



USE OF FORCE POLICIES: DISPELLING THE MYTHS

Three Mindsets That Can Jeopardize Your Policy

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INTRODUCTION

Confusion swirls around law enforcement use of force policies. One group says a use of force continuum is good, another one advises to avoid it all together. One model policy uses “shall” where another one uses “should.” One expert recommends putting as much detail into policy as possible, describing types of situations and appropriate responses, while another recommends a stripped-down policy with little elaboration.

Adding to the confusion: After every high-profile officer-involved shooting, the media and members of the public are quick to critique the officer’s actions and the agency’s policies. Often, the conclusion is that changes are needed to prevent similar incidents. Many large agencies have hastily made changes to their policies in recent years as a result of such pressure.

Continuous improvement is at the heart of law enforcement and risk management. And use of force is likely the most scrutinized topic in the crossover between these two disciplines. Certainly, no one disputes the need to continuously improve use of force policies. But in doing so, we must avoid becoming victim to some of the myths that surround these policies.

On the following pages, we look at three of those common myths, why they can produce problems for agencies and officers, and how to craft your policy to help officers make legally sound use of force decisions.

Law enforcement leaders facing competing views on use of force can feel like they must choose between a policy that reduces agency liability and a policy that encourages minimal use of force. Fortunately, this too, is a myth. Read on to learn how your policies can support the dual goals of reducing risk *and* reducing unnecessary use of force.



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MYTH #1

ADDITIONAL FORCE RESTRICTIONS IN POLICY PROVIDE LEGAL PROTECTION

It's not difficult to find advocates for writing use of force policies that hold officers to a higher standard than the one laid out in *Graham v. Connor*. On the surface, posing additional force restrictions in policy might seem to make a lot of sense. Police executives want to stress upon officers the seriousness of using force and encourage officers to employ tactics that can prevent the need for force. Having such language built into policy can also appease advocacy groups and members of the public who are quick to scrutinize agency use of force policies.

But it's also a slippery slope. For almost 30 years, law enforcement has functioned under the guidance of the Supreme Court's "objective reasonableness" standard detailed in *Graham*. Although juries are instructed to apply *Graham* regardless of the agency's policy, use of force policy often does become a focal point in court. A policy that doesn't align with *Graham* can easily confuse the jury and lead to an incorrect standard being applied to the officer's actions.

There is nothing wrong with establishing a culture that stresses minimal use of force, or even using policy to guide officers to use non-force means whenever circumstances reasonably permit. But a use of force policy that boxes officers in is likely to create—not solve—legal issues for the agency. The policy needs to help protect officers, the public and the municipality from all types of liability—civil (federal civil rights and state tort law) and criminal. Negligence cases are based upon state law and overly restrictive policy language can create a standard of care. Two cases from opposite sides of the country illustrate that point.

Peterson v. Long Beach (24 Cal 3d 238 (1979))

To highlight the issues policy language can create for agencies, we can go all the way back to *Peterson v. Long Beach*. The case was brought against the city after an officer, responding to a radio call of a burglary, shot and killed Roland Peterson while Peterson was running away from his apartment.

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The objective reasonableness standard accepts the reality that officers must make the best call they can with whatever information is available to them.

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The trial court found in favor of the officer and the city, but the California Supreme Court reversed, noting that the department's policy manual created a minimal standard of care. The policy read in part (emphasis added):

1. Members *shall exhaust every other reasonable means of apprehension before resorting to the use of a firearm.*
2. An officer *shall not discharge a firearm* in the performance of his police duties except under the following circumstances and *only after all other means fail*:
 - a. In the *necessary* defense of himself from death or serious injury when attacked.
 - b. In the *necessary* defense from death or serious injury of another person attacked.

Since the officer had not exhausted every other reasonable means of apprehension and the shooting was not necessary to defend himself (Peterson was unarmed), the officer violated the policy and, the Court found, that violation raised a presumption of negligence. The Court effectively used the department's use of force policy against the department.

While the Long Beach Police Department changed its policy language long ago, many departments continue to use similar language in their use of force policies. Consider how the above language could be applied if an officer shot a charging suspect who was holding an object the officer thought was a weapon, but was later revealed as something harmless. Or consider the effect a policy that prohibits officers from shooting at moving vehicles could have on an incident where a vehicle is used as a weapon of mass destruction.

