept. 24, 2020), <https://fop.net/letter/u-s-attorney-general-barr-for-implementing-president-trumps-executive-order-on-safe-policing-for-safe-communities/> [<https://perma.cc/5AZC-953S>] (expressing opposition to any adjustment of the *Graham* standard); *NAPO Opposes Ban on Riot Control Equipment*, WASH. REP. Nat'l Ass'n of Police Orgs./Alexandria, Va., Sept. 18, 2020, at 3–4, [http://www.napo.org/files/4816/0043/8967/Washington\\_Report\\_-\\_September\\_18\\_2020.pdf](http://www.napo.org/files/4816/0043/8967/Washington_Report_-_September_18_2020.pdf) [<https://perma.cc/NTG2-SL43>] (explaining the organization's opposition to a proposed bill to ban the use of riot control agents because "this bill puts our members' lives in danger").

company—are considered.”<sup>148</sup> Yet, despite this diversity of input and these representations of neutrality, we have found that Lexipol crafts its materials in ways that maximize officer discretion as a means of minimizing legal liability.<sup>149</sup> In the current moment of reflection and reform, Lexipol has doubled down on this retrograde position. Lexipol’s policies and public statements make clear that its leadership has strong views on what use-of-force policies should and should not contain—and these views stand in sharp opposition to those pushing for reform.

Although Lexipol has made some modest adjustments to their policies and trainings in the wake of George Floyd’s murder,<sup>150</sup> Lexipol’s formal policies and trainings are crafted in ways that go against many of the reforms currently being pressed by advocates and increasingly adopted by local governments. Lexipol’s standard use-of-force policy retains maximum flexibility for law enforcement and avoids placing any firm limits on officers’ power to use force. Lexipol’s other publicly available materials take even more vigorous—and less diplomatic—stands against reform proposals. And, when reforms have actually been proposed, such as the California law to restrict force only when necessary, Lexipol has advocated to limit the language of the bill ultimately passed and has further sought to limit the impact of the bill once enacted through its advice to subscribers.

In this Part, we support these claims by describing Lexipol’s anti-reform positions—as reflected in their publicly available use-of-force policies and training materials, self-published articles, blog posts, white papers, webinars, and public statements—regarding several of the key reforms currently being advanced by advocates and governments. Then we describe Lexipol’s advocacy efforts in response to proposed and enacted reforms, focusing on their efforts to undermine California’s new law, which was intended to restrict deadly force to situations in which it is deemed necessary.

#### *A. Lexipol’s Use-of-Force Policy and Trainings*

The cornerstone of Lexipol’s service for police and sheriff agencies is access to Lexipol’s copyrighted policy manual, supplemented by short online trainings for officers.<sup>151</sup> Lexipol’s standard advertising pitch stresses the difficulty that local law enforcement agencies have in creating their own policy manual. “You’re committed to fair, equitable policing for every member of your community,” Lexipol writes on its webpage, “[b]ut keeping up with changing legislation, expectations and training requirements—while also keeping your officers safe and healthy—is resource-intensive and challenging for any law enforcement leader.”<sup>152</sup> Lexipol offers a solution—“170+ state-specific policies written by industry experts and kept up to

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148. *Police Use of Force: Safer Communities Through Sound Policies*, LEXIPOL, <https://useofforce.lexipol.com/law-enforcement/> [<https://perma.cc/8GHE-PT99>].

149. See generally Eagly & Schwartz, *supra* note 10.

150. See *infra* note 243 and accompanying text (describing one such change).

151. Eagly & Schwartz, *supra* note 10, at 894–95.

152. LEXIPOL, *supra* note 15.

date as legislation and best practices change.”<sup>153</sup> By subscribing to Lexipol, customers “[r]educ[e] risk with policies that align with state and federal laws.”<sup>154</sup>

Lexipol has created a model national master policy manual that it maintains is based on constitutional standards.<sup>155</sup> Lexipol then turns to state laws to create a master manual for each state in which it has clients.<sup>156</sup> As Lexipol explains, its “policies are based on nationwide standards and best practices while also incorporating state and federal laws and regulations where appropriate.”<sup>157</sup> To promote its policies in the wake of protests over George Floyd’s murder and police use of force, in July 2020, Lexipol publicly released its national use-of-force policy on a “use of force” page on its website.<sup>158</sup>

Lexipol supplements its policies with training modules that allow agencies to “[m]eet training mandates with courses covering time-tested tactics and the latest hot topics.”<sup>159</sup> These signature Daily Training Bulletins (DTBs) are distributed to Lexipol clients and take only a few minutes to complete.<sup>160</sup> Officers can access these quick trainings through Lexipol’s mobile app, or they can be integrated into daily department roll call routines.<sup>161</sup>

In the discussion that follows, we describe Lexipol’s national policy on use of force as well as several of its corresponding DTBs on using force. Our goal here is to familiarize readers with how Lexipol articulates the use-of-force standard that police officers should follow and how its trainings address the topic.

### 1. Policy 300

Lexipol’s national use-of-force policy, as well as all Lexipol state use-of-force policies, are titled “Policy 300: Use of Force.”<sup>162</sup> Lexipol’s Policy 300 contains three

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153. *Id.*

154. *Id.*

155. Eagly & Schwartz, *supra* note 10, at 903.

156. *Id.*

157. *Policies & Updates*, LEXIPOL, <https://www.lexipol.com/solutions/policies-and-updates/> [<https://perma.cc/YM6P-UE58>].

158. LEXIPOL, ANYTOWN POLICE DEPARTMENT: USE OF FORCE POLICY (July 10, 2020), <https://info.lexipol.com/National-Use-of-Force-Policy> [<https://perma.cc/DBG7-5YP8>] [hereinafter Lexipol National Use of Force Policy]. Lexipol explains on its webpage that: “This [use-of-force] policy is intended as a starting point for local governments and agencies preparing policies for dealing with use of force. This is a national-level policy and references holdings from federal case law but does not include applicable state or local requirements.” *Police Use of Force*, LEXIPOL, <https://useofforce.lexipol.com/policy/> [<https://perma.cc/A2PH-Z5JA>].

159. LEXIPOL, *supra* note 15.

160. *Better Policy Understanding in Just Minutes a Day*, LEXIPOL, <https://www.lexipol.com/solutions/policy-training> [<https://perma.cc/CY2K-NDJ5>]; see also Shannon Pieper, *4 Ways to Integrate Policy into Police Training*, LEXIPOL (July 5, 2017), <https://www.lexipol.com/resources/blog/4-ways-to-integrate-policy-into-police-training/> [<https://perma.cc/MY3E-AX3X>].

161. Pieper, *supra* note 160.

162. For a sampling of Lexipol’s use-of-force policy across several states, see LEXIPOL, *Lexipol Illinois Policy Manual: Policy 300—Use of Force* (July 7, 2016),

distinguishing features. First, Policy 300 embraces the *Graham* standard, providing that officers should use force “that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event” and recognizing that “officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation.”<sup>163</sup>

Second, consistent with Lexipol’s overall approach, Lexipol’s national use-of-force policy retains maximal police discretion. As Bruce Praet, a former law enforcement officer and one of Lexipol’s founders, explained in a recent webinar: “One of our secret sauces, so to speak, is that rarely, if ever, will you see the use of the word ‘shall’ in our policies.”<sup>164</sup> Policy 300 is no exception: it includes a flexible list of factors that can support use of force, including the “[i]mmediacy and severity of the threat to officers or others,” the “individual’s mental state or capacity,” and the “conduct of the individual being confronted, as reasonably perceived by the officer at the time.”<sup>165</sup> Notably, Lexipol does not require officers to exhaust reasonable alternatives before resorting to using force. Instead, the standard language emphasizes that police officers should have maximum discretion and that “no policy can realistically predict every possible situation an officer might encounter.”<sup>166</sup> As a result, the policy counsels that “officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident.”<sup>167</sup>

The third key feature of Lexipol’s use-of-force policy—consistent with its embrace of *Graham* and maximum officer discretion—is its avoidance of bright-line rules that ban certain practices. In apparent response to the protests and calls for reform following the killing of George Floyd, Lexipol amended its policy on carotid

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<http://www.lexipol.com/wp-content/uploads/2016/08/Use-of-Force.pdf> [https://perma.cc/FG42-A77S]; LEXIPOL, *Lexipol Pennsylvania Policy Manual: Table of Contents* (Dec. 16, 2016), [http://www.lexipol.com/wp-content/uploads/2017/01/PA-LE-Policy-Manual\\_TOC.pdf](http://www.lexipol.com/wp-content/uploads/2017/01/PA-LE-Policy-Manual_TOC.pdf) [https://perma.cc/RM2R-SXMV]; LEXIPOL, *Policy 300—Use of Force, in* DENTON POLICE DEPARTMENT: MD POLICY MANUAL (Sept. 15, 2020), [https://www.dentonmdpolice.com/wp-content/uploads/2020/09/RELEASE\\_20200915\\_T110825\\_Denton\\_Police\\_Department\\_Policy\\_Manual.pdf](https://www.dentonmdpolice.com/wp-content/uploads/2020/09/RELEASE_20200915_T110825_Denton_Police_Department_Policy_Manual.pdf) [https://perma.cc/ZGS2-4W2Q]; LEXIPOL, *Policy 300—Use of Force, in* WEST LAFAYETTE POLICE DEPARTMENT POLICY MANUAL (Feb. 3, 2017), [https://www.westlafayette.in.gov/egov/documents/1486153609\\_21916.pdf](https://www.westlafayette.in.gov/egov/documents/1486153609_21916.pdf) [https://perma.cc/QXU7-8ZDT]; LEXIPOL, *Policy 300—Use of Force, in* CITY OF SUNNYVALE DEPARTMENT OF PUBLIC SAFETY: DEPARTMENT POLICIES (June 11, 2020), <https://sunnyvale.ca.gov/civicax/filebank/blobdload.aspx?BlobID=26744> [https://perma.cc/7DSD-HUZG].

163. Lexipol National Use of Force Policy, *supra* note 158, § 300.3. Lexipol’s state-specific policy manuals incorporate any state-law restrictions and requirements regarding the use of force and other police practices. Lexipol’s state policies are not discussed here but see *infra* notes 306–16 and accompanying text (describing how Lexipol has responded to changes in California law regarding use-of-force standards).

164. Bruce Praet, *Webinar: The “Act to Save Lives”: What Law Enforcement Needs to Know About CA AB392*, LEXIPOL, at 33:27 (Oct. 17, 2019), <https://info.lexipol.com/webinar-ca-ab392> [https://perma.cc/KXW4-S65Z] (complete “Register Now” instructions, then follow “View Now” hyperlink) [hereinafter *Lexipol Webinar on AB 392*].

165. Lexipol National Use of Force Policy, *supra* note 158, § 300.3.2.

166. *Id.* § 300.3.

167. *Id.*

restraints to limit their use to instances when deadly force is authorized but continues to maintain that “[t]he proper application of the carotid control hold may be effective in restraining a violent or combative individual.”<sup>168</sup> Nor does Lexipol’s standard manual ban shooting into vehicles. Instead, it counsels that shooting at a moving vehicle is “rarely effective” and suggests that officers should use the technique “when the officer reasonably believes there are no other reasonable means available to avert the threat of the vehicle, or if deadly force other than the vehicle is directed at the officer or others.”<sup>169</sup> In sum, Lexipol eschews the types of bright-line rules that prohibit certain dangerous techniques, including them in their state policy manuals only if they have been mandated by that state.<sup>170</sup>

## 2. Daily Training Bulletins

Lexipol offers its subscribers scores of Daily Training Bulletins (DTBs) to use with their officers. To illustrate its approach to training officers about their power to use force, we analyze three DTB training modules that Lexipol features on its website. Each begins with a policing scenario and then asks a basic true/false question that focuses on an aspect of Lexipol’s use-of-force policy. This format is consistent with Lexipol’s general approach to DTBs. According to Lexipol’s former vice president of Learning and Policy content, Don Weaver, Lexipol designs its “training bulletins to focus on a specific aspect of the agency’s policy and present them in the form of scenarios because we know this helps enhance learning retention—the officers are being asked to consider how their policy works in the real world.”<sup>171</sup> Because Lexipol prioritizes training topics that agencies are “most likely to get sued for,” use of force is one of the featured topics.<sup>172</sup>

One of Lexipol’s most popular DTBs,<sup>173</sup> called “Factors to Determine Reasonableness,” is based on a scenario involving a woman named Mary Craig who is pulled over for a “minor but arrestable” traffic violation (Figure 1).<sup>174</sup> Officers

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168. *Id.* § 300.3.4.

