CENTER FOR RESEARCH IN CRIMINOLOGY
INDIANA UNIVERSITY OF PENNSYLVANIA

ISSUES AND CONCEPTS PAPER

ABSTRACT

The authors present the underlying issues of the law regarding police use of force by examining the following four areas: (1) Section 508 of the Pennsylvania Crimes Code itself; (2) the United States Supreme Court decision in Tennessee v. Garner comparatively analyzed with Pennsylvania's Crimes Code Section 508; (3) analyses of the remaining 49 state statutes which regulate use of force by law enforcement officers; and (4) the legal models of police use of force policy and training.

It is concluded that the statutory language of Section 508 of the Pennsylvania Crimes Code: Use of Force in Law Enforcement is in conflict with case law previously handed down by the U.S. Supreme Court. The issue in this matter comes down to the propriety of the use, by the Pennsylvania Legislature, of a particular conjunction, that is, the disjunctive word **"or"** as opposed to the conjunctive word **"and,"** in Section 508(a)(1)(ii). Analyses of the other comparable 49 state statutes reveal similar defective statutory

The legal use of force is that which is lawfully available to the law enforcement officer. Police use of force/excessive force and use of force policies have been the subject of important research (Bayley & Garofalo, 1989; Bittner, 1970; Black, 1980; Chevigny, 1969; Friedrich, 1977; Fyfe, 1986 & 1988; Garner, Buchanan, Schade, & Hepburn, 1996; Garner, Schade, Hepburn, & Buchanan, 1995; Geller & Toch, 1995; Klinger, 1995; Klockars, 1995; Muir, 1977; Reiss, 1968; Sykes & Brent, 1983; Toch, 1969; Westley, 1953; Worden, 1995). Agency policies, laws, and the courts establish the limits of force that the police may use, based on reasonableness. Likewise, police training is that function which serves to translate laws and policies for proper action by officers on the streets.

An area of concern arises out of the statutory language found primarily in three states Illinois, Missouri, and Pennsylvania. Seven other states, Arizona, Colorado, Iowa, Maine, New Hampshire, North Carolina, and Oklahoma* using variations of language found in the three primary states create ambiguity at best.

The authors use the Pennsylvania statute as reference in this paper. Section 508 of the Pennsylvania Crimes Code Use of Force in Law Enforcement uses language, which apparently is in conflict with case law previously handed down by the U.S. Supreme Court. As a result of Section 508‘s defective language, police agencies‘

policies and statewide police training are, in effect, doing the wrong things well.

It is both important and necessary that the deficiencies in Pennsylvania and nine other state statutes be addressed prophylactically. The legislative, law enforcement, and academic communities must not ignore these laws and wait for future litigation when the defects inherent within this statute are evident and the risks arising from such defects place citizens, individual officers, and law enforcement agencies in potential jeopardy of civil litigation. In other words, three states figuratively are "sitting on a time bomb" equivalent to that which was once encountered by the State of Tennessee through the 1985 U.S. Supreme Court decision in Tennessee v. Garner.

Pennsylvania Consolidated Statutes Title 18 Section 508

Analysis of Pennsylvania Statute Section 508

The matter that requires consideration specifically is whether the current statutory language in the identified states and as presented using, as an example, Section 508 of the Pennsylvania Crimes Code, should be amended to clarify the Constitutional mandates espoused in the Garner case. The issue in this matter comes down to the propriety of the use, by the state legislatures, of a particular conjunction, that is, the disjunctive word **"or"** as opposed to the conjunctive word **"and,"** in their respective statutes regarding the use of force by law enforcement officers. This paper uses Section 508(a)(1)(ii) of the Pennsylvania Crimes Code to demonstrate the defective statutory language variably found in the states identified as a result of using the disjunctive word –or.‖ Section 508 reads:

> §508. Use of Force in Law Enforcement.
>
> (a) Peace officer's use of force in making arrest.
>
> (1) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to affect the arrest and of any force which he believes to be

necessary to defend himself or another from bodily harm while making the arrest. However, he is justified

> **Oklahoma;** 21 Okl.St. 732 2. a. such force is necessary to prevent the arrest from being defeated by resistance or escape, and
>
> b. there is probable cause to believe that the person to be arrested has committed a crime involving the infliction or threatened infliction of serious bodily harm, or the person to be arrested is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay; or. . . .

The authors submit that Garner, and the Model Penal Code, require that for the use of deadly force during an arrest to be upheld as lawful, the person to be arrested must have done something which will justify the use of that level of force as "reasonable." Certainly the suspect‘s commission or attempted commission of a forcible felony meets that requirement, on its face. But it is submitted that the suspect‘s mere "attempt to escape and possession of a deadly weapon"--without the existence of facts which also demonstrate an "imminent" threat to human life, or which reflect the "imminent" infliction of serious bodily injury to some person--fall woefully short of the standard of "reasonableness" required by the U.S. Supreme Court. In other words, the attempt to escape and possession of a deadly weapon must be coupled with facts which would

justify the officer‘s belief that "imminent danger" is present at the time deadly force is utilized.

> . . . when he [the officer] believes that such force is necessary to prevent death or serious bodily injury to himself or such other person.