Johnson v. City of New York (15 N.Y.3d 676 (2010))

Now let's consider the more recent New York Court of Appeals (the highest court in New York) case *Johnson v. City of New York*. Officers exchanged fire with a robbery suspect and the plaintiff, Tammy Johnson, was struck in the elbow by a bullet while lying on the ground with her daughter behind an SUV. In subsequent pretrial testimony, none of the officers reported observing any pedestrians or bystanders on the street.

Johnson brought a negligence action claiming, in part, that the officers violated department guidelines and so negligently discharged their firearms. The relevant section of the department policy was No. 203-12,

“Deadly Physical Force,” which states in part, “Police officers *shall not* discharge their weapons when doing so will unnecessarily endanger innocent persons” (emphasis added).

The plaintiff claimed the officers violated policy, which, she argued, created a standard of care since the policy language created a mandate. By the time this case had made it through the levels of the court system, a total of six judges felt there was a triable issue of fact of whether officers violated the department guidelines, and, therefore, may have been negligent in their actions. Fortunately, seven total judges disagreed, and the city prevailed. But this was a close case in which the policy was the source of the extensive litigation, with the courts not clear on what was required by the policy.

“Reasonableness” Is Key

Agencies are much better off keeping their use of force policies aligned with the objective reasonableness standard outlined in *Graham v. Connor*. Courts applying *Graham* often consider three factors when determining reasonableness:

1. The severity of the crime at issue
2. Whether the suspect poses an immediate threat to the safety of the officers or others
3. Whether the suspect is actively resisting arrest or attempting to evade arrest by flight

Graham stresses all facts and circumstances should be considered in addition to these factors, and notes these factors cannot be determined with hindsight: “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight ... The ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”

The *Graham* court recognized officers need to make split-second, life-or-death decisions that are not capable of precise definition or mechanical application. The objective reasonableness standard accepts the reality

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A strong use of force policy will outline suggested factors officers may use as guidelines to determine the reasonableness of force.

that officers must make the best call they can with whatever information is available to them, and sometimes that call will turn out to be wrong.

This is not to say that your use of force policy cannot or should not provide guidance to officers about reasonable use of force. It should! A strong use of force policy will outline suggested factors officers may use as guidelines to determine the reasonableness of force. Following are just a few:

- Individual's mental state or capacity
- The degree to which the individual has been effectively restrained and his/her ability to resist despite being restrained
- The availability of other options and their possible effectiveness
- Seriousness of the suspected offense or reason for contact with the individual
- Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others

Your use of force policy should set forth the objective reasonableness standard and use the "reasonably believes" and "reasonably appears necessary" language throughout. Such an approach allows you to stress the need for de-escalation and cautious use of force through training, while maintaining a legally defensible policy that will not be misinterpreted by officers or courts.

MYTH #2

ADDITIONAL FORCE RESTRICTIONS IN POLICY CHANGE OFFICER BEHAVIOR

There's another very practical reason not to incorporate overly restrictive language into use of force policies: It's unlikely to succeed in reducing use of force incidents.

To understand why, we need to look at some basic principles of human perception and reaction time. Public discussions around use of force often focus on factors such as the number of shots fired, whether the suspect was turned toward or away from the officers, and whether the suspect was attempting to indicate surrender. In the bright light of hindsight, it's easy for force to appear excessive. But such discussions fail to acknowledge that police officers are human beings.

Let's look at some principles that may impact an officer's actions in use of force situations.

Inattentional Blindness

Professional referees and umpires are highly trained and have a singular focus during game play, yet rarely does an autumn weekend go by without an example of a missed call. That so many sports now incorporate instant replay is an acknowledgement that even the most experienced, most focused referee can miss vital details of a rapidly evolving situation.

Curiously, however, we as a society seem reluctant to admit the same phenomenon happens with law enforcement officers—even though the situations officers face are far more stressful and unpredictable.

