

Examining Police Discretion and the Use of Firearms Involving the New York City Police Department

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Abstract

The issue of police discretion has often been evaluated as a factor that may cause disparate impact against minority communities, particularly in the United States. The New York City Police Department, the largest municipal law enforcement agency in the USA, has repeatedly come under criticism from civil rights group as it relates to police-suspect interaction. Even more so, shootings involving the police have routinely been labeled as racially biased. The NYPD has taken steps to reduce the number of police shootings, mainly through enhanced tactical training and through the promotion of the use of such non-lethal weapons as pepper spray and electronic shock devices (e.g. Taser). The US Supreme Court has also played a major role as it examined and interpreted the legality of specific police shooting scenarios. Policy implications and the impact of this significant court legislation and improved instruction will be comprehensively examined.

Keywords

Police, Shootings, Disparate Impact, Racial Discrimination

Introduction

In an effort to ensure efficiency in government organizations and in private business, an agency should compose a handbook or manual that delineates the specific policies, procedures, regulations and practices of institutional operations. These instructions should be distributed and/or accessible to all employees, and compliance should be regulated and enforced. By developing its guidelines in written fashion, the agency is able to defend itself against civil liability, discipline employees for misconduct, and become recognized as a professional organization after achieving its accreditation status (Peak, p.34). Even more importantly, the ready availability of this material (in the United States under the "Freedom of Information Law") will permit the public service agency to expose its policies to the public in an effort to provide the organizational transparency that the community expects. With the advent of the internet, the public (in the USA) often has immediate access to agency rules, regulations, statistics and contact information. Transparency should be a desired goal, as it provides a two way communication feedback mechanism for community input and agency insight (Curtain, Article 2.2).

One concept that applies to the sphere of law enforcement is discretion. It is the task of the top agency executive to balance unfettered discretion and complete standardization. There are some who differentiate between policies, procedures and

rules. There are others who consider the terms interchangeable. When the designations are distinctly defined, then “policies” are considered to basically be guidelines related to the organization's philosophy and mission which assist in interpreting those elements to agency personnel. “Procedures” are “more flexible than policy but less restrictive than rule or regulation,” describing a “method of operation while still allowing some flexibility within limits.” Rules and regulations tend to be more stringent and distinct with limited flexibility and discretion (Sheehan and Cordner, pp. 446 – 447). Often violation of rules and regulations can (should) lead to disciplinary and corrective actions by agency managers.

The issue of discretion in law enforcement remains a topic that receives much attention and scrutiny. Police discretion is the autonomy granted to police practitioners to make decisions and enforce the law. Ideally, police discretion involves a professional judgment that “preserves community and citizen safety, respect for the law, and citizen rights to due process and equal protection of the law” (Champion, p. 195). It is the scrutiny of police use of discretion that is the predominant source of allegations of police misconduct in the United States. The use of discretion by law enforcement personnel is, however, unique when compared to other trades, since their actions may lead to seizure, custody, use of force, and ultimately to the taking of a human life. Unfortunately many accusations of inappropriate police action are sensationalized by the media, and paint individual officers and law enforcement agencies in a negative light.

Police misconduct can be divided into a number of “negative” actions by police personnel, or in more realistic terms, accusations of perceived injustice by law enforcement personnel. These actions include: corruption, physical abuse and excessive force, verbal and psychological abuse, and violations of civil (legal) rights (Carter, pp. 150 – 152). While all involve serious integrity issues, the authority granted to law enforcement personnel to legally utilize force to accomplish their job tasks is a discretionary issue that often places officers and their actions “under the microscope” and susceptible to media, public and legal scrutiny. The use of force by police as it relates to law enforcement in the United States of America and New York City will now be further highlighted and analyzed.

Police Use of Force in the United States

The justifiable use of force by law enforcement personnel in the United States has its roots in English Common Law. In its original stages, force was permitted by all citizens, at the minimum, to detain a recognized criminal violator, and physical punishment, exile and death were common and acceptable penalties for alleged criminal conduct. When taken to the extreme, any convicted felon could (and would likely) be put to death. A person who opted to flee the scene of a serious crime

became a “fleeing felon,” and since death was the likely punishment, it became common practice for those tasked with law enforcement to merely kill the perpetrator before he could completely escape. This practice was transported to the thirteen colonies in North America and eventually became permissible law once the United States of America was founded. The “fleeing felon” concept was standard operating procedure for many American police agencies through the 1980s, and remained a legal standard in most American states until that time.