169. *Id.* § 300.4.1.

170. For example, several states—including California—have recently passed laws banning the use of carotid restraints under any circumstances. Harmeeet Kaur & Janine Mack, *The Cities, States and Countries Finally Putting an End to Police Neck Restraints*, CNN (June 16, 2020, 6:24 AM), <https://www.cnn.com/2020/06/10/world/police-policies-neck-restraints-trnd/index.html> [<https://perma.cc/J86V-BGCT>]. Lexipol’s California policy manual therefore includes a ban on carotid restraints to comply with state law. *See, e.g.*, CITY OF SUNNYVALE DEPARTMENT OF PUBLIC SAFETY: DEPARTMENT POLICIES, *supra* note 162, § 300.3.4. In states that do not have such a ban, Lexipol’s policy manual limits carotid restraints to instances when deadly force is appropriate. Lexipol National Use of Force Policy, *supra* note 158, § 300.3.4.

171. Lexipol Team, “Reasonableness” in *Police Use of Force Tops Lexipol’s 2018 Law Enforcement Training Topics*, LEXIPOL (Jan. 2, 2019), <https://www.lexipol.com/resources/blog/reasonableness-in-police-use-of-force-tops-lexipol-2018-law-enforcement-training-topics/> [<https://perma.cc/D5H4-RAR5>].

172. Pieper, *supra* note 160.

173. In 2018, the training topic most commonly relied on by departments was use of force. Lexipol Team, *supra* note 171.

174. *Sample Daily Training Bulletin: Factors to Determine Reasonableness*, LEXIPOL (Aug. 2016), [http://www.lexipol.com/wp-content/uploads/2016/08/DTB\\_UOF\\_factors-to-](http://www.lexipol.com/wp-content/uploads/2016/08/DTB_UOF_factors-to-)

have the “option of citing and releasing Ms. Craig or making a custodial arrest.” As they speak with her, she “becomes increasingly agitated,” asks why she has been stopped, and will not roll down her front window or get out of the car.<sup>175</sup> Officers are asked to consider whether to forcibly remove Ms. Craig from the car, despite the fact that she “has provided the correct identifying information” and officers believe she has done nothing wrong other than the minor traffic offense.<sup>176</sup>

**Figure 1.** Lexipol Daily Training Bulletin:  
“Factors to Determine Reasonableness”



**SAMPLE DAILY TRAINING BULLETIN  
USE OF FORCE  
Factors to Determine Reasonableness**

**SCENARIO:**

You are in a quiet parking lot on a lawful traffic stop of a red Pontiac Grand Am. Officer Tim Jensen is on his way to back you. You stopped the car because you saw the driver, Mary Craig, commit a minor but arrestable offense on a public street. You have the option of citing and releasing Ms. Craig or making a custodial arrest.

While you are talking to Ms. Craig through the front passenger window, she becomes increasingly agitated. She rolls up the passenger window and locks the doors. She then rolls the driver's window down a few inches and loudly demands that you come over to the driver's side to speak with her. She refuses your polite requests to roll down the passenger window and repeatedly yells at you, demanding to know why you stopped her.

When Officer Jensen arrives, you safely walk around to the driver's window. You politely and professionally explain the reason for the stop to Ms. Craig and ask for her driver's license. A highly agitated Ms. Craig yells, "I'm not giving you my driver's license! My name is Mary Craig and this is my car. Do what you have to do, but I am not getting out of this car!"

You unsuccessfully try to persuade Ms. Craig to cooperate. You have no reason to believe Ms. Craig has done or is doing anything unlawful other than the minor offense for which you stopped her. You also believe that Ms. Craig has provided correct identifying information. Officer Jensen suggests forcibly removing Ms. Craig from the car and taking her into custody.

**ISSUE: What should you consider before taking action?**

Rather than tell trainees how to de-escalate or handle the situation, Lexipol uses this scenario as an opportunity to teach the *Graham* standard. Lexipol counsels that officers should weigh a number of factors in determining whether to use force, including “the conduct of the individual being confronted,” the “[s]eriousness of the suspected offense,” the “risk and reasonably foreseeable consequence of escape,” and the “[i]mmmediacy and severity of the threat” to officers and others.<sup>177</sup> Lexipol’s training does not provide any tactical guidance about how to resolve this type of

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determine-reasonableness.pdf [https://perma.cc/EVK9-HUPW].

175. *Id.*

176. *Id.*

177. *Id.*

situation without force, but rather is only limited to clarifying that officers have maximum flexibility to use their discretion to decide what to do.

A second use-of-force training that Lexipol posts on its website is titled “Use of Force Continuum” (Figure 2).<sup>178</sup> This DTB addresses a scenario where police shoot and kill a civilian. In the scenario, police respond to “a report of a disturbance at a local tavern” and arrive to find an unnamed man in a parking lot “holding a baseball bat.”<sup>179</sup> Officers approach the man, who is swinging the bat, to “try to keep him calm” and have a Taser “ready in case it’s needed.”<sup>180</sup> As the police approach, the man “rushes” at the officer with the bat.<sup>181</sup> The officer draws his firearm and kills the man.

**Figure 2.** Lexipol Daily Training Bulletin:  
“Use of Force Continuum”



**SAMPLE DAILY TRAINING BULLETIN**  
**USE OF FORCE**  
**Use of Force Continuum**

**SCENARIO:** Late one afternoon, you respond to a report of a disturbance at a local tavern. As you arrive, you see several individuals standing in the parking lot, surrounding a man holding a baseball bat. The man is in a batting stance and repeatedly swinging as if he is trying to hit a fastball. You and your backup park on the far side of the tavern and approach cautiously. Your intent is to approach the man carefully and try to keep him calm. Your backup has his TASER® unholstered and ready in case it's needed. As soon as you come around the corner, the man with the bat catches sight of you and immediately rushes at you, as if he intends to strike you. Sensing an immediate threat to your safety, you draw and fire your duty weapon, striking and killing the individual.

Several months later, the man's parents file a 42 U.S.C. 1983 Civil Rights Act claim against you and your agency, alleging you violated their son's Fourth Amendment rights through the use of excessive force. More specifically, they claim that you should have attempted lesser force options to control their son before resorting to deadly force.

**ISSUE:** Does an officer have a legal responsibility to escalate through various force options before using deadly force?

The issue presented to officers by Lexipol in this training is not whether officers could have approached the situation differently to avoid killing this man. Instead, officers are asked about the filing of a civil rights lawsuit alleging excessive force and whether the officers had any “legal responsibility” to try non-lethal force before killing the unnamed man. The answer, according to Lexipol, is decidedly no. Lexipol judges that the police killing was justified because “the man brandishing the baseball bat determined what level of force you needed to use to counter his assault.”<sup>182</sup> Without providing additional facts, Lexipol writes that the officer in this scenario

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178. *Sample Daily Training Bulletin, Use of Force: Use of Force Continuum*, LEXIPOL (Aug. 2016), [http://www.lexipol.com/wp-content/uploads/2016/08/DTB\\_UOF\\_force-continuum.pdf](http://www.lexipol.com/wp-content/uploads/2016/08/DTB_UOF_force-continuum.pdf) [<https://perma.cc/H9MG-4THX>].

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*



“reasonably deduced that the suspect’s actions posed an immediate threat to the safety of you and others present and you responded accordingly.”<sup>183</sup>

This training module provides an opportunity to refer readers to Lexipol’s Policy 300, which indicates that “[r]easonableness of the force used must be judged from the perspective of a reasonable officer on the scene at the time of the incident.”<sup>184</sup> Officers learn that this standard of “objective reasonableness” comes from the “landmark case” of *Graham v. Connor*, which takes “into consideration the totality of the circumstances known to the officer(s) at the time, without the advantage of 20/20 hindsight.”<sup>185</sup> Citing to additional Supreme Court and Circuit Court precedent, Lexipol reassures trainees that “[f]ortunately, the rejection of any continuum of force is now consistently reflected by almost every federal court.”<sup>186</sup>

Entirely ignored in the problem is the opportunity to discuss officer tactics, including how officers could have de-escalated the situation so as to avoid killing this man. For example, Lexipol does not examine whether the officers could have instead engaged the man from a distance rather than approaching so closely. Nor does Lexipol explore whether a Taser could have been used in lieu of a firearm. Similarly, there is no consideration of whether the officers could have withdrawn or checked for any background information on the individual before approaching. These omissions underscore Lexipol’s focus on avoiding officer liability for police shootings, instead of avoiding such shootings in the first instance.

The third use-of-force training that Lexipol provides the public on its webpage, titled “Deadly Force Applications,” also involves a scenario of a police officer killing a civilian (Figure 3).<sup>187</sup> This scenario provides no facts at all leading up to the police killing but does state that the man who is killed had a pistol. The DTB starts with the officer wondering “How could I miss at this distance?” and exclaiming that the officer “can’t believe he’s not down!”<sup>188</sup> The officer then proceeds to kill the individual with multiple rounds of ammunition.

Like the prior trainings, this DTB does not address what the officer could have done to de-escalate or avoid this situation. Nor does it discuss what the officer should do to assist the man he shot. Rather, the training focuses on the officer’s worry that he “might be in trouble” and centers the lesson once again on the *Graham* standard. Lexipol assures the trainees that “the number of rounds alone does not determine the reasonableness of force.”<sup>189</sup> Instead, “reasonableness will be judged from the perspective of a reasonable officer on the scene at the time of the incident” and should be found to be reasonable because “[y]ou were protecting yourself from what you reasonably believed was an imminent threat of death or serious bodily injury.”<sup>190</sup> Although the training acknowledges that the officer may have shot the man “as he

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183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Sample Daily Training Bulletin, Use of Force: Deadly Force Applications*, LEXIPOL (Aug. 2016), [http://www.lexipol.com/wp-content/uploads/2016/08/DTB\\_UOF\\_deadly-force-factors.pdf](http://www.lexipol.com/wp-content/uploads/2016/08/DTB_UOF_deadly-force-factors.pdf) [<https://perma.cc/W84Z-MXXL>].

188. *Id.*

189. *Id.*

190. *Id.*

was falling” or “after he fell,” Lexipol reminds trainees that each round “appeared necessary given the facts and circumstances you perceived at the time.”<sup>191</sup>

**Figure 3.** Lexipol Daily Training Bulletin:  
“Deadly Force Applications”



**SAMPLE DAILY TRAINING BULLETIN  
USE OF FORCE  
Deadly Force Applications**

**SCENARIO:** You can't believe he's not down! Desperation rising, you wonder, "How could I miss at this distance?" You squeeze your trigger over and over again as if in slow motion. It's strange to see his pistol still pointing at you, the gaping muzzle seemingly too big to be real. You knew he was going to shoot you. Unexpectedly, he changes position. You're surprised to see that he is suddenly down and your trigger finger finally reacts to that realization. Your vision is expanding and normalizing. Your heart is pounding and you still have your gun pointing at him. You are grateful to realize you are apparently uninjured. Your mind is racing. Among many thoughts, you wonder how many shots you fired. You have no idea. You look around and notice many empty shell casings. You wonder if you might be in trouble.