What exactly happens to cause a highly trained NFL official to miss an obvious call or an officer to miss key details during a use of force incident? These are examples of a phenomenon called "inattentional blindness," the title of Arien Mack and Irvin Rock's groundbreaking book published at MIT in 1998 and subsequently made famous by the "invisible gorilla" video. In the video, six people in two teams of three pass a basketball back and forth. Team members are dressed in either a black or white t-shirt. The subjects watching the video are

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To hold officers strictly accountable by policy language will not change the reality that their attentional load is limited.

instructed to count the number of passes made by the team in white. During the video, a person dressed in a gorilla suit passes through the players and pounds his chest. The typical result of this experiment is that *half of the study participants do not see the gorilla at all.*

How can that be? The subjects were engaged in a specific search task. Our attentional load is limited, and when faced with complex tasks or situations we must decide what to attend to and when. It is not only entirely conceivable, but it is also *predictable* that NFL officials facing a complex play, with so many different things drawing their attention, will miss something. Police officers, when faced with potentially dangerous situations, have the same attentional load limitations. There is only so much that they can “see,” and, as frequently happens in real-life examples, officers can miss things that, in hindsight, are obvious.

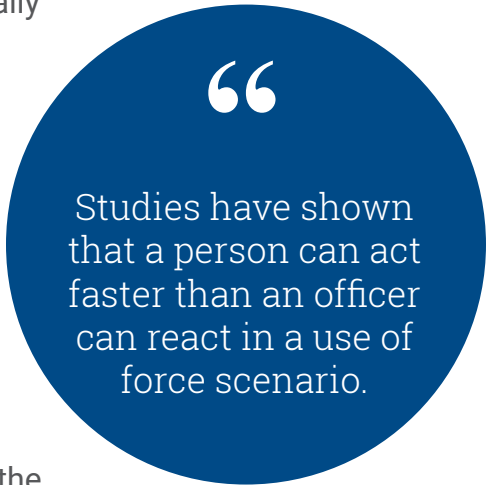
To hold officers strictly accountable by policy language will not change the reality that their attentional load is limited. And this does not even take into consideration other environmental factors an officer may face that can impact decision-making, such as inadequate lighting, inclement weather and the presence of factors known to the officer entering the situation (e.g., encountering a person near the scene of a “shots fired” call).

Environmental Stress

To add to the problems of limited attentional load, there is also the impact of stress on human physiology. Professional umpires and referees work under periodic mild to moderate stress, but police officers involved in deadly force incidents are subject to extreme stress.

When we perceive a threat, a complex process immediately commences in the brain, resulting in the release of adrenaline and cortisol. These substances help prepare the body for fight or flight, a response that has allowed our species to survive predatory attacks. But side effects of this process can impede an officer’s ability to properly perceive all available stimulus and react accordingly. Side effects of the fight or flight response include:

- Selective attention, also known as tunnel vision. There will be an immediate tendency to focus on the perceived threat, to the exclusion



of all other stimuli. As a result, the officer may fail to perceive peripheral activities.

- **Auditory exclusion.** This is the hearing equivalent of tunnel vision. People operating in high-stress situations may hear sounds and voices as muffled or distant—or may lose hearing entirely.
- **Loss of motor skills.** As a person’s emotional arousal increases, they begin to lose their fine motor skills and, eventually, their complex motor skills, which can compromise an officer’s ability to effectively use their firearm or apply some type of defensive tactic technique.

Action Versus Reaction

In use of force incidents, officers usually react to the decisions of others. Studies have shown that a person can act faster than an officer can react in a use of force scenario. Specifically, a suspect with his gun pointed down at his side can typically raise and shoot at a police officer before the officer, who has his or her gun at the high ready, can shoot at the suspect.

While that may seem counterintuitive, it happens because decision-making takes time. The officer in such a scenario must perceive and absorb the stimuli, process it within context, decide on a response and then execute the motor program to physically initiate and perform the response. The suspect, however, has already completed the first three of these four steps without the officer’s knowledge, requiring the officer to try to complete all four in the time it takes the suspect to raise and fire the gun.

