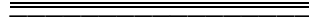


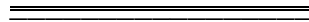
**The Bill Blackwood  
Law Enforcement Management Institute of Texas**



**Law Enforcement and Restrictive Use of Force Policies**



**A Leadership White Paper  
Submitted in Partial Fulfillment  
Required for Graduation from the  
Leadership Command College**



**By  
Mayo Williams Neyland V**

**Pflugerville Police Department  
Pflugerville, Texas  
May 2015**

## **ABSTRACT**

Law enforcement officers today are working in an increasingly difficult and dangerous world. Decisions they have to make may come down to seconds and can be the difference between them living and them dying. Yet agencies are repeatedly instilling in their officers a strict use of force policy out of fear of litigation and forgetting what makes officers great, the power to utilize discretion.

Some of the things that must be considered are the liability placed on the officer by the strict policies as well as the liability placed upon the governing body if a lenient policy is utilized. Strict policies may place an officer in a position where an intentional violation of policy is necessary to ensure the officer's survival, but at the same time may ensure that the officer can be trained easier. The officers most basic and powerful tool, discretion, must be reviewed if it potentially going to be limited but you must also look at the governing body and if they can allow for a policy that is so lenient that it can be misinterpreted.

This paper will address these issues as well as adult learning techniques and how they play into the debate. Research from books, journals, articles and the Internet will explore the merit of these arguments and help with solutions to use of force policies and whether they should be lenient or strict. This information reviewed will help conclude that liability will be lessened, officer safety will be increased, and officers will learn better from lenient policies versus strict policies.

**TABLE OF CONTENTS**

Abstract

Introduction .....1

Position ..... 2

Counter Position ..... 8

Recommendation ..... 12

References ..... 14

## INTRODUCTION

In 2012, 48 police officers were killed and 52901 were assaulted (Federal Bureau of Investigation [FBI], 2012). Police officers undertake a very dangerous job based merely on the number of people that attempt to or succeed in hurting them. Officers do not need their own departments making their chosen profession more dangerous by limiting or spelling out exactly how they must react to situations where they may need to use force to protect themselves or even save their own lives.

Police officers across this nation are faced with more and more questions on a daily basis, be it questions in regards to how to enforce the law or what weapon to deploy to protect themselves. They experience situations never before seen by law enforcement and oftentimes are expected to make split decisions that will not only affect their lives but the lives of their constituents and those they have taken an oath to serve and protect. Officers react in a millisecond to situations where “any hesitation in a crisis situation can potentially cost an officer his or her life” (“Combating conditioned hesitation,” 2005, para. 1).

While the oath may differ from department to department, it shares a core value: to serve and protect everyone. With all this responsibility, police officers have been afforded the training and knowledge that allows them to be entrusted with several grand powers. First and foremost is the ability to take away someone’s personal freedom, by force if necessary. Due to this entrusted power, police officers for years have had a broad array of discretion with which to carry out their duties, yet as this responsibility grows there is a movement to limit this discretion, particularly in the area of Use of Force.

Officers must continue to be afforded the opportunity to practice this discretion, especially in regards to use of force policies, as it is the officer who will have to live with their decision and immediately face the scrutiny that is to follow. Today's society is particularly litigious, as is evident from the fact that police are currently faced with more than 30,000 civil actions annually (Silver, 2000). Officers must be trusted, much as they are with extreme power, to make the rational decisions necessary to carry out these duties.

It is for the benefit of all citizens that use of force policies should be fluid in nature and not expressed as absolute restrictions. A fluid use of force policy makes for a more confident officer, who is respectful of possible litigation, but not afraid of it. It allows for an officer to use his discretion and not follow the letter of the law, but the spirit of the law. A less restrictive use of force policy would limit the amount of lawsuits officers must subject themselves to for merely doing the job that is expected of them. In the worst case scenario, a restrictive use of force policy could very well cause that officer to hesitate or second-guess a course of action, creating a delay in the response that could very well be the difference between life and death for the officer or the citizens he is sworn to protect.

## **POSITION**

In examining the need for police departments to go to more lenient use of force policies, there are several key issues that need to be examined. One must consider the undue legal liability placed on an officer by utilizing a more restrictive use of force policy. Another fact that must be looked at is the fact that restrictive policy can place an officer in a position where policy must be intentionally violated. The limiting of an officer's

options is another point that one must consider when trying to implement the use of a more lenient use of force policy.

