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A
Review of the
Harris County Constable Precinct 2
Deadly Force Policy

A Policy Research Project
Submitted in Partial Fulfillment
of the Requirements for the Professional Designation
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ABSTRACT

The Harris County Precinct 2 Constable's Office has had the current Deadly Force policy in place since 1989. The policy has not been reviewed since the day it was put into effect. The Internal Affairs supervisor believed an incident where a deputy fired a shot at a fleeing felons vehicle was a violation of the departments deadly force policy until he read it. It was suggested that a review of case law as well as other departments' policies to see if the current policy needed to be revised.

An Internet site named "caselaw" gave access to Supreme Court as well as Circuit Court of Appeals decision by subject matter. Copies of departmental policies pertaining to deadly force were requested from police departments who had web pages. A great deal of help in the initial research was received from the library at the Grand Lodge of the Fraternal Order of Police. A review of articles and books detailing existing research in the Use of Deadly Force would be the next step.

It is recommended that the current Precinct 2 Deadly Force policy be completely rewritten. The new policy should cover all aspects of the Use of Force and not segregate Deadly Force from the rest. Special emphasis should be placed on continuing in-service training. And most definitely a reporting requirement as well as an investigation procedure is highly recommended.

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Introduction

Several months ago a deputy fired a shot at a felony suspect who was fleeing in a vehicle. You would expect his action were a violation of the Precinct 2 Deadly Force Policy. Well you would have been wrong. According to section 11.4, paragraph E using deadly force against certain fleeing felony suspects was allowed.

After this incident the Constable of Precinct 2 and his senior staff wanted to know if the current policy was within the guidelines set out by the U.S. Supreme Court in the their 1985 decision in Tennessee v. Garner; 471 U.S.1, 1985. Further, they wished to know if it was sufficient under today's standards.

The first step to answering these questions was to gather copies of court decisions and departmental policies from not only Texas but also departments from around the United States. During this search of legal decisions and standards a number of articles on Police Use of Force were found that looked at the issue from a legal as well as a psychological standpoint.

The expected outcome of this research project is to determine if the current Precinct 2 Deadly Force policy is sufficient to control an officer's use of deadly force. Secondarily, if the current policy is sufficiently legally defensible to reduce not only departmental liability but personal liability as well. If the current

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policy doesn't meet this criteria, suggestions on a revised policy to better meet the needs of the officer and the department will be made.

Historical and Legal Background

On March 27, 1985 the authorized use of deadly force by law enforcement officers took a dramatic change. On that date the United States Supreme Court handed down their decision in the case styled Tennessee v. Garner; 471 U.S. 1, 1985. The court ruled that the shooting of an unarmed fleeing felon was an unreasonable seizure and violated Garner's Fourth Amendment rights.

The Garner case began late in the evening of October 3, 1974. Memphis Police Officers were dispatched to a possible "burglary in progress" call. When Officers Elton Hyman and Leslie Wright arrived a woman was gesturing to an adjacent house. She told them she had heard glass breaking and "they" were breaking in next door. Officer Hyman went around the back of the house where he heard a door slam and a person runs across the backyard. The fleeing suspect stopped at a six-foot chain link fence. With the aid of a flashlight Hyman was able to see Garner's face and hands and was unable to see a weapon. Hyman testified that he was "reasonably sure" Garner was unarmed. When Hyman shouted "Police! Halt!" Garner began climbing the fence. Hyman felt that if Garner got over the fence there would be little chance of capturing the

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suspect. He shot Garner in the back of the head. Garner later died during surgery at a Memphis Hospital.

Tennessee Law as well as several other states including Texas allowed the use of deadly force to prevent the escape of a fleeing felon. The Tennessee statue

read; "if, after giving notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest" [Tennessee Code Ann. 40-7-108 (1982)].

The Garner decision did not prohibit the use of deadly force against all fleeing felons however. In section II B of the majority decision written by Justice White, the court went on to say; "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." What the court found was that the use of deadly force on an unarmed fleeing suspect who posed no threat to the officers or others was an unreasonable seizure.