Training, Not Policy

Even with training, officers may suffer the effects of inattentive blindness and environmental stress during use of force situations. A suspect’s ability to act faster than an officer acts places officers at a disadvantage. Well-meaning police executives may feel they can restrict officer use of force by listing situations where force should be prohibited. But creating a list of prohibited behaviors will not ensure officers make the right decisions. Because of limited attentional load, an officer in a use of force situation will unlikely be able to retrieve that list from memory and make the appropriate decision in the fraction of a second available. And the effects of environmental stress can prohibit an officer from processing clues that force may not be needed.

So if policy won’t achieve the desired outcome, what will? While not a panacea, training can better prepare officers for these situations.

Understanding these principles is the first step toward training officers to use sound tactics and appropriate pre-force decisions. The goal is to minimize the situations where it is necessary to make split-second decisions. Scenario-based training allows you to place officers in realistic situations where they must account for the kind of variables they'll face in the real world. Training, not policy, is the appropriate area to address certain types of situations and help officers understand how to exercise discretion. Training must be used to reinforce legally sound and attainable policy provisions.

We are surrounded in everyday life by the reality of human shortcomings. That a use of force decision can have life-or-death consequences does not change the reality of human fallibility, especially when under stress.

MYTH #3

USE OF FORCE POLICIES SHOULD REQUIRE THE USE OF DE-ESCALATION TACTICS

In light of many high-profile police shootings over the last several years, the public and advocacy groups have latched onto the concept of de-escalation. And it's completely understandable. "De-escalation" sounds reasonable. Why wouldn't an officer want to take steps to try to calm a suspect, to reduce the chance of having to use force? Advocates of de-escalation, after all, aren't saying police should *never* use force. They're simply asking for officers to try some things *before* using force.

In fact, some law enforcement organizations have embraced this approach. The Police Executive Research Forum released a report in 2016 in which it recommended agencies "adopt de-escalation as a formal agency policy, making it clear that de-escalation is the preferred approach in many situations." The National Consensus Policy on the Use of Force, released in early 2017, requires officers to use de-escalation "whenever possible and appropriate before resorting to force."

De-escalation is not new. It includes slowing situations down, using distance and cover, speaking slowly and trying to negotiate, and responding proportionally from a range of options. Most police officers use de-escalation tactics—whether or not they realize it—almost daily. It's simply part of the job.

However, requiring the use of de-escalation techniques in policy is another thing all together. The primary issue with de-escalation is what does it mean, and in what situations does it apply? If your use of force policy incorporates a use of force continuum or other steps an officer must go through before they employ force, you can inadvertently create a situation where the safety of innocent persons or officers is compromised. The policy may also be used against the officer and the agency in court even when his/her actions were completely reasonable and justified.

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We do not want our officers to hesitate when facing a threat because they are not sure what is expected of them.

Disproportionate Force?

Let's look at a predictable situation. Two officers are flagged down by a store owner who just observed a man shoplift a candy bar. The owner tells the officers the violator has done it several times and wants him arrested. The officers approach the violator, who is immediately abusive and uncooperative. He refuses any requests to provide his name or any other information, making it impossible to issue a ticket at the scene. The officers then decide to lawfully make a custodial arrest for this minor offense after repeatedly explaining to the violator that he could leave with the ticket. Backing off and obtaining a warrant to make the arrest at a future time, when it may not be as volatile, is not possible since the officers do not know who the violator is.

By now other people have gathered around and begin recording the incident. As the officers attempt to handcuff him, the violator starts to comply but then sees the gathering people and suddenly begins to violently resist, screaming that he is being beaten by the police.

Now let's consider this situation against the concepts of proportionality and de-escalation. If the officers use force to arrest the violator, it could easily be seen by the public as disproportionate—you can just hear the media asking why a TASER or other control device or technique is necessary on someone charged with shoplifting a candy bar. But de-escalation is equally problematic: Backing away and losing whatever control the officers may have over the violator may place the officers or the public in jeopardy. Further, if they back away, are they ignoring the underlying need for the enforcement action? Should only people who cooperate be arrested? Claims of excessive force often center on the underlying "minor offense." But it's not the offense that provokes the use of force. Rather, it's the actions of the subject escalating the situation through his physical resistance that justifies the use of force.