The key issue that arises with a strict use of force policy and the most detrimental is that of the liability placed upon the officer. In today's society, when discussing liability in regards to police officers, it can be either civil or criminal in nature. The most common liabilities that officers will face when dealing with use of force issues are those of civil liability under state tort laws or Title 42 United States Code, Section 1983 (Payne, 2002). Criminal charges are possible where it is shown that excessive force was used, but this is a rarity (Payne, 2002).

This liability has not always been the case as far as police officers and municipalities were concerned. Sovereign Immunity was granted to municipalities and states for years, even after the enactment of Section 1983 by Congress in 1871, but this has since been changed by case law. In *Monell v. Department of Social Services* (1978) the United States Supreme Court held that the use of the word person in Section 1983 applied to municipalities and states as well, opening up states and municipalities for civil suits. As stated earlier, it is estimated that 30,000 law suits are brought against police agencies annually now (Silver, 2000). This is a topic that weighs heavily on police officers and may cause delay in actions, or concerns about utilizing any use of force against anyone, even when legally justified. This concern can be shown by a recent study conducted in Texas, where over 800 police chiefs were polled with 53% responding that "lawsuits or fear of lawsuits made it more difficult for them or their officers to do their job" (Vaughn, Cooper, & del Carmen, 2001, p. 47). The fear of liability cannot only affect the officer's ability to act in his best behalf, but also might

cause them to fail to act for the best interest of their constituents, such that officer's with this fear may become timid or indecisive and fail to act to the detriment of the public's interest (Schofield, 1990)

The more restrictive the use of force policy, the less likely the officer will be to use his discretion. Officers who lose this discretion may be forced to use force, under the guise that their policy promotes it, rather than looking for a non-force option or peaceful solution to a problem. Officers may also be forced to utilize a force option when one that is less forceful would have sufficed, if they believe their policy requires it. The use of the use of force continuum, which is common place, is still a viable option, as long as that policy does not strictly prohibit use of force options or require a definite use of force.

In all cases described above, the officer has opened themselves to liability. If the officer were to fail to act due to a hesitation, they could be subject to suit under State Tort Laws if it were seen that the officer had a duty to act. If the officer uses a higher force option than required to affect an arrest or lawful purpose, he opens himself to possible criminal charges of assault. The officer would also be subject to State Tort Laws civilly. The worst case scenario would be where the officer were accused of violating a constitutionally protected right, in which he would be subject to a civil suit.

The second issue that needs to be looked at in examining the need for more lenient use of forced policies, is that of situations that could arise in which an officer is forced to violate policy. In the introduction, a scenario was introduced in which an officer was faced with the decision to violate a known policy to subdue an out of control

arrestee. This was just a scenario, but in all actuality, it is a situation that could easily arise.

The policy utilized in the scenario is actual policy from the Pflugerville Police Department. The policy in questions strictly prohibits a Pflugerville peace officer from Tasing a handcuffed prisoner (Pflugerville Police Department Policy Manual, 2010, Chapter 2.10). In the scenario, an officer has made a legal arrest for Assault Family Violence. The arrestee slips his handcuffs to the front while being transported and upon being escorted out of the back of the patrol unit rushes the officer knocking him against a wall. While the arrestee is handcuffed, he is not under control and the use of the Taser against the prisoner would fall under acceptable practices in common use of force policies as the officer is being directly attacked. However, due to the restrictive nature of the policy within the Pflugerville Police Department the officer, although granted a useful legal option, would have to engage hands on with the prisoner, placing him more at risk. Or if the officer chose to use the Tasers to bring the situation to a quick close, the officer would have directly violated policy.

The intentional violation of policy, within the Pflugerville Police Department, as well as most departments in the country, could result in the termination of the officer. An example of this is directly shown in the City of Pflugerville Employee Manual, which states “Any direct intentional violation of any policy set forth may result in corrective action, up to and including termination” (Pflugerville Employee Handbook, 2010, p. 8). The restrictive use of force policy could also be interpreted to have caused the excessive use of force provided in the scenario. This can be seen in the court decision made in *Monell v. Department of Social Services* (1978) where a municipality can be



sued if it maintained a policy deemed to have caused a constitutional deprivation, such as loss of life, the ultimate use of excessive force.

