



LEGAL DEFENSE TRUST TRAINING BULLETIN

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"DEVELOPING A POLICY ON USE OF FORCE - - A SUGGESTED MODEL"

by

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Law enforcement use of force is perhaps, the single most frequently-encountered issue facing administrators today. Use of force incidents happen everywhere, everyday. Particular force incidents trigger profound public criticism of the police, and the way they do their job. More frequently than any other police activity, uses of force by officers are leading to whopping civil damage awards with punitive damages, and to criminal charges against officers based on the use of excessive force.

What can and should be done about this? The answer focuses on policy and training. These are the keys to gaining and maintaining control of the most volatile aspect of modern law enforcement, and to achieving or regaining public confidence and support for the police, and to establishing, within the organization, clear and effective techniques and tools for officers to apply in performing their jobs in the most safe, lawful, effective and humane way possible.

The first step is to analyze the department policies on use of force. Are they current? Do they convey to members, a reasonably clear explanation of the proper place of force in the officer's job? Do they impart an understandable and usable outline of the boundaries of the law in use of force situations? Do they disclose to the members what standards will be used to evaluate the appropriateness of or necessity for use of force in a given circumstance? Do they permit members to use appropriate and necessary discretion in the application of force? Do they identify variables that must be considered in applying and evaluating use of force? Do they unnecessarily restrict the use of discretion by

resorting to mandatory language that cannot be applied in a wide variety of situations officer's encounter? Do they set up unrealistic premises by setting forth absolute presumptions about the appropriateness of force, where the presumptions cannot be reasonably applied in every context?

Perhaps the existing policy takes into account all of these things, and more. Are we done? No, because it is the training, or lack of it, which establishes the actual policy of your department. Policy statements can be wonderful, but if the policy is not integrated with a periodic, comprehensive, realistic and dynamic program of training, the policy is largely irrelevant.

Non-existent or inadequate training leads to an official policy of "deliberate indifference" to the injurious consequences of putting an untrained or under-trained officer on the street with the tools of force, but without understanding. The responsibility for this dangerous situation falls upon the "policymakers" - those who manage and direct the organization. So, regardless of how the policy is set forth in the manual, it has no vitality at all unless it is linked to a sound program of training.

However, in pursuit of that "first step", the following "model" is suggested as an illustration of a policy statement that accomplishes what it is supposed to - - it drives the organization toward the next important step: training. The training incorporates the policy principles to accomplish the goal: *a fully integrated program of policy and training in use of force.*

USE OF FORCE POLICY¹ *A SUGGESTED MODEL*

I.

PREAMBLE

This policy statement recognizes that the use of force by law enforcement officers requires continuous evaluation. Even at its lowest level, the use of force is a special responsibility. The purpose of this policy statement is to provide officers of this Department with guidance on the use of reasonable force².

THIS POLICY STATEMENT IS FOR INTERNAL USE ONLY AND DOES NOT ENLARGE AN OFFICER'S CIVIL OR CRIMINAL LIABILITY IN ANY WAY. IT SHALL NOT BE CONSTRUED AS THE CREATION OF A HIGHER STANDARD OF SAFETY OR CARE IN AN EVIDENTIARY SENSE, WITH RESPECT TO THIRD-PARTY CLAIMS. VIOLATIONS OF THIS ORDER, EXCEPT THOSE OF A CRIMINAL NATURE, CAN ONLY FORM THE BASIS OF A COMPLAINT AND/OR DISCIPLINARY ACTION BY THIS DEPARTMENT AND THEN ONLY IN AN ADMINISTRATIVE SETTING.³

¹This "policy model" was developed by Michael P. Stone, Esq. of Michael P. Stone, P. C., Lawyers, a Pasadena, California police defense firm. Limiting its practice to police law and litigation, Michael P. Stone, P.C. represents local, state and federal officers and agencies in civil, criminal and administrative matters in state and federal courts. Michael P. Stone is a member of American Society of Law Enforcement Trainers, the National Organization of Black Law Enforcement Executives and the IACP, Legal Officers' Section.