This example illustrates the difficulty of making de-escalation a "formal agency policy." We do not want our officers to hesitate when facing a threat because they are not sure what is expected of them. The 9th Circuit recognized this in *Scott v. Henrich* (39 F. 3d 912 (9th Cir. 1994)), stating:

The appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. ... Requiring

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We must be careful in our efforts to promote de-escalation & remember that de-escalation isn't always possible.

officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle, with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to assess the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment. Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable.

In fact, the courts have consistently ruled that the Fourth Amendment does not require the use of less deadly alternatives, only that the use of deadly force is reasonable under *Tennessee v. Garner* and *Graham v. Connor*. A few examples include:

- *Mace v. City of Palestine* (333 F.3d 621, 625 (5th Cir. 2003)): “Although, in retrospect, there may have been alternative courses of action for (the officer) to take, we will not use ‘the 20/20 vision of hindsight’ to judge the reasonableness of (the officer’s) use of force.”
- *Plakas v. Drinski* (19 F.3d 1143, 1149 (7th Cir. 1994)): “We do not believe that the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of force is reasonable.”
- *Marquez v. City of Albuquerque* (399 F.3d 1216 (10th Cir. 2005)): “The only issue is whether the officer acted as a ‘reasonable officer’ ... This is because even if the officer used more than the minimum amount of force necessary and violated police procedure, his actions could nonetheless be reasonable.”
- *Roell v. Hamilton* (870 F.3d 471 (6th Cir. 2017)): “But no caselaw supports Nancy Roell’s assertion the deputies were prohibited from using any physical force against Roell before first attempting alternative de-escalation techniques ... In sum, we agree with the district court’s observation that ‘the fact that Roell’s resistance was probably caused by his excited delirium did not preclude the deputies from using a reasonable amount of force to bring him under control.’”

Rather than incorporating de-escalation mandates, your use of force policy should stress the department's commitment to avoiding or minimizing injury and list use of force considerations, as discussed in Myth #1. Note how this approach supports de-escalation without boxing an officer into having to take specific steps to de-escalate or follow a continuum before using force.

Crisis Response

If de-escalation mandates are best left out of your use of force policy, does de-escalation have a place anywhere in the policy manual? The answer is yes, as long as it's carefully worded.

Officers are often called to deal with persons experiencing a mental crisis, even when there's no criminal act involved. Too many of these incidents end with injuries and deaths that may have been preventable.

Consider this situation: An officer rushes into a house that contains a suicidal person armed with a knife, knowing there is no one else at risk in the residence. As the officer enters the living room, the person charges at him with the knife and the officer fires, hitting the subject and injuring or killing him. At the precise moment in time that the officer decided to use deadly physical force, was it reasonable for the officer to believe he was at risk of serious physical injury or death? The answer is yes. But should he have rushed in like that? The answer is no. This is where training on decision-making, including proper tactics and officer safety, can make a difference.

But this is a situation best addressed in the agency's crisis intervention policy or other similar policies. It's not a primarily a use of force policy issue because the rule of *Graham v. Connor* has nothing to do with the decision to enter the house. It only applies to the moment in time that an officer perceives he/she is at risk of serious physical injury or death and uses force.

An agency's policy on crisis intervention should stress the use of conflict resolution and de-escalation techniques when reasonably feasible—without making those tactics an absolute requirement. The policy can also remind officers that "taking no action or passively monitoring the situation may be the most reasonable response to a mental health crisis."



Most police officers use de-escalation tactics—whether or not they realize it—almost daily.

If you want to get more specific, you can provide a list of dos and don'ts for officers to consider—but again, these should be introduced with “should” rather than “shall” statements. For example:

When dealing with a person in crisis, officers should generally:

- Introduce yourself and attempt to obtain the person's name.
- Be patient, polite, calm and courteous and avoid overreacting.
- Speak and move slowly and in a non-threatening manner.
- Moderate the level of direct eye contact.
- Demonstrate active-listening skills.

Officers should generally not:

- Use stances or tactics that can be interpreted as aggressive.
- Allow others to interrupt or engage the person.
- Corner a person who is not believed to be armed, violent or suicidal.
- Argue, speak with a raised voice or use threats to obtain compliance.

Note again the careful wording. These are not steps an officer is obligated to move through. These are considerations for them to include in the decision-making process.