One of the first things we need to look at are some of the decisions the federal courts have written after Tennessee v Garner. Several of these cases have expanded on the limited areas the Garner decision covered, especially in areas involving qualified immunity. In a Texas case involving a Department of Public Safety Trooper Bryan Barnhart, the 5th Circuit Court of Appeals said,

> ". . . in determining the reasonableness of Barnhart's conduct, we are not to employ "the 20/20 vision of hindsight", and that we must consider

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> "the fact that police officers are often forced to make split second judgements - - in circumstances that are tense, uncertain and rapidly evolving - - about the amount of force that is necessary in a particular situation."

The court defined qualified immunity this way: "Qualified immunity shields government officials performing discretionary functions from civil damage liability if their actions were objectively reasonable in light of clearly established law." Can we define in a policy what would be "objectively reasonable"?

The court also cited the "Model Penal Code" in their decision. The relevant section cited by the court with approval was;

> The use of deadly force is not justified . . . unless (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a police officer . . .; and (iii) the actor believes the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is substantial risk that a person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

The Garner decision, although looked upon today as a 'Landmark' case, really was anticlimactic. The media of the day said that the court had struck down the laws in 21 states (Walker & Fridell, pg 97). According to the statistics cited by Walker and Fridell in their 1992 article in the "American Journal of Police" the Garner decision did not drive a nationwide change in departments deadly force policies. In a survey conducted in 1990 of the 100 most populous cities sixty-seven did not have to revise their deadly force policy. They had already adopted policies that met the Supreme Court rule or were even more restrictive.

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The court's decision may have derived more from the fact that there were so many departments across the country that had already revised their policies. The court in fact states in their decision that they reviewed "prevailing rules in individual jurisdictions". The court went on to say " . . . a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects".

Walker and Fridell assert in their article that changes in law enforcement policy on the use of deadly force began as early as the beginning of the 60's. One of the early incentives to change was the issuance of the Model Penal Code by the American Law Institute in 1962. (Walker & Fridell, pg 100) This suggested penal code limited deadly force to felony arrests when the officer believed that, number one, the crime involved the use or threatened use of deadly force or there is a substantial risk that delay in the arrest of the subject will result in death or seriously bodily injury.

Walker and Fridell believe that change was probably driven more by community groups and the civil rights movement. Even to this day there continue to be, at least, a perceived disparity in the involvement of minority suspects in police shootings. The pressure from outside political groups even today has a tremendous impact on the way law enforcement does its job. To illustrate that this is an ongoing concern to law enforcement an article in USA Today on February 26, 1999 said, "The leaders of two dozen civil rights groups

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called Thursday on President Clinton to convene an unprecedented national summit to fight an 'epidemic' of police brutality against blacks and other minorities." (Willing, pg 3A)

They also believe a move toward more professionalism in law enforcement has also had an effect. Changes in hiring and recruiting standards and the requirement for added and more realistic training have made a dramatic change in the officer seen on the street today. Also the movement to formulate accreditation requirements has driven the response to upgrade standards in policy and procedure.

There appear to be a number of reasons that departments had begun to become more restrictive in their deadly force policies. Probably the number one reason for the changes in the years before the Garner decision was public perception. The civil rights movement in the 1950's and 60's placed a lot of pressure to change use of force policies in general. After all the media was now showing live pictures of the police response to peaceful demonstrations. Another major reason was the mounting dollars expended from police budgets to settle excessive use of force lawsuits. And finally law enforcement began to attract better-educated and more progressive persons in to administrative positions.

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Review of Literature and Practice

James Fyfe discusses whether police shootings act as a deterrent to criminal activity. He contends that it is well known in the criminal community that there is little chance that there will be any police intervention during the commission of their criminal act. Since there is little chance that the subject will be shot by the police it stands to reason there is little deterrent effect. (Fyfe, pg 380)

Fyfe goes on to talk about the belief that there is a conspiracy to 'cover-up' police misconduct when police shootings occur. There are several reasons that this may be happening. First, the majority of police shootings not only occur but also are investigated in low light and low visibility conditions. Secondly, there is reluctance for a police agency to release its findings in what is essentially an internal investigation. Finally, there has been unwillingness from law enforcement to cooperate with researchers in the field of use of deadly force. Fyfe also makes the point that the use of deadly force is clearly incongruous in light of the mission of law enforcement to protect life, preserve order and fight crime. (Fyfe, pg 384)

Special Agent John C. Hall, JD discusses two points in his article in the FBI Law Enforcement Bulletin that should be considered. First of all is whether an officer is required to use alternate methods before resorting to the use of deadly force. Secondly, whether an officer can be held liable for doing

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something prior to the need to use deadly force that may have contributed to setting up the circumstances that then required that use of deadly force. The courts have so far found an officer is not liable under either circumstance.