**ISSUE:** Will the number of rounds you fired determine whether the force was reasonable?

The Lexipol policies and trainings just described maximize officer flexibility to use force and focus on officers' avoidance of legal liability. They do not incorporate the kinds of reforms called for by policing experts and advocacy groups. As we described in Part I, those advocating for police use-of-force policy reforms have identified many ways in which police policies contribute to police violence. To correct this problem, experts have proposed a range of policy revisions. These proposals include limiting the use of force only to circumstances in which it is necessary and using the least amount of force necessary under the circumstances. They also include adopting a range of bright-line rules to prohibit the use of force in certain scenarios, such as by prohibiting chokeholds or shooting at moving vehicles. By producing policies and trainings that are silent on these alternatives known to reduce police violence, Lexipol provides no structure for participating agencies to consider these alternatives.

*B. Lexipol's Anti-Reform Stance*

Lexipol's policies and trainings for its thousands of subscribing agencies have largely rejected recommended policy shifts, but Lexipol's influence does not end there. As we now discuss, Lexipol supplements its formal materials with a range of educational outreach and persuasive materials that send a clear message that Lexipol's leaders believe these types of reforms are a bad idea. As just one example, in response to growing calls for reform, in August of 2020, Lexipol launched a new

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191. *Id.*

portion of its website dedicated to its use-of-force policies.<sup>192</sup> The company took the opportunity to defend and justify its policy choices and explain that it has created this forum to serve “as an informational hub for all stakeholders.”<sup>193</sup> Through these and other actions, Lexipol reveals itself to be not just a policymaker but also an active and influential voice in the use-of-force debate.

Here, we describe central features of Lexipol’s anti-reform message that oppose the six approaches to reform we introduced in Part I. This Subpart also sets out the diverse ways in which Lexipol communicates that message to thousands of law enforcement agencies and millions of law enforcement officials across the country. As we show, Lexipol uses temperate language in white papers posted on its websites and blunter language in its webinars and other communications directed to members.

### 1. *Graham* Is the Only Applicable Standard

Lexipol focuses much of its public advocacy on promoting the *Graham* standard. According to Lexipol, *Graham v. Connor* is adequate guidance for police officers. Lexipol consistently takes the position that departments should not adopt more restrictive policies than that outlined in *Graham*. The company’s rationale appears to be based on a view that a policy that is more restrictive than the “reasonableness” guidelines established in *Graham v. Connor* will increase legal liability.

Lexipol uses diverse methods to get out its strong support of the *Graham* standard. For example, in 2018, Lexipol published a white paper titled “Use of Force Policy: Dispelling the Myths.”<sup>194</sup> This white paper was written by Lexipol co-founder and attorney Bruce Praet along with Lexipol Program Manager Mike Ranalli, and consultants Laura Scarry and Ken Wallentine. The document was promoted by Lexipol on Twitter.<sup>195</sup> It was also distributed through Lexipol’s wider contacts in policing circles, such as the Force Science Institute and Lexipol’s website, Police1.<sup>196</sup>

In the white paper, Lexipol claims it is a “myth” that increasing the force standard benefits law enforcement. According to Lexipol, any policy that “boxes officers in

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192. Lexipol Team, *Lexipol Introduces Online Police Use of Force Policy Resource*, LEXIPOL (Aug. 24, 2020), <https://www.lexipol.com/resources/blog/lexipol-introduces-online-police-use-of-force-policy-resource/> [<https://perma.cc/W6N5-NJRT>]. Among other materials, Lexipol published a new report on use of force that is available for download. See LEXIPOL, *supra* note 148.

193. LEXIPOL, *supra* note 148.

194. LEXIPOL, *USE OF FORCE POLICIES: DISPELLING THE MYTHS*, <https://perma.cc/S7FG-BNVQ> [hereinafter *Dispelling the Myths by Lexipol*].

195. @Lexipol, TWITTER (Dec. 14, 2017, 5:34 PM), <https://twitter.com/Lexipol/status/941436285042024453> [<https://perma.cc/4NHV-U6TF>].

196. See, e.g., Chuck Remsberg, *White Paper Cites Dangerous Myths of Restrictive Use of Force Policies*, FORCE SCI. INST. (Nov. 3, 2017), <https://www.forcescience.org/2017/11/white-paper-cites-dangerous-myths-of-restrictive-use-of-force-policies/> [<https://perma.cc/Q3M9-RWN8>]; Fred, *Use of Force Policy: Dispelling the Myths by Lexipol*, LAW ENF’T & SEC. CONSULTING BLOG (Nov. 11, 2018), <https://perma.cc/6DBD-8UXP>; Mike Callahan, *3 Myths About Officer-Involved Shootings*, POLICE1 BY LEXIPOL (Mar. 30, 2018), <https://www.policeone.com/evergreen/articles/3-myths-about-officer-involved-shootings-Inn9w3PqOMbyGEYo/> [<https://perma.cc/J6YJ-828S>].

is likely to create—not solve—legal issues for the agency.”<sup>197</sup> Straying from the *Graham* standard “can easily confuse [juries] and lead to an incorrect standard being applied to [an] officer’s actions.”<sup>198</sup> Lexipol concedes that modifying a use-of-force policy may “appease advocacy groups and members of the public who are quick to scrutinize agency use of force policies”<sup>199</sup> and “garner political points.”<sup>200</sup> Nonetheless, Lexipol’s consistent message is that departments should ignore these calls for reform because “[a]gencies are much better off keeping their use of force policies aligned with the objective reasonableness standard outlined in *Graham v. Connor*.”<sup>201</sup>

Lexipol has also relied on its employees and consultants to author news articles on its website that communicate the policy preference for *Graham*. For example, Michael Ranalli wrote an article titled “Countering the Critics: Responses to Common Arguments about Police Use of Deadly Force,” which originally appeared in *The Chief’s Chronicle*, a publication of the New York State Association of Chiefs of Police, and was then reprinted by Lexipol on its webpage.<sup>202</sup> In that article, Ranalli defends the *Graham* standard on the ground that it protects officers from liability:

The *Graham* standard works and results in the proper outcome in the majority of cases involving police use of deadly force. Many of those cases do not wind up in court because the rules worked, and the officers acted reasonably. Or they are brought but the courts apply the proper standard and find the officers’ actions to be reasonable.<sup>203</sup>

In another piece, Ranalli argues that “[s]ince officers may already be at a disadvantage, the last thing agencies should do is to create overly restrictive use of force policies that may not be possible for officers to adhere to.”<sup>204</sup> Ranalli further explains that, although reforms called for by advocates “may sound good and may appease some in the community,” they are “not effective.”<sup>205</sup> Police executives

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197. *Dispelling the Myths by Lexipol*, *supra* note 194, at 5.

198. *Id.*

199. *Id.*

200. Bruce Praet, *National Consensus Policy on Use of Force Should Not Trigger Changes to Agency Policies*, LEXIPOL (Jan. 25, 2017), <https://www.lexipol.com/resources/blog/use-caution-when-changing-use-of-force-policy-language/> [https://perma.cc/N7LL-26BT] [hereinafter Praet, *National Consensus Policy*].

201. *Dispelling the Myths by Lexipol*, *supra* note 194, at 7.

202. Michael Ranalli, *Countering the Critics: Responses to Common Arguments About Police Use of Deadly Force*, CHIEF’S CHRON. (N.Y. State Ass’n of Chiefs of Police, Schenectady, N.Y.), June 2018, at 5–7, <https://www.nychiefs.org/assets/docs/JUNE2018Chroniclewebversion-1.pdf>, reprinted in LEXIPOL (July 6, 2018), <https://www.lexipol.com/resources/blog/responses-common-arguments-police-use-deadly-force/> [https://perma.cc/UN2J-DP94] [hereinafter Ranalli on *Countering the Critics*].

203. *Id.*

204. Michael Ranalli, *Police Use of Force: Reality vs. Law*, LEXIPOL (Oct. 24, 2017), <https://www.lexipol.com/resources/blog/police-use-of-force-reality-vs-law/> [https://perma.cc/6XVL-GA6G] [hereinafter Ranalli, *Reality vs. Law*].

205. *Id.*

should not try “to change human behavior with mere words in a policy.”<sup>206</sup> Instead, they should maintain policies that are less restrictive, train their officers, and then “hope that they make sound tactical decisions.”<sup>207</sup> The view that restrictive use-of-force policies cannot influence officers’ behavior—a view Ranalli has shared in multiple Lexipol blog posts<sup>208</sup>—is flatly contradicted by decades of research indicating that such policies can, in fact, reduce police violence.<sup>209</sup>

Bruce Praet underscores his endorsement of use-of-force policies based on *Graham* in a webinar directed to Lexipol subscribers punctuated with crass language. In the webinar, this is how Praet explained that nothing should matter in evaluating use of force other than objective reasonableness under *Graham*: “I don’t care if you run him over with your police car. I don’t care if you smack him with your baton, choke him out, tase him, bite him, shoot him. One question: Was it objectively reasonable under the totality of the circumstances presented at the time?”<sup>210</sup> On Lexipol’s website, this on-demand webinar is described as a “frank discussion” with Praet about use-of-force policies—a characterization that undersells the off-color manner in which he describes the latitude offered by *Graham*.

## 2. No Requirement of De-Escalation Before Using Force

Lexipol has come out as a strong opponent to an emerging consensus on the need to require de-escalation techniques. In a widely circulated Lexipol white paper on use of force, the company claims it is a “myth” that “use of force policies should require the use of de-escalation tactics.”<sup>211</sup> Lexipol claims that reformers have “latched onto the concept of de-escalation” due to “many high-profile police shootings over the last several years,” but warns that any policy requiring de-escalation is misguided.<sup>212</sup> Time and time again, Lexipol criticizes reformers as portraying de-escalation as “the singular answer to reducing police use of force.”<sup>213</sup>

In a training sponsored jointly with the Force Science Institute, Lexipol goes a step further, arguing that de-escalation should sometimes be discouraged. In this

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206. *Id.*

207. *Id.*

208. *E.g.*, Michael Ranalli, *Police Use of Force: The Need for the Objective Reasonableness Standard*, LEXIPOL (Mar. 24, 2017), <https://www.lexipol.com/resources/blog/police-use-of-force-need-objective-reasonableness-standard/> [<https://perma.cc/WJ5U-X8RA>] (arguing that moving away from the objective reasonableness standard “will not have the desired effect on officer’s behavior”).

209. *See supra* notes 88, 95–101, 107–08, 116–21, 124–27, 136–39 and accompanying text (describing research).

210. Bruce Praet, *Still Clinging to a Use of Force Continuum or Labeling Force Levels? You’re at Risk!*, LEXIPOL, at 28:57 (Aug. 30, 2016), <https://info.lexipol.com/use-of-force-continuum> (complete “Register Now” instruction then follow “View Now” hyperlink) [<https://perma.cc/6WVS-CJ8Q>] [hereinafter *Still Clinging to a Continuum Webinar*].

211. *Dispelling the Myths by Lexipol, supra* note 194, at 13.

212. *Id.*

213. Michael Ranalli, *Do Police Officers Have a Legal Obligation to Use De-Escalation Tactics?*, LEXIPOL (Mar. 8, 2019), <https://www.lexipol.com/resources/blog/do-police-officers-have-a-legal-obligation-to-use-de-escalation-tactics/> [<https://perma.cc/45SL-V4LP>] [hereinafter Ranalli, *De-Escalation Tactics*].

training, presenters Michael Ranalli and Bill Lewinski, founder of the Force Science Institute, contend that de-escalation can be appropriate for “a person in crisis” but generally should not be used for “a criminal suspect”:<sup>214</sup>

It's not that you'd never use de-escalation or conflict communications on criminal suspects, but caution must be used in that you do not necessarily want to lose the first—and possibly best—opportunity to take the person into custody. When you have a noncompliant criminal suspect, de-escalation tactics can actually backfire, slowing things down, and give them the advantage and increase the risk to you.<sup>215</sup>

For Lexipol, all issues come back to the *Graham* standard. Lexipol advises its subscribers that courts do not require de-escalation tactics or the least intrusive means, so long as “the force used was objectively reasonable.”<sup>216</sup> Officers need only follow this minimal standard and policy manuals should too.