We must be careful in our efforts to promote de-escalation and remind ourselves, the media and the public that de-escalation *isn't always possible*. Police confront situations that are “tense, uncertain and rapidly evolving.” While we do our best to slow things down and make time our friend in resolving crises, we're often not able to control the intensity, the violence and the tempo of an urgent call for service.

Failure to Train

Although mandates to use de-escalation tactics don't belong in your use of force policy, your use of force training should absolutely incorporate de-escalation. This is not only practical to reduce the need to use force; it's also increasingly a focus of the courts. Consider these two cases:

Thomas v. Cumberland County

Lawrence Thomas sued after he was attacked by inmates at the Cumberland County Correctional Facility. The attack occurred after a verbal argument between Thomas and a group of inmates in the presence of corrections officers. Thomas sued Cumberland County and policymakers at the prison for their failure to properly train corrections officers in conflict de-escalation and intervention techniques.

The court found genuine issues of material fact as to whether the county exhibited deliberate indifference to the need for pre-service training in conflict de-escalation and intervention, and whether the lack of such training bears a causal relationship to Thomas' injuries. It vacated the district court's granting of summary judgment in the county's favor and the case may now proceed to trial.

Valdez v. City of Philadelphia

Roberto Valdez claimed officers banged on his car window as he was seated at a gas station, broke out the window, dragged him out of the car and beat him. The officers testified that they found him passed out, opened the car door and removed a syringe and drugs. When an officer shook Valdez to wake him, Valdez suddenly punched at the officer. The officer deployed a TASER, retreated and shut the car door. An officer broke the car window to assist with controlling Valdez.

Valdez sued, claiming that the police department lacked adequate training in de-escalation tactics. The court held there was enough evidence that a reasonable jury could determine the agency's failure to train constituted deliberate indifference. The court particularly emphasized a U.S. Department of Justice finding that the police department failed to provide consistent training in its use of force policies. Thus, the court denied the city's motion to dismiss and let a jury consider the adequacy of de-escalation training in the police department.

Bottom line: The court decisions in these two cases do not mean the municipalities will be liable; it is now up to juries to decide. The key point to understand: Had the municipalities provided at least some training to help officers apply de-escalation tactics, these litigations may have ended without a trial—even if the training did not prevent the injuries.

De-escalation is an area of high risk for law enforcement agencies. Your use of force training should include a discussion of de-escalation tactics, and you should have a way to document such training and to store those training records so you can produce them in light of litigation.



KEY TAKEAWAYS

Law enforcement leaders often face enormous pressure when it comes to use of force policies. By all means, agencies should make community engagement a cornerstone of their operations, seeking to incorporate the viewpoints of community members, advocacy groups and elected officials. But they must be equally careful not to fall prey to the common myths surrounding use of force policies.

To summarize:

- Avoid additional standards in your use of force policy. Instead, ensure it aligns with the *Graham v. Connor* standards. Don't require officers to move along any kind of use of force continuum.
- Choose "shall" and "should" carefully throughout policies that govern use of force or address crisis intervention. Good policy is written in a way that makes clear when things are required and when there is room for well-guided discretion within policy. "Should" doesn't mean that an officer can ignore the policy. But it provides room for those dynamic, unforeseeable situations officers may encounter.
- Give special consideration to incidents involving people in crisis. If you look at many of the high-profile use of force cases where officers' actions have been questioned and where officers have lost their jobs, many of them involve people who are in crisis. Our standard methods of gaining compliance simply don't work on people who are seriously mentally ill or who are under the influence of mind-altering drugs. Policy should make clear that de-escalation should be considered in these situations when feasible.
- Craft policy carefully to ensure you're not boxing officers in. There are countless ways for your agency to emphasize the importance of proportionality, discretion and de-escalation. Recognize what belongs in policy, and what's a better fit for procedure or training.
- Provide realistic training that is consistent with and reinforces your policy content.

Keeping these points in mind can help your agency craft legally defensible, consistent, effective policy that supports constitutionally sound policing. Combined with ongoing training, sound policy better prepares law enforcement officers to make split-second use of force decisions governed by the concepts of *Graham v. Connor*.



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