A review of the *Rules and Regulations of the New York City Police Department*, the precursor to the NYPD's current *Patrol Guide*, reveals that shooting a fleeing felon, firing warning shots, and putting a horse or other animal out of its misery were suitable and necessary actions in police work. By the early 1980s, these guidelines had become more restrictive. With the acknowledgement that New York City had evolved into a densely populated metropolis, the feasibility of firing bullets into the air or into a dying animal were no longer acknowledged as low risk actions for police personnel to take. A random bullet could cause both physical injury and property damage, and worse yet, lead to the death of an innocent bystander. Plagued from 1960 through the mid-1990s with an uncontrollable murder rate, there was no need for the police to add to this unwanted statistic.

Due to the population density in New York City and the escalating crime and violence rate, the New York City Police Department had instituted more restrictive guidelines into its “Use of Deadly Force” policy than was legally permitted. As stated above, it was lawfully sanctioned within Article 35 of the *New York State Penal Law* that police personnel could use deadly physical force to apprehend a fleeing felon within the State of New York. NYPD policy emphasized the value of human life and the use of the minimum amount of force necessary to accomplish the mission as the preferable practical options for agency personnel faced with that undesirable situation. As such, the New York City Police Department policy delineated that officers could only use deadly physical force (discharge their firearm) in situations in which deadly physical force was used or threatened against them or another person. Additional restrictions were applied, including the prohibition against firing at a moving motor vehicle that is threatening the officer unless there is another source of deadly physical force being utilized or apparent. Warning shots and putting a disabled or injured animal out of its misery were no longer viable options.

In 1985, the United States Supreme Court acknowledged the changing times and evolving standards of decency and decided the famous *Tennessee v. Garner* case (47 U.S. 1, 1985), which prohibited the use of deadly physical force to apprehend a fleeing felon. The Supreme Court specifically held that a police officer may not use deadly physical force to apprehend a fleeing felon who does not pose a “significant

threat of death or serious physical injury” to the police officer or to others at the scene. In essence, the United States Supreme Court was not only creating new legislation, but also law enforcement agency policy. The contributing factors in the court's reasoning were the elimination of the death penalty for all crimes except for murder, based on *Coker v. Georgia* (422 U.S. 584, 1977), and the revision of penal codes to include non-violent crimes in the felony category, which would have allowed a police officer to shoot at a fleeing tax evader or shoplifter under certain circumstances. The United States Supreme Court was merely elevating the “Justification” statutes outlined in state legislation to reflect contemporary standards.

While this court decision did not have an overwhelming effect on New York City Police Department procedures, it did have a dramatic impact on many law enforcement agencies across the nation. Many police departments with liberal use of deadly physical force guidelines were faced with the overnight responsibility of revising agency policy to meet this legal demand. And many, if not all, American states found their “Justification” statutes within their jurisdictional penal codes to be immediately obsolete and unconstitutional.

Revising Police “Use of Force” Policy in the United States

The *Tennessee v. Garner* case was not the only significant factor influencing law enforcement policy revision involving police use of deadly physical force. Other relevant United States Supreme Court actions include the 1978 *Monell v. Department of Social Services* (436 U.S. 658, 1978) and the 1980 *Owen v. City of Independence* (445 U.S. 622, 1980) decisions, which permitted civil litigation by victims (or family members of victims) of alleged police misconduct. This has resulted in fundamentally every police-involved shooting leading to a civil suit against the jurisdiction or municipality involved. Jurisdictional leaders (i.e., governors, mayors, county executives, sheriffs, etc.) therefore have strong financial incentive to influence their respective law enforcement agency in revising pertinent policy in an attempt to reduce police shootings.

Another factor that has affected police “Shoot – Don't Shoot” policy is the enhanced tactical training now available for police personnel. Tactical considerations now call for the emphasis on cover for improved survival, even with the advent of comfortable and light weight body armor. Contemporary law enforcement training highlights the use of a tactical retreat, which would not have been a realistic (permissible) option within the police academy environment prior to 1990. Many new technological devices are now available to simulate genuine confrontational situations that may lead to use of force by police personnel. Video supported shooting ranges allow law enforcement officers to shoot real or computer

adjusted firearms, and measure shooting effectiveness. The ultimate goal is now to reduce the likelihood of firearm discharge, and sharpen an officer's ability to make that difficult split second decision.

In addition, other options are now available to law enforcement personnel to avoid using firearms and opt for a non-lethal weapon other than the police baton. The development of chemical or pepper spray and electronic stun devices (e.g., "stun gun" and "taser") now offer police officers an intermediate tool that can be used to incapacitate a resisting or noncompliant and armed offender or emotionally disturbed individual.

The final factor that can be said to influence police department use of force policy is alleged racial discrimination. It is not uncommon for minority group advocates to blame the police when a minority offender is the recipient or target of police use of force. Of course, cries of racism routinely draw the attention of the media, and eventually the attention of reelection-oriented politicians. The end result is repeated pressure on law enforcement administrators to reduce the frequency of police involved shootings. While practitioners recognize that the number of minorities involved in police shootings normally reflect regional arrest (and described offender) rates (Fyfe, 1981), some view the disproportionate number as resulting from institutional or individual racism.