Scott Lewis in his discussion of an officers qualified immunity points out the courts have not required officers to be either equipped by their departments with alternate force options or use alternate methods instead of or before the use of deadly force. He also says that, "Compliance or noncompliance with state laws or departmental policy is not a dispositive issue. However, state law or department policy may be indicative of what is or is not reasonable." (Lewis, pg 41)

Michael Dearington in his Report to the Chief State's Attorney talks about the lack of realistic training for police officers. He questions whether officers undergo realistic training in the appropriate use of force.

Although Fyfe believes the public wants the deterrent effect of the swift application of justice he finds it unlikely that the officers ability to use deadly force has any appreciable effect on many criminals. Lewis points out that departmental policies may be used as a measure when the court makes a decision on what a reasonable officer would do under similar circumstances.

The current Precinct 2 "Policy Concerning the Use of Firearms in Police Actions" is broken down into eight specific sections. Section "a" outlines the legal limitations and specifically cites Texas Penal Code sections 9.51 and 9.52. The policy allows the use of deadly force for self-defense and the defense of the life of another person. It does not authorize the use of deadly force to affect the

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arrest of a person who is to be charged with a misdemeanor or one who is only suspected of committing a felony. And the policy does not allow for the use of warning shots.

The Cleveland (OH) Police Department's "Use of Deadly Force" policy covers a much broader area than just the justifiable use of deadly force. In addition to the usual areas it also covers required firearms qualifications, reporting and investigation requirements, off duty carrying of a weapon and a requirement that all officers undergo annual training on use of force policy and procedures.

The Chicago (IL) Police Department covers the use of force in a very in-depth policy that is entitled "Protection of Life" Policy. General Order 75-12 covers not only the reasons an officer may discharge a weapon but use of chemical agents as well. It also details the officer's responsibility when he discharges a firearm to destroy an animal. The order goes into great detail what notifications must be made, the responsibility of communications, the field lieutenant, watch commander, investigation team, etc.

A number of agencies policy and procedures manuals incorporate the use of deadly force into an overall "Use of Force" policy. The Humble (TX) Police Department incorporates a Use of Force Continuum into General Order 401.00.00. Midland (TX) Police Department also incorporates very specific criteria for the use of various types of alternative force.

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A very interesting variation of incorporating a Force Continuum is General Order 94-2 issued by the Kansas City (KS) Police Department on August 1, 1994. The policy specifically outlines the escalation for each level of the Force Continuum and then goes into great detail the responses appropriate for each level. Interestingly, Kansas City includes intentional collision and roadblocks in its definition of lethal force.

While Kansas City uses a narrowly defined use of force continuum, the Humble policy, which also use a force continuum, does not try to define the appropriate action for every eventuality. This move may prevent the policy from being used against the agency in a lawsuit.

Discussion of Relevant Issues

The current Precinct 2 Deadly Force policy meets the letter of Chapter 9 of the Texas Penal Code. In light of the Deputy's discharging his firearm at a fleeing vehicle it may not be sufficient in helping a Deputy understand the potential ramifications of his actions. This does not refer to the microseconds he may have before making this critical decision, but the days, months and years he has to think about what he might do if certain situations arise. After all, one purpose of a policy manual is to give the Deputy known guidelines to use to determine what his actions might be in a variety of situations.

Looking at the particular incident that began our analysis of the current deadly force policy may help to determine whether the current policy is deficient

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and, if so, where it may need to revision. An examination of the incident raises the issues of officer judgement, timely incident reporting, the realistic aims of officer training and public perception. It must first be determined whether the shot fired at the fleeing vehicle was justified under the existing policy. At the point the shot was fired it met the letter of current Precinct 2 Deadly Force policy and Texas law. The vehicle was fleeing an aggravated robbery and may have continued to be a threat to the public. However the officer made a number of errors in judgement that set up the circumstances that led to the robbery occurring. Errors in judgement by an officer who had limited patrol experience. A policy that defined the use of force in more explicit terms may have prevented the officer from making the errors in judgement that could lead to what may turn out to be a very expensive lesson for the department and the officer. And a policy that set out specific reporting requirements may have prevented that.