Lexipol co-founder, Bruce Praet, cautions against mandatory de-escalation in a blog post on the company's webpage:

While “de-escalation” has become the latest buzzword and is conceptually advisable, agencies must exercise extreme caution when mandating action with the use of inflexible “shalls.” Recognizing that critics and attorneys will inevitably argue that de-escalation or other action was ultimately “possible and appropriate,” the Supreme Court in *Graham* cautioned against using the benefit of 20/20 hindsight. As such, it is essential that every aspect of every use of force policy retain the critical “reasonably believes” qualifier. It's also why Lexipol policy clearly defines the difference between “shall” and “should” and cautions against the unnecessary use of “shall.”<sup>217</sup>

In another Lexipol webinar, attorneys Laura Scarry and Ken Wallentine discuss the killing of Philando Castile, a Black man shot in a traffic stop. Mr. Wallentine criticizes “so-called experts” who he contends “rushed to claim that de-escalation training could have altered the outcome and could have prevented the shooting.”<sup>218</sup> Discounting that de-escalation could have saved Castile's life, Wallentine concludes that “some situations simply evolve too rapidly to allow time for any de-escalation efforts.”<sup>219</sup> Ms. Scarry then cautions listeners to “make sure you're not adding any

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214. Bill Lewinski & Mike Ranalli, *De-Escalation: When & How to Make It Work*, LEXIPOL, at 8:23 (May 10, 2018), <https://info.lexipol.com/webinar-deescalation-FSI> (complete “Register Now” instructions then follow “View Now” hyperlink) [<https://perma.cc/89AK-2P3Y>].

215. *Id.* at 8:39.

216. Ranalli, *De-Escalation Tactics*, *supra* note 213.

217. Praet, *National Consensus Policy*, *supra* note 200 (emphasis omitted).

218. Laura Scarry & Ken Wallentine, *A Rational Approach to Incorporating De-Escalation into Policy*, LEXIPOL, at 6:00 (Sept. 12, 2017), <http://info.lexipol.com/deescalation-webinar-on-demand> (complete “Register Now” instructions then follow “View Now” hyperlink) [<https://perma.cc/8WCL-5UQM>].

219. *Id.* at 6:23.

additional standards to your use-of-force policy. That policy is best written to align with the *Graham v. Connor* standards and not [to] require officers to move along any kind of use-of-force continuum.”<sup>220</sup>

### 3. No Use-of-Force Continuum

Although reformers have pushed law enforcement to adopt use-of-force continuums that encourage the proportional use of force and limit the amount of force used by officers, Lexipol has never incorporated a continuum into its policies or trainings. Moreover, Lexipol has been vocal in its opposition to the very idea of a continuum.

Lexipol’s white paper on use of force underscores its view that officers should not be required to “follow a continuum before using force.”<sup>221</sup> Quite simply: “Don’t require officers to move along any kind of use of force continuum.”<sup>222</sup> Instead, Lexipol urges that police departments subscribe to their service and adopt “legally sound” policies that are “based on Fourth Amendment principles rather than more restrictive and possibly unattainable standards.”<sup>223</sup> This kind of wide latitude to use force and rejection of use-of-force continuums runs counter to reformers pushing to reduce the use of force and lacks empirical evidence.<sup>224</sup>

Lexipol’s objection to continuums appears to be rooted in its concern about erosion of the *Graham* reasonableness standard by reforms that encourage officers “to use or even consider the least intrusive means available.”<sup>225</sup> As Lexipol posted on its website defending its anti-continuum stance in the wake of increasing public cries to incorporate use-of-force continuums, “[n]either case law nor state legislation requires the adoption of use of force continuums within policy. Accordingly, Lexipol’s Policy 300 on use of force does not include a continuum, instead following precedent set by the Supreme Court in *Graham v. Connor* that force must be ‘objectively reasonable.’”<sup>226</sup>

Lexipol also gets its message out in more direct terms through webinars. One such webinar taught by Bruce Praet features the catchy title “Still Clinging to a Use of Force Continuum or Labeling Force Levels? You’re at Risk!”<sup>227</sup> The webinar is described as emphasizing that continuums are “outdated” and “ill-advised” and

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220. *Id.* at 31:08.

221. *Dispelling the Myths by Lexipol*, *supra* note 194, at 16.

222. *Id.* at 19.

223. Michael Ranalli, *Police Use of Force Policy: Civil vs. Criminal Liability Considerations*, LEXIPOL (Aug. 9, 2017), <https://www.lexipol.com/resources/blog/police-use-of-force-policy-civil-vs-criminal-liability-considerations/> [<https://perma.cc/A28M-P4QU>].

224. See Lorie Fridell, Steve Ijames & Michael Berkow, *Taking the Straw Man to the Ground: Arguments in Support of the Linear Use-of-Force Continuum*, POLICE CHIEF (Dec. 2011), <https://www.policechiefmagazine.org/taking-the-straw-man-to-the-ground/> [<https://perma.cc/M3NM-VVE3>] (critiquing proponents of what the authors call the “just be reasonable” view that argues against continuums and in favor of simply following a reasonableness standard).

225. Ranalli, *De-Escalation Tactics*, *supra* note 213.

226. LEXIPOL, *supra* note 148.

227. *Still Clinging to a Continuum Webinar*, *supra* note 210.

warns listeners that adopting one “creates legal trouble, even if an officer’s actions are reasonable.”<sup>228</sup> As Praet bluntly tells webinar participants: “All of this stuff about continuums of force and escalation scales . . . that’s all hogwash. . . . Get rid of the continuums of force. You cannot put a real-life situation into an artificial graph or whatever.”<sup>229</sup>

In another webinar, Praet got this same point across with far coarser language:

I’m gonna shoot myself for even using this term, but this escalation of force, this continuum of force—by the way if I ever hear any of you using a continuum of force, I will personally choke your ass out and it will be objectively reasonable for me to have done so.<sup>230</sup>

He then assures listeners that they should “[p]urge [their] brains of this whole continuum concept; you will never find that anywhere in our policies because you can’t fit a square peg into a round hole.”<sup>231</sup>

#### 4. No Bright-Line Rules

Lexipol vehemently opposes bright-line restrictions on officers’ use of force. As Gordon Graham, one of Lexipol’s founders, explains: “There are not really any simple, bright-line rules for use of force or tactical decisions.”<sup>232</sup> Lexipol’s Michael Ranalli agrees: “Policy language that definitively prohibits an action will inevitably result in a situation where an officer violates the policy under reasonable circumstances, which in turn can create issues that must be dealt with if litigation results.”<sup>233</sup> As a result, Lexipol’s model policies retain officer discretion and the company resists bans of any police practices.<sup>234</sup>

Retaining officer discretion is essential, according to Lexipol, to protect officers and departments from liability. As Michael Ranalli counsels: “You don’t draft policy when you know that there can be exceptions to that policy.”<sup>235</sup> The “[b]ottom line”

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228. *Id.*

229. *Id.* at 27:29.

230. Bruce Praet, *Think You’re Ready to Testify? How to Effectively Prepare for Depositions & Cross-Examinations*, GoToWEBINAR, at 40:22 (Apr. 17, 2017), <https://register.gotowebinar.com/register/6545965947007305218> [<https://perma.cc/AV5K-ZG2C>] (complete “Register” instructions then follow “Register” hyperlink) [hereinafter *Think You’re Ready to Testify Webinar*].

231. *Id.* at 40:38.

232. Gordon Graham, *Law Enforcement Officers and the 21-Foot Rule*, LEXIPOL, at 1:25 (Nov. 27, 2018), <https://www.lexipol.com/resources/todays-tips/law-enforcement-officers-and-the-21-foot-rule/> [<https://perma.cc/PYM7-7CC4>].

233. Michael Ranalli, *Why PERF’s Prohibition on Shooting at Vehicles Sells Agencies Short*, LEXIPOL (Sept. 8, 2016), <https://www.lexipol.com/resources/blog/why-perfs-prohibition-on-shooting-at-vehicles-sells-agencies-short-2/> [<https://perma.cc/ZNF6-QFH3>].

234. *See id.*

235. Michael Ranalli, *Priority of Life: A Model for Improving Officer Safety and Reducing Risk*, LEXIPOL at 58:41 (July 27, 2016), <https://info.lexipol.com/improve-officer-safety-wbn> (complete “Register Now” instructions then follow “View Now” hyperlink) [<https://perma.cc/WLF8-GVFC>].



here is that “[c]ompletely banning behavior may come back on you.”<sup>236</sup> For example, Lexipol believes that policies banning shooting at moving vehicles are a bad idea because “there are times when shooting at a moving vehicle is appropriate.”<sup>237</sup> When departments adopt such policies and the policy is violated, this “places the officer and the agency on the defensive should litigation develop from an incident.”<sup>238</sup> In a recent “Tip from Lexipol,” co-founder Gordon Graham further underscored this point for his “cop friends,” warning: “I’ve seen policies around America—‘shall never shoot at a moving vehicle.’ That makes me very nervous. You know, there are going to be some times when we have to do something.”<sup>239</sup> As Lexipol further clarifies on its webpage, the push by “police reformers” to ban police shooting at moving vehicles “does not align with Supreme Court case law as well as numerous cases in federal circuits” finding such shootings to be reasonable.<sup>240</sup>

In response to the public outcry over the use of a neck restraint on George Floyd, Lexipol did clarify its policy on carotid restraints. But rather than ban the practice, Lexipol’s policy now limits carotid restraints to situations where deadly force may be used—except in jurisdictions where the practice has been banned by the state legislature.<sup>241</sup> In fact, Lexipol continues to defend the practice, explaining that the carotid restraint “has been an acceptable force option for many law enforcement agencies for decades”<sup>242</sup> and claiming that “[m]edical evidence supports the carotid control hold as safer compared to other control techniques or the use of impact weapons.”<sup>243</sup>

## 5. Litigation-Focused Report Writing

In apparent response to reformers’ calls for comprehensive reporting of force incidents, Lexipol’s use-of-force website proudly proclaims that “[c]omprehensive reporting of police use of force, including threats to use force, is a key component of

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236. Ranalli, *supra* note 233.

237. *Id.*

238. *Id.*

239. Lexipol, *Police Policy: Shooting at Moving Vehicles - Today’s Tip from Lexipol*, YOUTUBE, at 00:05 (Apr. 20, 2021), <https://youtu.be/hR6roPchRZs> [<https://perma.cc/HQ2T-SMCL>].

240. LEXIPOL, *supra* note 148.

241. *Id.* For examples of states that have banned chokeholds, see Assemb. 1196, 2019-20 Leg., Reg. Sess. (Cal. 2020) (banning chokeholds); H.R. 350, 150th Gen. Assemb., Reg. Sess. (Del. 2020) (banning chokeholds); Assemb. 3, 2020 Leg., 32nd Spec. Sess. (Nev. 2020) (banning chokeholds); H.R. 5007, 2020 Leg., 5th Spec. Sess. (Utah 2020) (banning chokeholds); S. 219, 2019-2020 Leg., Reg. Sess. (Vt. 2020) (banning chokeholds); Assemb. 6144, 2019-2020 Leg., Reg. Sess. (N.Y. 2020) (making chokeholds that result in injury or death a crime). Other states have adopted laws that are consistent with Lexipol’s approach. *See, e.g.*, H.R. 2647, 88th Gen. Assemb., Reg. Sess. (Iowa 2020) (limiting chokeholds to times when deadly force is necessary); H.R. 4203, 80th Leg., Spec. Sess. (Or. 2020) (limiting chokeholds to times when deadly force is necessary).

242. LEXIPOL, CAROTID RESTRAINT 1 (Aug. 2020), [https://info.lexipol.com/ufm/position\\_Lexipol\\_Carotid-Restraint.pdf](https://info.lexipol.com/ufm/position_Lexipol_Carotid-Restraint.pdf) [<https://perma.cc/A8T7-THJU>].