Policy Influences on Police Use of Deadly Physical Force

Much of the research conducted on police use of deadly physical force (actually police firearms discharges) was conducted prior to the *Tennessee v. Garner* decision. One of the first studies to examine the impact of the *Tennessee v. Garner* decision in Tennessee revealed that, within the state of Tennessee, this policy revision resulted in a -40% reduction in police firearm discharges within the first 3 years of this groundbreaking decision (Culliver and Sigler, p. 187). From a national perspective, it has been estimated that the *Tennessee v. Garner* decision has decreased the number of justifiable police shooting related homicides by 60 annually throughout the United States. This amounts to a -16% reduction through the 1990s, indicating that this important court decision and its resultant policy revision has had positive results on police practices (Tennenbaum, p. 241). It should be noted that these results may not be exclusively affected by the *Tennessee v. Garner* decision, but may also be attributed to changes in agency tactical ideology.

A number of studies have attempted to evaluate the influence of a more restrictive "use of deadly force" (i.e., firearm discharge) policy on the number of police shootings. One of the earliest studies in the era before the *Tennessee v. Garner* decision was an analysis of police-involved shootings by New York City Police Department personnel following the implementation of a "defense of life"

policy revision (i.e., police personnel could only discharge their firearms in defense of their own life or the life of another due to the immediate threat of deadly physical force) in the 1970s. Not only did the number of police firearm discharges decrease, but the number of police officers killed in the line of duty in firearm confrontations also declined, which refuted the common practitioner belief that a more restrictive policy would endanger law enforcement personnel on patrol (Fyfe, 1979, p. 309). A more recent study of firearms discharges involving the New York City Police Department in the 1990s supported the earlier findings (Fyfe, 1996, p. 191). Nationally these two trends were replicated when more restrictive agency firearm discharge policies were instituted prior to the *Tennessee v. Garner* decision. One study revealed that between 1971 and 1984, the number of police related shooting deaths declined -50%, while the number of officers killed in shooting confrontations declined almost -70% across America (Sherman and Cohn, p. 5). These statistics are supported by official FBI Index Uniformed Index Crime statistics that revealed that there were 339 justifiable police related homicides annually on average between 1965 and 1979, and 142 annually on average between 1985 to 1989. This amounts to a decline of -58% between the pre- and post-*Garner* eras. One statistic of note is that the New York City Police Department had accounted for approximately 29% of all justifiable police homicides in the United States through 1990 (Albrecht, 2000, p. 107).

The deployment of new non-lethal weapons clearly has reduced the need for firearm usage as the primary option for police personnel dealing with an armed or resistant suspect. By promoting the use of chemical (mace) or pepper spray and electronic stun devices, the number of police shootings has dramatically declined, while confrontations rectified through the use of optional non-lethal weapons has increased exponentially. As a clear example, the number of justifiable police shootings in New York City had declined -70% from 1994 through 2000, while the number of confrontations rectified through the use of pepper spray over the same time frame had increased over +600% (Albrecht, 1996, p. 4). By arming law enforcement personnel with viable tactical options, law enforcement personnel conducting enforcement functions no longer have to rely solely on a firearm to terminate a threat in an armed or violent confrontation, but can turn to a less lethal option.

Improved professional training has enhanced the abilities of police personnel when confronted with an armed adversary. In addition to advocating non-lethal weapons, many agencies have upgraded their side arms to semi-automatic pistols, with additional readily available magazines. The computerization of firearms tactical training has allowed agencies to instruct their personnel under more realistic situations and scenarios. By promoting the use of available cover and emphasizing

the practicality of tactical retreat, one could deduce that the number of police firearm discharges should decline. In fact, this has occurred in New York City. The result of the improved training has resulted in a -50% decrease in police-involved shootings, with a concurrent -45% decline in the number of rounds (bullets) fired from 1994 through 2000, and agency records reveal that this dramatic reduction continued through 2010. These findings are quite astonishing and equally impressive as the number of bullets available to each police officer on patrol increased from 18 to 46, and the number loaded in each firearm increased from 6 to 16. In addition, the complement of the NYPD increased +40% over the same time frame (Albrecht, 2000, p. 107). Many civil libertarians had concluded that the opposite should have resulted. This improved training has also had a drastic impact on the civilian complaint rate in New York City. The number of civilian complaints filed against New York City Police Department from 1994 through 2000 had declined – 20% since the inception of the 9MM sidearm as the firearm of choice for patrol personnel and since the promotion of non-lethal weapons as tactical options. More importantly, the number of complaints of excessive force by police decreased -32% over the same time frame (Albrecht, 2000, p. 106).