²This "policy" is illustrative of the necessary elements of the Department's statement on the use of force by its members, from the lowest levels of the continuum, though and including lethal force. As a "policy", it retains flexibility, and emphasizes the use of discretion based on the totality of circumstances presented to the officer. When combined with a periodic, realistic and dynamic program of training in the application of law and policy to force situations, as well as in the techniques and mechanics of force, the "policy" will serve its purposes well. Beyond this "policy", *training, training, training* is the key. Remember, a "policy" such as this model, is the moving force behind the training; but it is the training which establishes the "actual policy". While a policy statement such as this may accurately reflect the legal limits on use of force established by law (statutes and precedent decisions of the courts), training (or lack of it) will establish how the policy of the Department is executed and carried out. Where the policy and training are integrated, training defines the actual or "real policy", and runs with it. Where there is a lack of essential training or inadequate training, the void or inadequacy also establishes a "policy": it is a policy of "deliberate indifference" to the potential injurious consequences of having a non-existent or inadequate training program. Not surprisingly, it leads to liability for the administrator who is also the *policymaker*, when an untrained or under-trained officer uses excessive or unauthorized force, causing injury which is unnecessary or unreasonable.

³See, for example, California Evidence Code §669.1, which specifically sets forth an exception to the use of such manual provisions to establish a "standard of care" in an evidentiary setting, toward proving liability in a civil action.

II.

PERSPECTIVES ON USE OF FORCE

The use of force by law enforcement personnel is a matter of critical concern both to the public and the law enforcement community. Officers are involved on a daily basis in numerous and varied human encounters and, when warranted, may use reasonable force in carrying out their duties.

Officers must have an understanding of, and appreciation for, the limitations of their authority, particularly with respect to overcoming resistance from those with whom they come in official contact. Just as law clothes officers with certain authority, so does it define the limits of that conferred authority.

This Department recognizes and respects the value of all human life and dignity without prejudice to anyone. It is also understood that vesting officers with the authority to use reasonable force and protect the public welfare requires a careful balancing of the human interests involved.

III.

USE OF FORCE POLICY AND THE LAW

Since it is the law which confers authority on officers, and which also limits the use of that authority, the law should also serve as the framework for the Department's policy statement on use of force. It is therefore the policy of this Department that officers should only use that force which is lawful under the circumstances when the force is employed. The law requires that the force be "reasonable under all the circumstances". Hence, it is the policy of this Department that officers will use no more force than that reasonably called for, given the facts and circumstances perceived by the officer *at the time* of the event, to effectively bring an incident or person under control. The "perception" of the officer must also be reasonable; hence, "reasonableness of the force used" must be judged from the perspective of the reasonable officer on the scene at the time of the incident, and must embody allowance for the fact that officers are often called upon to make split-second decisions about whether to use any force, and what and how much force to use, in circumstances that are tense, dangerous and rapidly-evolving. While the 20/20 perspective of hindsight is useful for a variety of reasons, it is the *objective reasonableness* of the force employed at the time the officer must respond to the threat or incident confronting him, that will determine the lawfulness of the officer's response. See: *Graham v. Connor*, 490 U.S. 386 (1989).

The California Penal Code contains the primary sources of law governing police force:⁴

§834a Use of Force or Weapon to Resist Arrest

If a person has knowledge, or by exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using any force or any weapon to resist such arrest (1957).

§835 Methods of Making Arrest--Restraint

An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subjected to such restraint as is reasonable for his arrest and detention (1872, 1957).

§835a. Reasonable Force--Resistance

Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest, or to prevent escape, or to overcome resistance (1957).

§836.5 Warrantless Arrest by Public Officer or Employee

- (a) A public officer or employee, when authorized by ordinance, may arrest a person without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a misdemeanor in his presence, which is a violation of a statute or ordinance which the officer or employee has the duty to enforce.
- (b) There shall be no civil liability on the part of, and no cause of action shall arise against, any public officer or employee acting pursuant to subdivision (a) and within the scope of his authority for false arrest or false imprisonment arising out of any arrest which is lawful or which the public officer or employee, at the time of the arrest, had reasonable cause to believe was lawful. No such officer or employee shall be deemed

⁴In jurisdictions other than California, policy drafters should incorporate the relevant statutory law of that jurisdiction, as defined by courts of the jurisdiction, so that the objective of setting forth, in the policy, an accurate statement of controlling law is accomplished.

an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest, prevent escape, or overcome resistance (1957).

