

How do we use policy after the fact: (hindsight analytics, investigations, review.)

In the recent months, I have been involved in some significant arbitrations as a Use of Force expert, where a “Use of Force Continuum” has been the cause, possibly a direct cause, of an officer’s termination. This is due simply to the misperception that there exists a mechanical application of force in a critically dynamic and rapidly evolving scenario, based on the use of a “force continuum” in department policy.

As the May 15, 1989, S.C.O.T.U.S. decision in *Graham v. Conner*, is the standard for determining the Objective Reasonableness of a Use of Force, it is paramount to recognize the spirit of wording in the decision and the directions to the lower courts generated by that decision, and how it *should* apply to police policy as it relates to Use of Force, how it affects training, and how it affects the investigative process of Use of Force, from a low level Use of Force to a critical use of deadly force.

There are critical uses of force, where it is not possible, considering the facts and circumstances known to the officer, and considering the actions of the offender, to effectively stay within the confines of policy guidelines regarding tactics and techniques. Officers are subjecting themselves to unreasonable scrutiny and possible termination based on a mechanical application of the Use of Force, an element of police Use of Force that is discouraged in the very Supreme Court case law decision that governs and determines the objective reasonableness of the Use of Force.

As the officer articulates and describes his/her actions, which may have fallen outside of the guidelines established by policy, reviewers will be able to identify the officer’s perspective and perceptions and make a determination of the reasonableness of the officer’s actions. Policy that specifically forbids a particular tactic or technique, and does not include verbiage allowing an officer to explain his/her intentions in the application of the improvised tactic, especially in the realm of hands, fists, and feet as control or impact weapons, is limiting the officer’s ability to effectively de-escalate a potentially critical incident. An officer needs to be able to apply his training in tactics, known policy elements, and life experiences as they applies to a specific incident, considering a unique set of facts and circumstances, and improvise his or her response, tailored to the level of resistance the officer is being faced with at the time, and other factors the officer knows at the time of the application of the force. This is not implying that an officer use excessive, unnecessary, or unreasonable force. It is negligent thinking to expect a policy to cover every aspect of the application of a Use of Force. In other words, policy cannot possibly list every justifiable and reasonable response in an infinite array of possible force encounters or levels of resistance. This is addressed in *Graham v. Connor*,

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court

Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," Bell v. Wolfish, 441 U.S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, 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. See Tennessee v. Garner, 471 U.S., at 8 -9 (the question is "whether the totality of the circumstances justify[es] a particular sort of . . . seizure").

The Force Continuum or the Response Continuum, both a fashion of mechanical application of Use of Force, is not a reflection of Objective Reasonableness based on the three-prong test, (The Calculus for Objective Reasonableness). The Use of Force Continuums is systematically being removed from policy across the county, and for good reason. In documents generated by IACP and their primary publication, *Police Chief Magazine*, (Peters and Brave), it discusses in depth and at length how the Use of "Force Continuums" is not an effective element of a constitutionally based Use of Force Policy and can adversely affect an officers ability to make a split second decision in a critical Use of Force. The following segment from a document titled *legal implications of force continuums* (Ciminelli), reflects the change happening nation wide:

At a recent conference sponsored by the Police Executive Research Forum (PERF), Los Angeles Assistant Police Chief Sandy Jo MacArthur stated that officers are taught, "to evaluate the entire situation," and while a continuum is still used in training, it has been eliminated from policy:

In 2009 we implemented a major change in our use-of-force policy so that it was infused with the concept of an objectively reasonable standard. Although some people see the potential for flexibility in use-of-force continuums, unfortunately, there is a tendency for officers to look at a continuum and think, "If the subject does X, I use force option Y." This is the danger in our continuums.

We still use a continuum in our training, but it is not part of our policy. We emphasize teaching officers to properly respond to suspects' behavior, rather than simply prescribing a formula. This has helped us tremendously in getting officers to understand how to articulate their reasonable response to the incident. We have had this in place since 2009, and it's been very successful.

Whatever the outcome of the incident, the outcome should be the result of a thoughtful Use of Force Policy, a responsible investigation and a fair analysis based on the officer's statements as supported by all other investigative information available including any video or audio recordings of the incident.

In summary, a Use of Force Policy and the verbiage used in the policy is in need of careful scrutiny by policy writers with input from the line level to the top management of a police department. The application of the policy in the analysis and review of Use of Force needs to be reasonable and balanced based on current case law, policy, the

considerations of human factors and the officer's intentions when the force was applied. Officers need to understand the balance of the need to use force and the liability issues that exist for the department. Line level supervisors need to understand the importance of thorough on scene investigations, and the department should be balanced and working toward a cultural change in the matter of Use of Force, based on the vocation of police work, and not a knee jerk reaction to outside pressure. Police departments need to protect themselves from rogue or criminal behavior from officers that shouldn't be officers, protect officers that have signed up to do the job in the selfless servant based attitude that exists in most officers, and be able to identify changes necessary to improve the department globally through transparency and relationships, both interdepartmentally and with the public.

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Qualifications: With six years as a Use of Force Instructor, firearms instructor, Taser instructor and Defensive Tactics Instructor with the Henderson Police Department, Officer Jamie Borden is currently work in the position of "Use of Training and Analysis Officer," a position created as a part of the Henderson Police Department Model for Use of Force as envisioned by Chief Patrick Moers. Jamie has been instrumental in writing the existing Use of Force policy and has been conducting force investigations for approximately four years. Jamie is a Certified Analyst and has obtained the Advanced Specialist Certification in human factors from The Force Science Institute. Jamie has been deposed as an expert in human factors, Use of Force, Video Analysis and police procedure related to police officers in a critical incident primarily in Arbitrations. Additionally, Jamie has provided testimony and reports in the capacity of expert in Use of Force, video analysis, police procedures and training. Jamie is currently on staff with the Force Science Institute.

Works Cited

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