Thus, through fear of retribution for intentional violations, an officer may be forced to use force when other means would have been more suitable. Instead of having to possibly draw his weapon and utilize it on a charging handcuffed prisoner, if policy were more lenient without restrictions, the officer could have used his Taser. The use of the Taser in this situation could and most likely would have resulted in a quickly executed, less dramatic solution.

The last issue that needs to be examined is that of limiting an officer's option in use of force situations. Officers, as stated earlier, are granted many powers that come with great responsibility. To prepare officers for this responsibility, they undergo strenuous training requirements before they are even allowed to serve as a peace officer.

As a minimum, Texas police officers are required to be licensed by the state licensing entity, Texas Commission of Law Enforcement Officers Standards and Education (TCLEOSE), which requires a minimum of 618 hours of training to be certified (Texas Commission of Law Enforcement, 2010). This does not take into account the continuing education that Texas peace officers must also undergo, which at a minimum is 40 hours of continuing education during their two year mandated TCLEOSE training cycle, in essence ensuring that officers are receiving a minimum of 40 hours of training during a two-year period.

The majority of topics taught to police officers are meant to be tools, such as that they may place in a "toolbox" to be utilized when required. Instructors will consistently

talk about this tool box, while stressing that it will be the officer's discretion on when and where to use which particular tool they need. Police officers agree that discretion is possibly the most powerful tool they have available to them ("Do police officers," 2014).

The standard for use of force policy within the United States has become the force continuum, which at best is a tool, a guideline (Payne, 2002). It has worked very well and withstood many challenges in courts of law. However it was not intended to be utilized in a restrictive manner. The use of force continuum was designed with overlap between required steps, so that there is discretion left to the officer, due to his interpretation and training (Payne, 2002). When elements are added to this policy making it very restrictive, such as the word shall or never, the officer's ability to use his discretion is lost.

Limiting an officer's discretion is also a negative trait as far as the learning process is concerned. In examining learning theories, it is evident that adults learn best from experience and have a deep desire to be self-directing (Knowles, Holton, & Swanson, 2005). There is nothing to base experience on, nor be self-directing from merely memorizing facts and information. As a matter of fact, it has been suggested that teaching is vastly antiquated, that the mere act of imparting knowledge (teaching) makes sense in a never changing environment. However, today, men live in an ever-changing environment and that the main purposes of education needs to change from teaching to facilitating learning (Rogers, 1969).

Officers live and work in a fluid situation, with scenarios constantly changing, so one should expect the use of force policies to be dynamic, instead of the dry, step by step rules they have become. This does not instill a drive to learn, where stimulus is

needed. Officers have been taught since the beginning of police training to be self-thinkers, to place their tools in their tool box, to use their discretion. A fluid use of force policy with limits, not absolute restrictions, acting as a guideline, embraces this need for discretion and actually supports the effective learning of the policy.

## **COUNTER POSITION**

In examining the need for leniency among police use of force policies, one must also look at the claim that stringent standards are needed in these policies. One must examine the fact that with a use of force policy that spells out one's options, that training officers would become easier. The limiting of municipality liability through the use of a more strict use of force policy is another key issue that must be examined. The last point that must be evaluated is that a strictly spelled out policy ensures that policy is not open for interpretation, that it cannot be misinterpreted.

There are several schools of thought when it comes to the ability of humans to learn. Original theories do state that while humans have the ability to learn on their own, it is not always prudent and may in fact be dangerous to the learning process in general. The presentation of use of force policy in an absolute fashion allows for the memorization of the steps in the use of force process, if A then the officer does B, if C then the officer responds with D. One of the originators of educational process even stated it could be dangerous to believe that there is something destructive in memorizing facts or code, and to pass on teaching these facts so that one can discover them on their own (Skinner, 1968).

To counter this point though, one must look at the advances made in the understanding of adult learning. Gagne (1972) identified five domains of learning and

the best method for instruction to those domains. The successful utilization of force as a response to another can be defined as a cognitive strategy, due to the fact that it relies on interpretation of the force being responded to and the necessary force used to defuse or successfully combat it. Gagne stated that cognitive strategies require repeated occasions in which challenges to thinking are presented. There is nothing challenging about a strict use of force policy which states if A do B, if C do D. In expecting the officer to analyze and utilize discretion the learning is challenging and therefore easier for an adult to learn.