§196 Justifiable Homicide by Public Officers

Homicide is justifiable when committed by public officers and those acting in their command in their aid and assistance, either - -

1. In obedience to any judgment of a competent court; or
2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or
3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest (1872).

Note: Federal and state courts have construed statutes such as Penal Code §196 (3), authorizing the use of deadly force to apprehend a fleeing felon, to be limited to situations where the felony crime involved is "inherently dangerous" and threatens death or great bodily harm. That is, the officer must have probable cause to believe the fleeing or escaping suspect poses a significant threat of death or serious physical injury to the officer or others. For example, see *Tennessee v. Garner*, 471 U.S. (1985); *Kortum v. Alkire* (1977) 69 Cal.App.3d 325; and *Long Beach Police Officers' Association v. City of Long Beach* (1976) 61 Cal.App.3d 364.

§197 Justifiable Homicide by Other Persons

Homicide is also justifiable when committed by any person in any of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or
2. When committed in defense of habitation, property, or person, or against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or
3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, where there is reasonable ground to

apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or

4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace (1872).

Note: Here again, the involved "felony" must pose a threat of great bodily harm or death.

Since no policy can realistically predict every possible situation an officer might encounter in the field, it is recognized that each officer must be entrusted with well-reasoned discretion in determining the appropriate use of force in each incident. While it is the ultimate objective of every law enforcement encounter to minimize injury to everyone involved, nothing in this policy requires an officer to actually sustain or unreasonably risk physical injury before applying reasonable force to effect arrest, overcome resistance, or prevent escape.

Any application of force by a member of this Department must be judged by the "objective reasonableness" standard. The use of force equation must take into consideration the following factors *and any others relevant to the reasonableness of the officer's response:*

- The conduct of the individual being confronted (as reasonably perceived by the officer at the time).
- Officer/subject factors (age, size, relative strength, skill level, injury/exhaustion, number of officers vs. subjects).
- Influence of drug/alcohol or mental capacity.
- Presence or proximity to weapons (including any object that could be used to inflict injury or death).
- Availability of other options (what resources are reasonably available to the officer under the circumstances).
- Seriousness of the suspected offense or reason for contact with the individual.
- Training and experience of the officer.
- Potential for injury to citizens, officers and suspect.
- Risk of escape.

- Relative timing of events, i.e. was the officer required to really make a "split-second" decision, or , was there time for reflection and planning?
- The existence, and effect upon the officer, of psychological and physiological phenomena that frequently occur in sudden, violent or deadly encounters, such as fear, visual and auditory distortion or exclusion, "tunneling", memory and sequencing distortion, time distortion and many others.
- Other exigent circumstances.

It is recognized that officers are often required to make split-second decisions and that the amount of time available to evaluate and respond to changing circumstances may impact an officer's decision, choices and reasonable options.

While various levels of force exist, each officer is expected to respond with no more than that level of force which reasonably appears appropriate under the circumstances at the time to successfully accomplish the legitimate law enforcement purpose in accordance with the law

IV.

REPORTING THE USE OF FORCE

Any use of physical force by a member of this Department shall be documented in the appropriate report depending on the nature of the incident (e.g. arrest report, crime report, incident report), the use of particular weapons such as chemical agents, may also require the completion of additional forms as required by Department policy and/or law.⁵

Supervisory notification shall be made as soon as practical following the application of physical force which, at the time, appears likely to have caused physical injury.

Medical assistance shall be obtained for any subject who has sustained injury, expressed a complaint of injury, or who has been rendered unconscious.

⁵The author recommends that departments utilize a separate, internal "use of force report" which is completed by the responsible supervisor, ensuring independent review, and tracking of use of force patterns. Every such report should be routed to the defensive tactics training staff and reviewed to identify training needs or breakdowns; the reports may also indicate a need for change in the training.

V.

CONCLUSION

The decision to use force rests with each officer. While there is no way to specify the exact amount or type of force to be applied in any situation, each officer is expected to use these guidelines to make such decisions in a professional, impartial and safe manner.⁶

⁶This “model” is illustrative only, and is not intended to be adopted without reference to individual circumstances and environments in those departments which may consider it, in the development of individual department policies. Nothing herein constitutes legal advice. Please refer all such questions to government counsel.