The final issue that will be addressed is the issue of racial discrimination raised by minority group leaders after justifiable shootings and homicides involving minority suspects and police personnel. When evaluating these statistics in New York City from 1990 through 2001, even with the dramatic decline in fatal police shootings over that time frame (-77%), the percentage of minority suspects tragically killed in these confrontations has remained stable at approximately 90%. While this could be interpreted as racism, since the minority population has been reported at approximately 60% within New York City, these numbers are actually deceiving. A better correlate would be arrest statistics, which reveal that about 92% of all apprehended suspects are non-white. This would lead a reasonable individual to conclude that approximately 90% of the criminal population would likely come from minority populations. These numbers are supported by victim and witness descriptions of their perpetrators, which revealed that 90% of offenders were minority group members; and by documented police-suspect interactions (“*Terry*” reasonable suspicion stops) which were determined to involve approximately 85% non-Caucasians as an annual average since the mid-1990s (Albrecht, 2000, p. 102 - 104). One could therefore conclude that this statistical disparity is not based on racial discrimination, but rather on the disproportionate number of minority group members at poverty or worse levels (with lower socio-economic status), which has been shown to be highly correlated to violence and higher crime rates. Reality, not racism, is the underlying factor. Even as far back as 1981, it was determined that the most likely adversary in a police shooting in an urban American setting was “an armed, black male between the ages of 17 and 30 at night in a public location” (Geller and Korales, p. 56).

Summary and Discussion

This paper has examined the relationship of policy revision, implementation, and, ultimately, evaluation as it relates to law enforcement use of deadly physical force (firearms) policy in the United States, and more specifically in New York City. It is clear that the *Tennessee v. Garner* decision by the United States Supreme Court has had tremendous impact on use of firearm procedures across the nation. This court decision immediately created a need for both revised state and local legislation and for alterations to law enforcement agency policy and procedures. The outcome was equally as significant as these revisions caused dramatic declines in police involved shootings and justifiable police homicide rates. Just as important was the decision by many policing agencies, both before and after the *Garner* decision, to move to a “defense of life” protocol when faced with a “Shoot – Don't Shoot” scenario. Since 1990, the number of police shooting incidents and justifiable police homicides in New York City and the United States have generally continued to decline, supported by a trend toward non-lethal weapon options, enhanced self-defense and tactical training, improved firearms, and declining violence and serious crime rates.

Based on the above findings, it can be concluded that a more restrictive use of deadly physical force policy will not only reduce the number of police shootings, but also justifiable police homicides, and more importantly, firearm related police line of duty deaths, as well. These declines have been found not to be related to jurisdictional population size, law enforcement agency complement, index crime and violent crime rates (Milton, et al, p. 5). On the other hand, one could be forced to disagree with this conclusion. If the violent and serious (index) crime rate in New York City is examined from 1990 into the new millennium, there is a clear correlation between index and violent crime decline (-80%) and the decrease in justifiable police homicides (-77%). One could easily support the premise that a dramatic reduction in violent crime could lead to an equally impressive reduction in police shooting incidents and the need to deploy deadly physical force against non-compliant or threatening suspects. One should also not hesitate to conclude that the breakdown of justifiable police homicides will racially reflect that of the criminal population in that jurisdiction, and that this would be most apparent in large metropolitan American cities, which tend to have larger minority populations.

Conclusion

Since 1970, law enforcement agencies in the United States of America have made strong efforts to revise use of deadly force policies by making them more restrictive. These efforts have increased over time and have become more common

since the ground breaking *Tennessee v. Garner* decision by the United States Supreme Court in 1985 which prohibited the shooting of fleeing felons by police personnel. Thereafter, technological training enhancements, the development of non-lethal weapons, revised tactical strategies, and effective enforcement initiatives have lead to dramatic reductions in police involved shooting incidents. One can conclude that the implementation of more restrictive use of deadly physical force policies will not increase the danger to law enforcement personnel on American streets, and will reduce the propensity for police firearms usage, justifiable police homicides, and line of duty deaths of America's police personnel.

Recent Scrutiny of Police Shootings in Pakistan

Given the recent scrutiny placed on Pakistani security forces involving the alleged shooting of an unarmed criminal suspect that was caught on video tape (Black et al, 2011), there appears to be the need to evaluate the legislation and policies of the Pakistani police in order to enhance safety during police-suspect interactions. A greater criticism further involves the need for swift prosecutorial and court review of this and similar incidents to determine if criminal conduct played a role. Prompt judicial action in such cases reportedly is not routine in Pakistan (Black et al, 2011). Recommending revisions to law enforcement use of force and other policies is clearly not unique to the United States, but should be considered by police officials when public criticism leads to questions of legitimacy and transparency. There is sufficient research available globally for government officials and law enforcement administrators in Pakistan and other jurisdictions to make competent recommendations to improve agency policy and procedure.

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