243. LEXIPOL, *supra* note 148.

transparency and accountability,” and a key component of their policies.<sup>244</sup> Yet these platitudes are in stark contrast to Lexipol’s repeated instructions to officers to prepare reports with litigation in mind. Lexipol’s communications with subscribers have repeatedly emphasized officers’ reports as crucial information “to ensuring your success in court,” not for truth seeking and accountability.<sup>245</sup>

A 2020 Lexipol webinar on officer use-of-force statements emphasizes the need to write reports that “support investigative priorities.”<sup>246</sup> That is, in writing reports, officers should go back to basics and consider the *Graham* objective reasonableness standard.<sup>247</sup> Because *Graham* looks to whether the conduct was objectively reasonable under the circumstances, reports should include “pre-event context information” that will help the officer to frame “the key points that were critical to *him* in this moment.”<sup>248</sup> As cofounder Bruce Praet explains in a 2016 training on what to do when you shoot someone, the inclusion of “state of mind” in the officer’s statement is key to winning lawsuits because the statement is “going to be the script in the civil case down the road.”<sup>249</sup>

Not only does Lexipol want officers to frame reports around the *Graham* standard but the company has also advised officers to reduce discoverable information about use-of-force incidents. Praet advocates against officers using text messages to communicate because such communications are discoverable in litigation. Instead, he suggests that officers talk over the radio.<sup>250</sup>

Lexipol’s trainings also instruct departments to frame documentation so it looks better for a jury. One disturbing piece of advice that founder Praet conveys in Lexipol materials is to clean up blood to make victims of police violence appear less injured.<sup>251</sup> For example, in a webinar on how to write more effective police reports Praet had this to say:

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244. *Id.*

245. Lexipol Team, *How to Write Effective Police Use of Force Reports*, LEXIPOL (Nov. 11, 2019), <https://www.lexipol.com/resources/blog/how-to-write-effective-police-use-of-force-reports/> [<https://perma.cc/6R6H-24GP>].

246. Mike Ranalli & Paul Taylor, *Officer Use of Force Statements: Considerations to Support Investigative Priorities*, LEXIPOL, at 00:15 (Feb. 18, 2020), <https://info.lexipol.com/webinar-officer-use-of-force-statements> [<https://perma.cc/65MQ-H7WL>] (complete “Register Now” instructions then follow “View Now” hyperlink).

247. *Id.* at 29:46–30:20, 41:31.

248. *Id.* at 47:15–47:34 (emphasis added).

249. *I Just Shot Someone. What’s Next?*, LEXIPOL at 32:20 (Nov. 15, 2016), <https://info.lexipol.com/just-shot-someone-whats-next> (complete “Register Now” instructions then follow “View Now” hyperlink) [<https://perma.cc/434S-C7HW>] [hereinafter *I Just Shot Someone Webinar*].

250. *Think You’re Ready to Testify Webinar*, *supra* note 230, at 27:00 (“You know, I always tell cops the death of law enforcement as we know it today is going to be social media and technology. It’s great, but . . . those text messages that you’re sending back and forth—does anybody ever use the radio anymore?”).

251. See Lexipol Team, *supra* note 245 (“Render medical aid first, then photograph the clean, injured areas of the suspect, yourself, and any others involved, such as your K9. Take photos of the non-injured areas of the suspect to ensure they don’t claim further injuries later. Document their emotional state following the incident; a photograph of a smiling suspect or one flashing a gang sign is important evidence in court.”).

Take your pictures but please clean him up. Now, if some of you have learned half a lesson, you clean him up but you're leaving the bloody gauze on either side of the photo. There's a simple formula, you all need to commit this to memory. Red turns to green at the time of trial. If there is blood in the photo, you are going to pay money. Clean him up and get him smiling for the picture.<sup>252</sup>

Praet concludes: "Get 'em smiling, pointing to their 'oh-so-painful' injuries; we use that in court later, it is good stuff."<sup>253</sup>

Lexipol's other recommendations about report writing also pertain to their hallmark concern of reducing agency liability. For instance, Lexipol has weighed into the debate about allowing officers to view bodycam footage before writing a report or providing a statement.<sup>254</sup> Civil rights organizations have opposed department policies that enable review of video footage before writing a report and cite research that shows that watching videos can change how people remember events.<sup>255</sup> Bruce Praet has a different view. He explains in a webinar on the topic, "I am a huge believer in letting the officer view the video before they write their report, before they give their statement."<sup>256</sup> Thus, Lexipol consistently advises its member agencies to give officers access to videos and other documentation before writing their reports. Doing so is essential, according to Lexipol, to avoid losing police misconduct lawsuits.<sup>257</sup>

Finally, Lexipol is also careful to clarify that taking a statement should not be mandatory. Statements by officers "may actually create discrepancies."<sup>258</sup> Therefore, departments shouldn't "take a statement just to check a box."<sup>259</sup> Instead, video or witnesses "may be enough, as long as [agencies] are not short cutting the investigation process."<sup>260</sup>

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252. Bruce Praet, *It's Your Story: Tips for Writing More Effective Police Reports*, LEXIPOL at 30:52 (Feb. 5, 2019), <https://info.lexipol.com/webinar-police-reports> (complete "Register Now" instructions then follow "View Now" hyperlink) [<https://perma.cc/7TPQ-2Q9G>].

253. *Id.* at 31:37.

254. For a primer on this issue, see Jay Stanley & Peter Bribing, *Should Officers Be Permitted to View Body Camera Footage Before Writing Their Reports?*, ACLU (Jan. 13, 2015, 12:15 PM), <https://www.aclu.org/blog/free-future/should-officers-be-permitted-view-body-camera-footage-writing-their-reports> [<https://perma.cc/2DPL-9KKJ>].

255. See, e.g., Harlan Yu & Miranda Bogen, *The Illusion of Accuracy: How Body-Worn Camera Footage Can Distort Evidence*, UPTURN (Nov. 2017), <https://www.upturn.org/reports/2017/the-illusion-of-accuracy/> [<https://perma.cc/A8BY-6HA4>].

256. *Think You're Ready to Testify Webinar*, *supra* note 230, at 17:18.

257. Force Science Institute, *10 Ways to Lose Police Lawsuits*, POLICE1 BY LEXIPOL (Feb. 21, 2018), <https://www.policeone.com/evergreen/articles/10-ways-to-lose-police-lawsuits-1sld5IzGrEqfrvTG/> [<https://perma.cc/2ZND-G54R>].

258. Mike Ranalli & Paul Taylor, *3 Considerations When Taking Officer Use of Force Statements*, LEXIPOL (Apr. 29, 2020), <https://www.lexipol.com/resources/blog/3-considerations-when-taking-officer-use-of-force-statements/> [<https://perma.cc/6AUY-3AVM>].

259. *Id.*

260. *Id.*

## 6. Favoring Warrior-Style over Peacemaker Training

Lexipol's educational materials promote a warrior—rather than a guardian—philosophy of policing and seek to justify rather than limit police use of force. Lexipol's various training and educational materials epitomize the warrior model. In an advertisement for its use-of-force trainings, Lexipol selects a photograph of heavily armed force members dressed in military combat-style fatigues (Figure 4).

**Figure 4.** Image from Lexipol Educational Materials



The content of Lexipol's trainings primes and prepares officers to use force. Lexipol counsels officers to “train like you fight.”<sup>261</sup> Departments should place officers in “[i]ntensive and realistic scenario-based training” and those “scenarios” in the use-of-force context are often of officers shooting and killing people.<sup>262</sup> It is important that these scenario-based trainings teach officers “to fight” and “to win.”<sup>263</sup> To do so, as Lexipol's cofounder Gordon Graham explains, officers must be primed and ready to use violence in response to threat:

Tunnel vision, increased heart rate, rapid breathing, the body takes over and you're along for the ride. The threat is real, but your response depends on your level of preparation. You revert to what you know, whether it's using a firearm, empty hand techniques, or even a call for a backup. None of these efforts produce results without training and not all training will prepare you.<sup>264</sup>

Lexipol also warns officers about “cop killers” and subscribes to a logic that people have killed officers “because they knew they could.”<sup>265</sup> This framing portrays

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261. Gordon Graham, *Train Like You Fight*, LEXIPOL (Sept. 3, 2019), <https://www.lexipol.com/resources/todays-tips/train-like-you-fight/> [<https://perma.cc/U7F5-JF9R>].

262. *Id.* at 1:16.

263. *Id.* at 2:17.

264. *Id.* at 0:52.

265. *Id.* at 2:01.

officers who are killed in the line of duty as weak: “They sized up the officer and attacked a perceived weakness.”<sup>266</sup> If officers want to survive and “go home after every shift” they need to “play like [they] practice.”<sup>267</sup> As Bruce Praet concludes: “In order to stay alive, the cop has to suspect the worst and hope for the best.”<sup>268</sup>

Lexipol’s warrior stance is apparent in its repeated characterization of police killings as “good shooting[s].” For example, in a training about “what’s next” after “I just shot someone,” Lexipol co-founder Bruce Praet justifies police violence, saying that “99.9%” of police shootings are what he calls “good shooting[s].”<sup>269</sup> Lexipol’s trainings even provide glamorous visuals of “good shooting[s],” like the one in Figure 5 which was included in a PowerPoint presentation by Bruce Praet.<sup>270</sup> This photograph, which is captioned, “GOOD SHOOTING?,” features an officer shooting at close range into a vehicle.

**Figure 5.** Image from Lexipol Educational Materials



### *C. Lexipol’s Advocacy Against Reform*

Although Lexipol presents itself as a neutral writer of “legally defensible, continuously updated policies and training,”<sup>271</sup> the previous sections have shown that

266. *Id.* at 2:12.

267. *Id.* at 2:21.

268. *Think You’re Ready to Testify Webinar*, *supra* note 230, at 6:12.

269. *I Just Shot Someone Webinar*, *supra* note 249, at 32:00.

270. *Still Clinging to a Continuum Webinar*, *supra* note 210; Lexipol, *Still Clinging to a Use of Force Continuum or Labeling Force Levels? You’re at Risk!*, LEXIPOL 1, 7 (July 2016), <https://perma.cc/QJ5C-7BV7>.

271. LEXIPOL, *supra* note 15.

Lexipol has an agenda. Its policies and trainings on use of force hew closely to the minimum constitutional standard and do not incorporate the guidance and limitations proposed by respected experts in the field. In this Subpart, we describe another way in which Lexipol tries to advance its anti-reform agenda: Lexipol participates in the political process to stop reforms from passing and, when they do pass, Lexipol works to minimize their impact.

As use of force has become a topic of heightened concern around the country, Lexipol has not stayed quiet. Instead, Lexipol has used its powerful position as a writer of police policies in thirty-five states to sound off against reform proposals. This trend has been present for some time. For example, when the Police Executive Research Forum published its *30 Guiding Principles for Improving Law Enforcement* in 2016, Lexipol spoke out against the use-of-force proposals in the report.<sup>272</sup> The following year, Lexipol publicly opposed the proposals contained in the *National Consensus Policy on Use of Force* report issued by an influential group of national law enforcement agencies.<sup>273</sup> Lexipol suggested that the reforms proposed by both law enforcement groups were dangerous and would result in increased agency liability. As Lexipol's Bruce Praet summed it up with regard to the *National Consensus Policy on Use of Force*: "[W]e will always urge caution when any model policy is released or new buzzword concepts threaten to create confusion for officers and leaders alike."<sup>274</sup>

Lexipol has also opposed and sought to undermine legislative efforts to reduce police use of force. A key example occurred in California, a state where Lexipol writes policies for ninety-five percent of police departments.<sup>275</sup> Lexipol opposed recent legislative efforts to revise the statewide standard on use of force. And, since the state passed a reform to the use-of-force standard, Lexipol has worked to minimize its impact.