It was not until the next day that anyone became aware the deputy's weapon had been discharged. Even though the current policy doesn't outline investigation requirements when there is an officer involved shooting, by unwritten tradition there are certain steps that must be taken. It is very difficult to implement some of those steps 24 hours later. If for no other fact than there is no longer a sterile crime scene.

A policy may contain the requirement that any use of force or at least discharge of a weapon is immediately reported to a supervisor, a subject that the

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current policy is silent on. Almost all of the policies from other departments that were reviewed had not only a reporting requirement but also investigative procedures that actually may reinforce the reporting requirement.

The way the policy is currently written it might be difficult for an attorney to argue that it sets specific standards for what a 'reasonable officer' would do, the courts and juries appear to be moving toward holding police officers and their departments to a higher standard.

The policy as it is written cannot be used as a self-teaching tool. A tool to help an officer in his psychological preparation for a variety of incidents they might anticipate. This is what a properly written policy should be used for. It is a guide for an officer to consider before they become involved in the split second decision. A decision that attorneys, judges and juries may take months to consider.

The vast majority of policies that were looked at spoke about training. Training is an issue Dearington points out is currently not realistic in its approach to equipping officers. The public as well as the courts expects better trained officers. As we continue to bring professionalism to law enforcement training, especially realistic training, becomes more important.

The current policy may be legally defensible due to its vagueness, but what about the public's perception. The public may never have access to the policy itself, but imagine if it was the lead story in tomorrow's newspaper? It may not traditionally fall under the freedom of information act until it is subpoenaed in discovery. Then it will be available to anyone who wants to see it.

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It appears possible that a policy could incorporate elements from several other department's policies. A new policy that has specific reporting requirements for the full range of uses of force would give the department a tool to analyze officers weaknesses as well as their strong points. It would also give the department the information it would need to gear a training program to benefit both the department and the officer. This incident points out the need for continuing training for the department's officers.

The initial cost of rewriting the current policy will be minimal compared to implementing training programs that will insure not only compliance with the policy but understanding of it. The cost of new and increased training will be high. There will be the necessity of preparing new teaching materials. The largest expense will be the cost of taking fifty officers from their normal duties and placing them in a classroom. And this cost will be repetitive because of the need to reinforce this training through annual or biannual classes. But without this training the department is potentially liable for much larger amounts of money when they loose a wrongful death or excessive force lawsuit. Even if the department and officer prevail in such a suit the cost of defense will be considerably higher that the amount the department will spend on providing adequate training.

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Conclusion and Recommendations

The purpose of this policy research project was to try and determine if the current Precinct 2 deadly force policy meets the standards set out by the U. S. Supreme Court in its 1985 decision styled Tennessee v Garner. The paper set out to determine whether the policy meets the requirements set forth in that decision and whether the policy is legally defensible.

Assuming the policy were defensible in its present form, there is a concern as to the public reaction to its wording. Over the last thirty years law enforcement has come under considerable public pressure to re-examine its use of deadly force. Even if law enforcement was not under the public microscope its goal of being recognized as a profession would necessitate another look at use of force policies.

The original problem of a deputy firing at a fleeing vehicle really put the process of examining the current policy in a new light. A light that pointed out that although the policy met the letter of the law it did not address the need for reports after force has been used in an attempt to subdue and effect the arrest of a subject. It also said nothing about training. Training required to ensure the officers are aware of what not only the policy requires but what is expected of them under the law.

An adoption of a policy similar to Chicago's "Protection of Life" policy will accomplish several things. It will allow the incorporation of training at regular intervals. Training that will insure compliance with any policy. A new policy

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must require specific reporting requirements as well as investigation procedures. Without requiring reports and investigations of at least discharge of weapons there will be no way to determine which officer may need additional or remedial training.

The new policy should not only cover deadly force but also the use of force in general. It is strongly recommended that a force continuum be incorporated in the policy. A force continuum will give the officer a way to determine the level of force that is appropriate in a number of situations.

The type of policy that has been recommended will provide the officer a better guide to be used in when they may only have a split second to decide on an appropriate action. It should also provide the department with a more defensible policy. A policy that could save the department a considerable settlement in a future lawsuit or even prevent one from being filed.

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