There is a second argument when examining the issue of lenient use of force policies that must be looked at. The issue of city/municipality liability is one that can be argued to being in favor of the city with a stricter use of force policy. If a policy is spelled out with absolutes, there is far less a question will be raised over its interpretation. With words like *shall* commonly used in policy, it is understood that this is an absolute. Officer study the Texas Penal Code, the Texas Traffic Code and it is commonly accepted that shall requires the action or whatever it spells out.

In the majority of the use of force litigation, which are filed under Title 42 United States Code, Section 1983, the target is often going to be the municipality, since they are often perceived to have deep pockets (Kappeler, 2001). This being the case, the courts have interpreted that a municipality is subject to liability if a municipal policy or custom was that which directly attributed to an officer's violation of a citizen's rights, if that custom or policy was either created or condoned by a high-level municipal policymaker (Kappeler, 2001). With the fact that most chief or administration makes and enforces policy within a municipality, this is a fairly easy assertion to make and has

been recognized in multiple court cases. Thus the stricter a policy that has been reviewed by a municipalities legal services and approved would save the agency/municipality from liability by assuring that policy is specifically spelled out and legal.

To counter this point, one must understand that the trend in 1983 lawsuits is towards vicarious liability (Payne, 2002). With the general trend leading towards this theory one must understand that regardless of the policy, by mere nature of their position as the “deep pocket” municipalities have opened themselves up for liability. Regardless of how well a policy is written the municipality will almost always be named in a lawsuit because “suing public officials has become the second most popular indoor sport in the country (del Carmen, 1994). It is not uncommon for a police department to be sued for any action regardless of how well the law and policy was followed (Payne, 2002).

Police chiefs in general have taken a much better stance on this fact that the officers themselves, as evident from the fact that in an informal survey of chiefs civil liability ranked 20<sup>th</sup> on their list of concerns (Carter, 1994). A study also showed that in general police chiefs feel that civil liability has yet to reach a point of crisis (McCoy, 1987). With the fact that chiefs are not worried about liability and the fact that litigation is going to occur, it really does not matter whom the liability is placed on, and in fact the municipality is in a much better position to weather liability.

A third point that should be examined is the fact that a strict policy cannot or limits itself from misinterpretation. When rules and regulations are stated in absolute there is no mistake of fact and no room for misunderstanding. There is no question left

to the officer to interpret what he is looking at, merely to act in accordance with that policy. The repeated facts and review of a formal policy, written with absolute language, provides for the ability of the officer to understand it completely and without question.

In examining the belief that misinterpretation of a strict policy is not possible, one must review adult learning and communication. In any discussion of communication, there is what is seen as a sender and a receiver. Many things can lead to the misinterpretation of information on any of several different levels (supporting communication process evidence).

Another factor that has to be considered is again the adult learning process. As discussed earlier, adults are going to learn easier and more completely that which they have an honest input it. That which teaches the officer to think will be remembered, not merely a response to a given stimuli. Lindeman (1926) stated that "Authoritative teaching, examinations which preclude original thinking, rigid pedagogical formulae-all these have no place in adult education" (p. 10). Adults want to be challenged, want to learn to think for themselves. Officers capable of self-thinking and not just responding to stimuli more meet the image society seeks in its peace keepers. Officers, as stated earlier, are entrusted with their discretion and across the nation 800,000 law enforcement officers have maintained this trust with society. Law enforcement uses the ability to think for themselves to act for the reason they were created, to enforce the law fairly and equally. Restricting officers thinking with stringent policies for the sake of memorization would rob this ability.

## RECOMMENDATION

Law enforcement across the country should look into the revision of use of force policies to take away absolute restrictions and allow for the implementation of fluid use of force policies. Officers across the nation are faced with fluid situations, each one different, and each ever changing in which they must utilize some degree of force to remedy a situation. Whether that is to enforce a law, protect a citizen or effect an arrest, these situations are all different. What is proposed is the removal of all absolute language in the Pflugerville Police Departments' use of force policy to allow for the interpretation of situations and empower the officers to make the right decisions at the right time.

The strict use of force policy has long since past its prime. It is no longer an effective tool. Officers are facing challenges today they have not ever seen before in history. The officers face an increasingly litigious society, one which is only compounded by an absolute policy. They are faced with ever changing situations with violence becoming an everyday occurrence, which requires the ability to change, adapt and overcome. The more options they are provided with, the more tools they have, the less likely they are to be placed in a position where they have no choice but to violate the very policy they swore to uphold.