In 2017, a historic bill was introduced in the California legislature to limit the use of deadly force.<sup>276</sup> As proposed, Assembly Bill 931 would have limited the use of deadly force "to those situations where it is necessary," meaning that it could only be used "to defend against a threat of imminent and serious bodily injury or death to the officer or to another person."<sup>277</sup> This reform would not only have prohibited the use of deadly force when "an individual poses a risk only to himself or herself," but

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272. Michael Ranalli, *Above and Beyond Graham v. Connor? Examining PERF's Second Guiding Principle*, LEXIPOL (July 8, 2016), <https://www.lexipol.com/resources/blog/beyond-graham-v-connor-examining-perfs-second-guiding-principle-2/> [<https://perma.cc/TCZ9-UVA5>]; see also Michael D. Ranalli, *Adding Perspective to the PERF Guiding Principles on Use of Force: What Police Administrators Should Consider*, CHIEF'S CHRON. (N.Y. State Ass'n of Chiefs of Police, Schenectady, N.Y.), June 2016, at 7–11, [https://www.nychiefs.org/assets/docs/June\\_16.pdf](https://www.nychiefs.org/assets/docs/June_16.pdf) [<https://perma.cc/DZA3-WZW2>] (advising that the PERF principles were "not suitable for immediate adoption by agencies since further context is required").

273. Praet, *National Consensus Policy*, *supra* note 200.

274. *Id.*

275. Eagly & Schwartz, *supra* note 10, at 893.

276. Assemb. 931, 2017-2018 Leg., Reg. Sess. (Cal. 2017).

277. *Id.*

also have significantly curtailed the ability to use deadly force against someone fleeing from arrest.<sup>278</sup>

On March 18, 2018, while the bill was making its way through the legislature, Stephon Clark was shot and killed by Sacramento police officers in the backyard of his grandmother's home.<sup>279</sup> A twenty-two-year-old African American man, Clark had a cell phone in his hand at the time.<sup>280</sup> Sacramento police officers fired more than twenty rounds at Stephon Clark, who was unarmed, hitting him eight times, primarily in the back.<sup>281</sup> The killing made national news and was investigated by the California Attorney General.<sup>282</sup>

Assembly Bill 931's limitation of police use of force to circumstances where it is necessary was important, but not revolutionary.<sup>283</sup> The language in the bill was consistent with proposed recommendations by the Police Executive Research Forum, Law Enforcement Action Partnership, Campaign Zero, Communities United Against Police Brutality, and the Legal Defense Fund.<sup>284</sup> Similar restrictions on officers'

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278. *Id.*

279. XAVIER BECERRA, REPORT OF ATTORNEY GENERAL REGARDING CRIMINAL INVESTIGATION INTO THE DEATH OF STEPHON CLARK, OFF. OF THE ATT'Y GEN., ST. OF CAL. DEP'T OF JUST., <https://oag.ca.gov/system/files/attachments/press-docs/report-attorney-general-regarding-criminal-investigation-death-stephon-clark.pdf> [<https://perma.cc/3AEK-GPNM>].

280. *Id.* at 5.

281. Frances Robles & Jose A. Del Real, *Stephon Clark Was Shot 8 Times Primarily in His Back, Family-Ordered Autopsy Finds*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/us/stephon-clark-independent-autopsy.html> [<https://perma.cc/LBP6-9GR2>].

282. For national coverage see, for example, Josiah Bates, *The Death of Stephon Clark: What We Know About the Sacramento Police Shooting*, ABC NEWS (Mar. 28, 2018), <https://abcnews.go.com/US/death-stephon-clark-police-shooting/story?id=54039443> [<https://perma.cc/TA97-JUBZ>]; Christine Hauser, *Sacramento Man Fatally Shot by the Police in His Backyard*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/us/stephon-clark-police-shooting.html> [<https://perma.cc/6T6M-PPUP>]; Richard Winton, Sarah Parvini & Monte Morin, *Stephon Clark Shooting: How Police Opened Fire on an Unarmed Black Man Holding a Cellphone*, L.A. TIMES (Mar. 23, 2018), <https://www.latimes.com/local/lanow/la-me-stephon-clark-shooting-sacramento-explainer-20180323-story.html> [<https://perma.cc/74LG-HN3K>]. For coverage of the California Attorney General's investigation of the shooting, see Brandon E. Patterson, *California AG Launches Investigation into Stephon Clark Shooting*, MOTHER JONES (Mar. 27, 2018), <https://www.motherjones.com/crime-justice/2018/03/california-ag-launches-investigation-of-stephon-clark-shooting/> [<https://perma.cc/MNT5-CRXN>] (describing the state attorney general's investigation). Ultimately, the California Attorney General declined to bring criminal charges against the officers who killed Stephon Clark. See Jose A. Del Real & Matt Stevens, *Stephon Clark Shooting: California's Attorney General Won't Charge Officers*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/us/sacramento-stephon-clark-protests.html> [<https://perma.cc/Q5GG-6DFA>].

283. Assemb. 931, 2017-2018 Leg., Reg. Sess. § 2 (Cal. 2017) ("A peace officer may use deadly force only when such force is *necessary* to defend against a threat of imminent death or serious bodily injury to the officer or to another person.") (emphasis added).

284. See *supra* Part I.C.1 (describing these organizations' recommendations).

power to use force had been implemented in San Francisco and Seattle.<sup>285</sup> And decades of research on the effects of restrictive use-of-force policies in Atlanta, Kansas City, New York, Oakland, and Philadelphia supports the conclusion that these types of policies can save lives.<sup>286</sup> Nevertheless, Lexipol vigorously opposed AB 931.

Lexipol characterized AB 931 as a “knee-jerk reaction to Stephon Clark,” which it said was “one of many controversial shootings that the activists were promoting to restrict law enforcement use of force.”<sup>287</sup> Bruce Praet called the bill “ill-conceived and dangerous” and called on “law enforcement, from chief executives down to line officers” to “actively campaign for its defeat.”<sup>288</sup> Praet warned that the effort by state legislators would “craft[] unrealistic legal standards that will only serve to further inhibit law enforcement’s ability to deal with increasingly violent criminals.”<sup>289</sup> Praet also attacked lawmakers who supported the legislation as antipolice: “Just once it would be great to ask the people behind such efforts whether they’re willing to run into an active-shooter situation, or who they’ll be calling when they hear their downstairs window break at two o’clock in the morning.”<sup>290</sup>

Michael Ranalli, Program Manager for Lexipol, echoed these same sentiments, criticizing the introduction of California’s AB 931 as a “rush to judgment” typical of what often happens after “a police use of deadly force incident.”<sup>291</sup> Ranalli urged that “dismay and anger” caused by these incidents are “borne out of a limited understanding of the law” and are “hardly the basis for changing the established standards governing police use of force.”<sup>292</sup>

Lexipol took to Twitter (Figure 6) to warn that AB 931 was “bad for law enforcement, the legal system and the community.”<sup>293</sup> The company’s opposition was centered on the bill’s deviation from *Graham*. According to Lexipol, adopting a “necessary” standard for the use of deadly force would unsettle legal precedent holding that officers using force “need not select the least intrusive or even most reasonable action.”<sup>294</sup> Therefore, according to Lexipol, AB 931 would result in “large verdicts against law enforcement officers and their agencies.”<sup>295</sup> Ultimately, the bill did not pass.

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285. See *supra* notes 85–88 and accompanying text (describing use-of-force policy reforms in Seattle and San Francisco).

286. See *supra* notes 89–90 and accompanying text (describing this research).

287. *Lexipol Webinar on AB 392*, *supra* note 164, at 4:46–5:07.

288. Bruce Praet, *Police Use of Force Legislation: The (Un)Intended Consequences of CA AB 931*, LEXIPOL (Apr. 23, 2018), <https://www.lexipol.com/resources/blog/police-use-of-force-legislation-unintended-consequences-ab931/> [<https://perma.cc/CNZ5-HFJL>] [hereinafter Praet, *(Un)Intended Consequences*].

289. *Id.*

290. Bruce Praet, *Exactly Who Creates the Need for Deadly Force?*, LEXIPOL (May 17, 2018), <https://www.lexipol.com/exactly-who-creates-the-need-for-deadly-force/> [<https://perma.cc/L4Y2-EUF5>] (emphasis omitted).

291. *Ranalli on Countering the Critics*, *supra* note 202.

292. *Id.*

293. @Lexipol, TWITTER (Apr. 23, 2018, 9:13 PM), <https://twitter.com/Lexipol/status/988601776260747265> [<https://perma.cc/5TNG-YC3R>].

294. Praet, *(Un)Intended Consequences*, *supra* note 288.

295. *Id.*



**Figure 6.** Lexipol Tweet

In 2019, California lawmakers proposed and passed a successor bill, AB 392, known as the Act to Save Lives or the Stephon Clark Law.<sup>296</sup> Under the new law, which went into effect on January 1, 2020, law enforcement officers in California may use deadly force only when “necessary.” The new law also clarifies that officers’ conduct leading up to the use of force is relevant in determining its necessity and requires that prior to using deadly force, “officers shall . . . use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.”<sup>297</sup>

AB 392’s final text was the product of compromise, and some of the language was weakened in response to opposition from law enforcement groups. For example, although the bill restricts deadly force only to circumstances when it is “necessary,” a definition of “necessary” was removed from the bill, and the necessity of using force was made dependent upon the “totality of the circumstances,” defined as “all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.”<sup>298</sup> Language was also removed from the statute that would have required officers to use de-escalation tools.<sup>299</sup> Some groups, including Black Lives Matter, withdrew their support for the legislation as a

296. Assemb. 392, 2019 Leg., Reg. Sess. (Cal. 2019).

297. CAL. PENAL CODE § 835a(a)(2) (2020).

298. *Id.* § 835a(e)(3).

299. Jane Coaston, *California’s New Law to Stop Police Shootings, Explained*, VOX (Aug. 23, 2019, 1:00 PM), <https://www.vox.com/2019/8/23/20826646/california-act-to-save-lives-ab-392-explained> [<https://perma.cc/VA3L-GYSA>].

result of these modifications.<sup>300</sup> However, despite uncertainty about what the “necessary” standard will mean in practice, and the inclusion of a consideration of the “totality of the circumstances,” many still view the bill as an important step forward to limit police power to use force.<sup>301</sup>

As soon as AB 392 was introduced, Lexipol sought to undermine the bill. In April 2019, as hearings on the bill began, Bruce Praet complained that the requirement that officers’ preshooting conduct be considered when determining whether force violated the law would introduce uncertainty into prosecutors’ determinations:

It’s going to take years and cost millions to define what is negligent tactics, and more specifically what are criminally negligent tactics. . . . In the meantime, who becomes the guinea pig? Which officers get sacrificed to test the new law? Which D.A. is going to be motivated by the pressures of protestors outside his offices?<sup>302</sup>

After AB 392 was passed, Lexipol took credit for the controversial amendments to the bill. We do not know for certain what role Lexipol LLC played in pushing forward the elimination of a definition of “necessary” or the inclusion of a consideration of the “totality of the circumstances.” But, in a “Client Alert” to the company’s California subscribers from Praet’s law firm, Lexipol suggested that it did play an active role in these efforts by framing modifications to the original bill’s language as changes that “we were able to convince the Legislature to add.”<sup>303</sup>

This “Client Alert” also made clear Lexipol’s view that the amendments to AB 392 meant that *Graham v. Connor* remained the standard for excessive force, despite the inclusion of the word “necessary” in the statute. As Praet explained to California subscribers, “[n]otwithstanding a few benign changes . . . the good news is that we’ve managed to fully retain the ‘reasonableness’ standard so artfully established by the U.S. Supreme Court back in 1989 in *Graham v. Connor*.”<sup>304</sup> Furthermore, Praet clearly stated to Lexipol subscribers that AB 392 “will have little, if any, negative effect on how officers perform their daily jobs.”<sup>305</sup>

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300. *Id.*

301. *See id.* (describing the ACLU’s view that AB392 is “extraordinary, precedent-setting” legislation). The California State Legislature clearly views the bill as making a difference, describing it as changing the standard for the use of deadly force so that it will be used “only when necessary in defense of human life.” *Id.*; *see also infra* notes 313–15 and accompanying text (describing the view of California POST that the statute limits officers’ power to use force).

302. Anita Chabria, *Why California’s Proposed Law on Deadly Police Force Isn’t as Tough as It Seems*, L.A. TIMES (Apr. 9, 2019), <https://www.latimes.com/politics/la-me-california-use-of-force-police-shootings-stephon-clark-20190404-story.html> [<https://perma.cc/G4ZS-SD3V>].

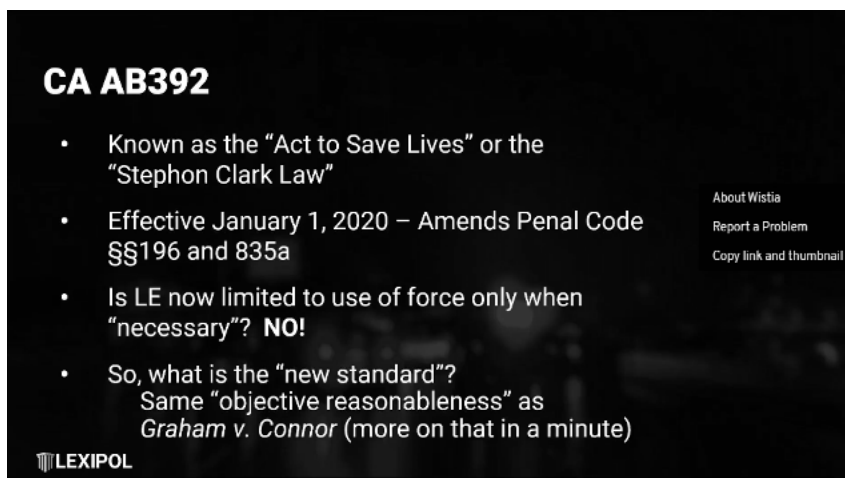
303. *See, e.g.*, Client Alert from Bruce D. Praet, AB 392 Use of Force Legislation [Penal Code §835a] (Aug. 6, 2019), <https://porac.org/wp-content/uploads/Lexipol-UPDATE-2019-re-AB392.pdf> [<https://perma.cc/984V-7Q9D>].

304. *Id.*

305. *Id.*

After the bill was signed, Lexipol produced a webinar in which Bruce Praet again minimized the significance of the new law.<sup>306</sup> In the webinar, Praet began by characterizing the Act to Save Lives as “pretty much a knee-jerk reaction by some of the more liberal legislators to try to put handcuffs on law enforcement on the ability to use force.”<sup>307</sup> However, he reassured listeners that the standard for use of force was not changed by the new law: “What is the new standard? The new standard is the exact same thing we’ve had for the last fifty years, and that is *Graham v. Connor*, [the] objective reasonableness standard.”<sup>308</sup> Praet also described the law as requiring officers to “consider other resources and techniques” before using force, but emphasized that that requirement only goes into effect when an officer concludes those alternatives are “reasonable and feasible.”<sup>309</sup> An accompanying PowerPoint slide displayed for webinar participants (Figure 7) summed up Lexipol’s view of the new California law this way: “Is LE now limited to use of force only when ‘necessary’? **NO!**”<sup>310</sup>

**Figure 7:** Lexipol Webinar on California’s AB 392



The claim by Lexipol that the new California standard is “the exact same thing we’ve had for the last fifty years” conflicts with the stated intent of the California legislature “that peace officers use deadly force only when necessary in defense of human life.”<sup>311</sup> The repeated claims by Lexipol that the *Graham* standard still applies

306. *Lexipol Webinar on AB 392*, *supra* note 164, at 25:28.

307. *Id.* at 3:27.

308. *Id.* at 4:21.

309. *Id.* at 11:03.

310. *Id.*

311. CAL. PENAL CODE § 835a(a)(2) (2020) (“[I]t is the intent of the Legislature that peace officers use deadly force only *when necessary* in defense of human life.” (emphasis added)).

to the use of deadly force in California goes against the legislative intent to establish a new standard more restrictive than *Graham v. Connor*.<sup>312</sup>

Lexipol's advice to its subscribers also contradicts the view of district attorneys who will be deciding whether officers have violated the new law. California's State Commission on Peace Officer Standards and Trainings (POST) created a video to describe the new use-of-force standard in AB 392 from the perspective of district attorneys.<sup>313</sup> Michael Hestrin, the District Attorney for Riverside County, who is extensively interviewed in the video, describes the new law as containing "meaningful changes" that "codify an emphasis that's been happening in law enforcement towards de-escalation and the use of less lethal force."<sup>314</sup> This district attorney also explains that, when he assesses whether an officer has violated the new law, "I'm going to use the necessary standard, and I'm going to ask . . . was the use of force necessary in this situation given everything the officer knew."<sup>315</sup> Lexipol's assertion that AB 392 does not change the use-of-force standard thus contradicts the view of a district attorney who will decide whether thousands of officers—including officers in jurisdictions that subscribe to Lexipol—have violated the law.

Lexipol made repeated efforts to undermine AB 931 and then AB 392 and characterized AB 392, after it passed, as making no meaningful change to use-of-force standards, in contravention to the legislative intent of the bill and the view of advocates and government officials. But, its efforts have not ended there. California POST is mandated by a companion bill, SB 230, to create training and other guidelines regarding use-of-force standards. As a POST representative explained to one of us, it always develops its curriculum and guidelines with input from "subject matter experts from the field, legal and of the public."<sup>316</sup> This representative also disclosed that Bruce Praet "has been one of those experts used in development of SB 230 requirements."<sup>317</sup> She made clear that Praet was being consulted because of his legal expertise, not his role at Lexipol, and that California POST "does not endorse individual companies."<sup>318</sup> However, Bruce Praet's communications and Lexipol's official communications make clear that there is little daylight separating the two. And Lexipol's position on AB 392 suggests that Praet may use his role as a POST

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312. SENATE RULES COMM., SENATE FLOOR ANALYSIS, Assemb. 392, 2019 Leg., Reg. Sess., at 6 (Cal. 2019), <https://trackbill.com/bill/california-assembly-bill-392-peace-officers-deadly-force/1678109/> [<https://perma.cc/QH58-XU3Q>] ("Unlike existing California statutory law, the provisions of this bill would exceed the standards articulated and set forth by the U.S. Supreme Court in *Graham*.").

313. *AB 392 and Peace Officer Use of Force Standards*, COMM'N ON POLICE OFFICER STANDARDS & TRAINING, <https://post.ca.gov/Use-of-Force-Standards#UseOfForce> [<https://perma.cc/67GM-DX77>].

314. *AB 392: Use of Force Standards*, COMM'N ON POLICE OFFICER STANDARDS & TRAINING, 0:59, 2:06, [https://postsms-usw22.streaming.media.azure.net/1397578a-8519-4d61-8e64-99cef48c421e/use\\_of\\_force\\_full\\_11\\_1\\_19\\_rev1\\_1280x720\\_AACAudio\\_2480.mp4](https://postsms-usw22.streaming.media.azure.net/1397578a-8519-4d61-8e64-99cef48c421e/use_of_force_full_11_1_19_rev1_1280x720_AACAudio_2480.mp4).

315. *Id.* at 12:28.

316. Email from Meagan Catafi, Legis. Liaison/Pub. Info. Officer, Comm'n on Peace Officer Standards & Training (POST), to Joanna Schwartz (July 22, 2020, 2:39 PM) (on file with authors).

317. *Id.*

318. *Id.*

advisor to further limit the practical impact of the new standard on police trainings and other guidelines.

### III. IMPLICATIONS

Having described the push for use-of-force policy reform and Lexipol's multi-pronged efforts against these reforms, this Part considers the implications of our findings. First, we review the ways in which Lexipol has frustrated—and likely will continue to frustrate—efforts at reform. Next, we direct recommendations to local governments that we contend should be increasingly cautious about developing or continuing a relationship with Lexipol LLC. Finally, we argue that those pushing for change to use-of-force policies must be informed about Lexipol's influential retrograde policies and anti-reform stance.

#### *A. How Lexipol's Efforts Frustrate Reform*

This Article makes clear that Lexipol is likely to impair the prospect of use-of-force policy reforms in three ways. First, Lexipol's resistance to more restrictive policies will limit the reach of reform efforts nationwide. Subscribers rely on Lexipol to provide them with ready-made policies and officer trainings. These 3500 participating agencies—amounting to almost one-fifth of law enforcement agencies across the country—are likely to simply adopt the use-of-force policies provided in Lexipol's off-the-shelf manual.<sup>319</sup> Lexipol agencies also rely on the company for general education on use-of-force standards, webinars on current issues involving police shootings, and related police training. Yet, as we show in this Article, those materials and trainings emphasize officer discretion and adopt a warrior-type stance to policing. As a result, if Lexipol continues to refuse to embrace proposed reforms to use-of-force policies in its police manuals, its subscribers likely will too.

Second, Lexipol's megaphone in the policing debate means that it has an outsized influence on how police departments and local governments respond to demands for change. As we unearth in this Article, despite attempting to present itself as a neutral provider of “legally defensible” policies, Lexipol is not at all neutral when it comes to use-of-force policy. Rather, the company and its representatives have been vocal in defending policies that give officers maximum discretion. And, they don't just stop there. Lexipol uses its web platform,<sup>320</sup> blogs, and media arms, like Police1, to vigorously advocate against reform, including against use-of-force continuums, bright-line rules, and anything that would go beyond the *Graham* standard.

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319. As we described in our previous study, Lexipol does not give its subscribers complete information about alternatives to its policy and training choices in contested areas and makes it difficult for subscribers to modify Lexipol's standard policies. Eagly & Schwartz, *supra* note 10, at 930–37.

320. As Lexipol writes on its webpage, it has been “encouraged” by the wide reach of its web presence “to use webinars as a platform to dive deeper into police reform topics. Lexipol also launched a website last year dedicated to providing information to law enforcement and community members on police use of force policy.” *Lexipol Announces Free Police Reform Webinar Series*, LEXIPOL (Feb. 22, 2021), <https://www.lexipol.com/resources/blog/lexipol-announces-free-police-reform-webinar-series/> [<https://perma.cc/KX3S-5CTY>].

Third, Lexipol threatens to undermine reforms once they are adopted by federal, state, and local governments. Even if Congress, states, or local governments mandate changes to use-of-force policies, those mandates are just the first step. The next is actually implementing these changes in the nearly 18,000 law enforcement agencies across the country. Here, Lexipol also plays a key role. In fact, in past instances where police departments have been investigated by the Department of Justice for use-of-force and other constitutional violations, Lexipol has been hired to write policies to implement the required reforms.<sup>321</sup> Lexipol is being called upon again today to help implement reforms that respond to calls for change. One example of Lexipol's continuing efforts in this space is Bruce Praet's role as an expert consultant to California's POST as they create policies and trainings to conform with AB 392.<sup>322</sup> Other states are currently reviewing their use-of-force standards, and Lexipol may well be retained to interpret new laws and draft implementing policies.<sup>323</sup>

Lexipol may also take advantage of this moment of reform to expand their dominance in the policy field. For example, former New York Governor Cuomo signed an executive order in June 2020 requiring the state's more than 500 law enforcement agencies "to develop a plan that reinvents and modernizes police strategies and programs in their community based on community input" by April 2021, or risk losing state funding.<sup>324</sup> This requirement has, reportedly, left small New York jurisdictions "scrambling and overwhelmed at the prospect of having to rewrite their police rulebooks from scratch."<sup>325</sup> Seeing this new requirement as a business opportunity, Lexipol has offered to assist New York agencies to comply with the executive order. Agencies appear to be taking them up on this offer. For example, the village of Saranac Lake agreed to pay Lexipol \$11,000, plus additional yearly fees, to write its police policies.<sup>326</sup> But, as the California example from AB 392 teaches, Lexipol's involvement in these processes threatens to dilute the intended impact of New York's attempt to "reinvent and modernize" policing.

Lexipol may also be able to capitalize on federal reforms. Following weeks of sustained protest in support of Black Lives Matter, former President Donald Trump signed an executive order calling for "[i]ndependent credentialing bodies" to review

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321. For example, police departments in both Baltimore and New Orleans turned to Lexipol to craft their policies as part of a consent decree. See Justin Fenton & Doug Donovan, *Use of Local Foundation Allowed Baltimore Police Surveillance Project to Remain Secret*, BALTIMORE SUN (Aug. 24, 2016), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-community-foundation-20160824-story.html> [<https://perma.cc/EY7J-YJZA>]; Charles Maldonado, *Paying for the Consent Decree*, GAMBIT (Aug. 14, 2012), <https://perma.cc/5VYT-V62X>.