The arguments can be made that a stricter policy is more important today than it has ever been, but these arguments do not support themselves. It has been argued that strict absolute policy makes learning easier. With the stress and development of the adult learning theories, this has been shown to be untrue. Adults need to be

challenged to learn effectively. They must be trained to think, to use the very discretion officers have been taught to take advantage of for years.

The municipality being subject to liability has been brought up for discussion as well, however it is commonplace for municipalities to be subject to lawsuits anyway, regardless of if policy or law is followed. The emphasis is lawsuits now is to go for the “deep pockets” and whose pockets are deeper, the municipality with a multimillion dollar budget or the officer making \$50,000 a year?

Freedom from policy misinterpretation has also been discussed. However, as shown in communication models and adult learning, anything can be misinterpreted when looked at in black and white for any number of reasons. When trained to think for themselves based on a fluid situation the fluid policy prevails, allowing the officer to utilize that discretion that seems to be a recurring theme.

Officers must be trusted to use their discretion, to make decisions based on sound decision-making capabilities. Without this trust, this discretion, a possibly severe negative side effect could arise, one in which the ideals of community policing, the involvement of the community in their own development is retarded. A limiting of the officer, the fear of litigation and the inability to produce thinking officers would lead us to a world in which robots might as well replace human officers. Ones that do not think, that merely act, that can interpret only if A then B, if C then D. The human element must be embraced, believed in, and put back into policing.



## REFERENCES

- Carter, D. (1994). Contemporary issues facing police administrators: Guide-posts for the academic community. *Police Liability Review*, 9-10.
- Combating conditioned hesitation. (2005, July 1). *Police Magazine*. Retrieved from <http://www.policemag.com/channel/patrol/articles/2005/07/officer-survival.aspx>
- del Carmen, R. (1994). *Civil and criminal liabilities of police officers*. Cincinnati, OH: Pilgrimage.
- Do police officers have too much or too little discretion? (2014, February 19). *Police One*. Retrieved from <http://www.policeone.com/investigations/articles/6878880-Do-police-officers-have-too-much-or-too-little-discretion/>
- Federal Bureau of Investigation. (2013). *FBI Uniform Crime Report*. Retrieved from <http://www.fbi.gov/about-us/cjis/ucr/nibrs/2013>
- Gagne, R. M. (1972). Domains of learning. *Interchange*, 3, 1-8.
- Kappeler, V. E. (2001). *Critical issues in police civil liability*. Long Grove, IL: Waveland Press.
- Knowles, M. S., Holton III, E. F., & Swanson, R. A. (2005). *The adult learner*. San Diego: Elsevier.
- Lindeman, E. C. (1926). *The meaning of adult education*. New York: New Republic.
- McCoy, C. (1987). Police legal liability is "not a crisis" 99 chiefs say. *Crime Control Digest*, 1.
- Monell v. Department of Social Services, 436 U.S. 658 (1978).

- Payne, D. M. (2002). *Police liability*. Durham, NC: Carolina Academic Press. City of Pflugerville Employee Handbook. (2010). City of Pflugerville, TX: Author.
- Pflugerville General Orders. (2010). City of Pflugerville, TX: Author.
- Pflugerville Police Department Policy Manual. (2010). City of Pflugerville, TX: Author.
- Rogers, C. R. (1969). *Freedom to learn*. Columbus, OH: Merrill.
- Schofield, D. L. (1990). Personal liability: The qualified immunity defense. *FBI Law Enforcement Bulletin*, 26-32.
- Silver, I. (2000). *Police civil liability*. New York: Matthew Bender.
- Skinner, B. F. (1968). *The technology of teaching*. New York: Appleton-Century-Crofts.
- Texas Commission of Law Enforcement . (2010 ). *TCLEOSE Homepage*. Retrieved from  
[http://www.tcleose.state.tx.us/content/training\\_1000\\_bpoc\\_instruc\\_guides.cfm](http://www.tcleose.state.tx.us/content/training_1000_bpoc_instruc_guides.cfm)
- Vaughn, M., Cooper, T., & del Carmen, R. (2001). Assessing legal liabilities in law enforcement: Police chiefs' views. *Crime & Delinquency*, 47.