322. See *supra* notes 317–18 and accompanying text.

323. As just one example, Maryland passed a sweeping reform bill that limits police use of force to what is "necessary and proportional." Michael Levenson & Bryan Pietsch, *Maryland Passes Sweeping Police Reform Legislation*, N.Y. TIMES (Apr. 10, 2021), <https://www.nytimes.com/2021/04/10/us/maryland-police-reform.html> [<https://perma.cc/UNN5-6HFC>].

324. Alice Speri, *Private Company Moves to Profit from New York's Police Reforms*, INTERCEPT (Aug. 9, 2020), <https://theintercept.com/2020/08/09/new-york-police-reform-lexipol/> [<https://perma.cc/YQ78-4WGR>].

325. *Id.*

326. See *id.*

law enforcement policies and trainings.<sup>327</sup> The executive order, which uses discretionary grant funding as a carrot to encourage agencies to voluntarily participate in the program, gives wide-ranging discretion to police policy experts on how to write policies and construct trainings.<sup>328</sup> Experience tells us that if agencies contract with Lexipol to review their policies, any change will be designed to protect officers' interests, not Black lives.

### *B. How Lexipol's Efforts Harm Government Interests*

We have previously argued that local governments should be cautious about contracting with Lexipol. Their policies are overly focused on limiting officer liability; they do not provide subscribing agencies with enough information about their policies and the experts who craft them to make educated decisions about whether to adopt the policies; and Lexipol's ready-made policies make it difficult for the kind of community engagement that experts believe is necessary for democratic rulemaking.<sup>329</sup> In this Article, we offer additional reasons for local governments to exercise caution before contracting with Lexipol: its aggressive stance against reform may harm government interests, exposing local governments and officers to *more* liability instead of less.

For example, New York's executive order "calls on community members, stakeholders, local elected officials and police to come to the table and be part of a collective effort to create transparent and fair law enforcement policies that reflect the community's desires."<sup>330</sup> The executive order requires that municipalities "file a certification with the state Division of Budget and certify that all stakeholders contributed to the process" before securing entitlement to state funding.<sup>331</sup> However, all available evidence suggests that Lexipol's efforts to capitalize on this executive order in New York go against the language and spirit of the order. In July of 2020, Lexipol held a webinar with the New York State Association of Chiefs of Police that told potential subscribers how to limit liability and maximize officer flexibility in the face of new state limits on use of force.<sup>332</sup> Some local governments in New York are contracting with Lexipol while resisting community input about the decision to do so.<sup>333</sup> And if past is precedent, once in contract with Lexipol, these local governments will adopt their proposed policies with minimal public engagement. Although lack of community engagement with police policies is always troubling, this approach now appears to violate New York law.

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327. See Exec. Order No. 13,929, 85 Fed. Reg. 37,325, § 2(c) (June 19, 2020) (creating a credentialing program to encourage meeting standards set by the Attorney General).

328. See *id.* § 2(b).

329. Eagly & Schwartz, *supra* note 10, at 896–97.

330. Speri, *supra* note 324.

331. *Id.*

332. *New York Legislative Update: Understanding Recent Police Reform Legislation*, LEXIPOL (July 30, 2020), <https://info.lexipol.com/webinar-new-york-legislative-update> [<https://perma.cc/Y3YE-T9C2>] (complete "Register Now" instructions then follow "View Now" hyperlink).

333. Speri, *supra* note 324.

Lexipol's efforts to minimize the effects of AB 392 on California agencies may also expose its subscribers to liability. Lexipol's staunch position that AB 392 "does not create a new legal standard for the use of deadly force" is inconsistent with the view of the California State Legislature that passed the bill, district attorneys, and advocacy groups including the ACLU.<sup>334</sup> Lexipol's opinion on the effects of AB 392 is not, however, limited to its blog posts and webinars—it also guides the use-of-force policies it provides to the hundreds of California law enforcement agencies that count themselves as Lexipol subscribers.<sup>335</sup>

Lexipol's assertion that California's use-of-force standard has not changed could also expose officers to criminal liability. The District Attorney from Riverside County, who spoke in the California POST training video on AB 392, explained that he will evaluate whether officers' use of force was necessary when deciding whether to criminally prosecute an officer.<sup>336</sup> However, officers in Riverside County that subscribe to Lexipol, including police departments in Riverside, Corona, Palm Springs, Cathedral City, and Beaumont, are getting the message from Lexipol that their decisions to use force need only comply with the *Graham* standard.<sup>337</sup>

Lexipol's stance on AB 392 may also expose cities to civil liability. The ACLU of Southern California recently filed a taxpayer action against the City of Pomona for adopting policies—crafted by Lexipol—that do not conform to current law.<sup>338</sup> The ACLU's complaint alleges that Pomona police officers killed three people since the enactment of AB 392 and that, during this time, Pomona spent public funds on Lexipol trainings and policies that violate AB 392. The lawsuit also cites the Lexipol

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334. *Id.*

335. Lexipol's California clients appear to have adopted Lexipol's changes to use-of-force policies in light of AB 392. *See, e.g.*, LEXIPOL, *Policy 300—Use of Force*, in SANTA ROSA POLICE DEPARTMENT POLICY MANUAL (June 16, 2020), [https://srcity.org/DocumentCenter/View/30463/\\_Policy\\_Manual2020OctNEW?bidId=](https://srcity.org/DocumentCenter/View/30463/_Policy_Manual2020OctNEW?bidId=) [<https://perma.cc/T2NC-FLNJ>]; LEXIPOL, *Policy 300—Use of Force*, in ANAHEIM POLICE DEPARTMENT POLICY MANUAL (Aug. 27, 2020), <https://www.anaheim.net/DocumentCenter/View/29459/APD-Policy-Manual> [<https://perma.cc/TWX5-AYZK>]; LEXIPOL, *Policy 300—Use of Force*, in SALINAS POLICE DEPARTMENT POLICY MANUAL (Dec. 1, 2020), <https://perma.cc/BE6R-N9GK>; LEXIPOL, *Policy 300—Use of Force*, in HUMBOLDT COUNTY SHERIFF'S OFFICE MANUAL (June 14, 2021), <https://humboldtgov.org/DocumentCenter/View/86838/HCSO-Policy-Manual> [<https://perma.cc/45PW-AMQM>]. These policies reflect some differences in use-of-force policy language; it is impossible to know from these manuals what, precisely, Lexipol's California use-of-force policy provides and what modifications these subscribers have made. One of the authors requested that Lexipol produce a copy of their California use-of-force policy, reflecting changes made in light of AB 392; they declined to do so. *See* Email from Tim Kensok, Vice President, Prod, Mgmt., Lexipol LLC, to Joanna Schwartz (Oct. 2, 2020, 1:35 PM) (explaining that he "can't directly provide our CA State Master") (on file with authors).

336. *See supra* notes 314–15 and accompanying text.

337. *See* Eagly & Schwartz, *supra* note 10, at appendix (setting out the cities in Riverside County that subscribe to Lexipol).

338. *See* Complaint for Declaratory & Injunctive Relief, *Gente Organizada v. Pomona Police Dep't*, No. 20-ST-CV-28895 (Cal. Super. Ct. L.A. Cnty. July 31, 2020), [https://www.aclusocal.org/sites/default/files/aclu\\_social\\_pomona\\_20200731\\_complaint.pdf](https://www.aclusocal.org/sites/default/files/aclu_social_pomona_20200731_complaint.pdf) [<https://perma.cc/G7AJ-9MYT>].



webinar instructing its subscribers and their officers that the new California law “is the exact same thing we’ve had for the last fifty years.”<sup>339</sup> The suit seeks to enjoin Pomona from using funds to educate and train its officers about an unlawful standard and requests an injunction barring Lexipol materials that misstate the law.<sup>340</sup>

Lexipol markets its services as designed to reduce liability. It contends that its policies are crafted to conform with federal and state laws and best practices. In contrast, this Article has shown that Lexipol is not playing the neutral role that it suggests. In taking aggressive positions against the types of reforms that are being adopted in California, New York, and elsewhere, Lexipol threatens to expose local governments to the very type of civil liability they seek to avoid and may even expose officers to criminal liability. Of course, local governments must adopt policies that conform with newly enacted reforms. But delegating those responsibilities to Lexipol may solve local governments’ problems in the short term, while creating additional problems for them in the longer term.

### *C. How Lexipol Should Shape Advocacy Efforts*

This Article has revealed that Lexipol is playing an underappreciated, yet central, role in policing policy. Far from being a neutral scribe of policing policies, Lexipol advocates a set of positions about use-of-force policies and actively opposes policing reforms that would restrict officer discretion. Our research suggests that advocates pressing for local governments to adopt policy reforms should keep in mind that the success of their efforts may depend on who is writing their jurisdiction’s policies. It is becoming increasingly likely that Lexipol is crafting those policies. And, so long as they are, advocates will be fighting not just the decisions by local police officials but also the decisions by a private, for-profit company engaged in a multipronged effort to prevent these types of policies from being enacted.

We encourage nonprofit organizations and other groups with knowledge about policing to draft easily adoptable policies to disseminate to local policing agencies. These policies could prioritize police accountability instead of discretion and be based on research rather than concerns about police liability. Given that so many agencies do subscribe to Lexipol, experts could produce these use-of-force policies in a way that could be easily adopted into the Lexipol template. Although some organizations have begun this work, more state-specific policies need to be crafted and made readily available to policing agencies.

There are other steps that concerned community members and advocacy groups could take to change this state of affairs. One approach is to bring taxpayer suits—like the ACLU’s suit against Pomona—challenging the use of taxpayer money to buy Lexipol’s questionable services. Another possibility is for groups to oppose Lexipol’s efforts to enter into contracts with new jurisdictions. A final option is to push local governments to demand that Lexipol amend its policies to reflect evidence-based alternatives that limit officer discretion. Lexipol has not yet been

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339. Press Release, ACLU, ACLU Sues Pomona Over Refusal to Implement New Police Law (July 31, 2020), <https://www.aclusocal.org/en/press-releases/aclu-sues-pomona-over-refusal-implement-new-police-law> [<https://perma.cc/526X-LXY6>]; see also *Lexipol Webinar on AB 392*, *supra* note 164, at 4:21.

340. ACLU, *supra* note 339.

swayed by public calls to reform. However, given its focus on the bottom line, it might well pay additional attention if local government subscribers threaten not to renew their contracts until Lexipol's policies and trainings are improved.

Lexipol provides an attractive service, particularly for small jurisdictions without the infrastructure to write and keep current their policies and trainings.<sup>341</sup> However, given the concerns raised in this Article, we encourage jurisdictions not to adopt Lexipol's manual off the shelf. Instead, jurisdictions could use Lexipol's policies as a starting point to develop their own use-of-force standards that embrace approaches proven to reduce police violence. In drafting these materials, jurisdictions should consult with other experts and departments that do not subscribe to Lexipol and invite community members to voice their concerns about police violence.

#### CONCLUSION

America is in the midst of a critically important moment in police reform. National and local attention is fixed on how to reduce the number of people killed and injured by the police. One approach that has been proven to reduce police killings is to limit police power to use force. This Article shows that Lexipol is blocking this path to reform in multiple ways: by promoting policies and trainings that do not adopt use-of-force policy reforms, by advocating against these reforms, and by limiting their impact when adopted. Even though local governments and insurers have viewed Lexipol as an essential partner in keeping policies lawful and up to date, it is time that they take a closer look. Lexipol's aggressive efforts to limit and undermine use-of-force policy reform may ultimately expose officers and agencies to liability instead of shielding them from it. Unless and until the company changes its approach, Lexipol should be viewed as an impediment to reform.

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341. See Eagly & Schwartz, *supra* note 10, at 898–99 (describing this benefit of Lexipol).