However, there are three other ways where Pennsylvania law would permit the use of deadly force while an officer is making an arrest; each of these require the officer to meet a two-prong test. The first of these three ways and one which arguably also DOES MEET the Garner standard for "reasonableness" because of the involvement of a "forcible felony"--is also pursuant to 508(a)(1.) that provision requires the officer to —. . . believe[s] both of these two prongs:

> (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and
>
> (ii) . . . the person to be arrested has committed or attempted a forcible felony . . . .

The second of these ways and one which DOES NOT MEET the Garner standard for "reasonableness" is also pursuant to 508(a)(1); it requires the officer to ". . . believe[s] both of these two prongs:

> (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and
>
> (ii). . . the person to be arrested . . . is attempting to escape and possesses a deadly weapon . . . ."

In regard to this section of law, unless the "mere possession" of a weapon is construed under all circumstances to equate with

"imminent danger" to the arresting officer, then the language does not meet the "reasonableness" standard espoused in Garner. A scenario proffered later in this paper challenges the propriety of such an all-encompassing generalization!

The third way authorizing the use of deadly force during an arrest--and one which also clearly DOES MEET the Garner standard for "reasonableness"--is again pursuant to 508(a)(1); it also requires the officer to —. . . believe[s] both of these two prongs:

> (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and
>
> (ii) . . . [the person to be arrested][**or** deleted] otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.‖

The three elements of Section 508 are that the perpetrator:

1. has committed or attempted a forcible felony; or,
2. is attempting to escape and possesses a deadly weapon; or,
3. otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

U.S. Supreme Court in Tennessee *v.* Garner. That 1985 decision, of such vintage to be considered "well established" law, clearly requires that the use of "deadly force" by an officer be limited to those situations where the escaping suspect poses an immediate threat to the officer or to another, or where there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm (Tennessee v. Garner, 1698 and 1699.)

Neither scholars nor practitioners need go far to find support for the proposition that while a state's statute can be a strong foundation upon which to rest police actions, there is also sufficient precedence to make it clear that a state law in question must also "be in accord" with the mandates of the U.S. Constitution and all of its respective Amendments. Further, the ultimate test for whether the officer's actions were appropriate, or actionable at law, is one of "reasonableness." The reasonableness of an officer's actions within the totality of the circumstances will be scrutinized whether the officer injures or kills a person with a firearm, PR-24, flashlight, his fists (hands), a vehicle or a weapon of opportunity such as a rock or board.

Tennessee v. Garner and Section 508: A Comparative Analysis

The case of Tennessee v. Garner is one which upheld civil liability against an officer in a wrongful death case for actions taken by that officer notwithstanding the fact that the officer's

the officer shot the suspect. The perpetrator, Garner, died from one bullet in the back of the head." Evidence identified as having been taken from the crime scene was found on Garner's body. Tennessee v. Garner, (1697).

In the litigation at the state level that followed this incident, there was no question that under the applicable law in the state of Tennessee at that time the officer's actions were lawful. Neither a police Review Board, nor a Grand Jury, took any action against the officer for his role in the shooting.

The holding in what became the case of Tennessee v. Garner, arose, therefore, out of a civil "wrongful death" action which was pursued in federal court. The question that made its way to the U.S. Supreme Court boiled down to: "Was the law upon which the officer's action was based, and, ultimately, the shooting of the suspect by the officer, constitutional?"

After a lengthy discussion of the mandated Constitutional protections contained within the Fourth Amendment, as well as a full discussion of the history of the "use of deadly force" by law enforcement officers under both common law and statutory law provisions across the United States, the U.S, Supreme Court held that the Tennessee law was "invalid" insofar as it purported to give authority to the officer to use deadly force under the circumstance of the facts in that particular case.

The Court went on to make clear that since the officer had

508 simply because that particular law was one of several mentioned by the Court in the Garner decision.

In reality, a careful reading of the language in the Africa case clearly shows that the federal trial court concluded [and quite incorrectly it seems] that ". . . one of those statutes noted with favor . . ." was Pennsylvania's Section 508. (Africa, 380). While the above language has been deemed to be a reflection of the U.S. Supreme Court's "approval" of the language of Section 508 as being "constitutional," that is, in reality, a "strained" reading of the Garner Court's holding.

For, in the very same paragraph containing the above language, the Garner Court went on to state that it was doing nothing more than "surveying" the myriad of ways that the respective states were handling the use of deadly force, noting--without further comment one way or the other--the fact that:

> Some 19 states have [simply] codified the Common Law [which the Court, in Garner, rejected as being unlawful]; four state's retain the Common Law rule [but with no statutory enhancement]; two states have adopted the Model Penal Code's provision verbatim; and eighteen others [including Pennsylvania] allow, in slightly varying language, the use of deadly force only if the suspect has committed a felony involving the use or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested (1704).

Immediately following that above-cited language is the Court's footnote, Number 18, which thereafter makes reference to Pennsylvania's Section 508.

just not within the parameters of Constitutional law! As the opinion in Garner states:

> The fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. [The officer therefore] . . . did not have probable cause to believe that Garner . . . posed any physical danger to himself or others." The court did postulate, however, that . . . . Although an armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not mean [that he, the perpetrator] is physically dangerous. (1706: head notes 12,13)

the courts.

A Practical Scenario

The rhetorical question might therefore be asked: Does the mere fact that a perpetrator is carrying a gun mean, on that basis alone, that the perpetrator can be considered "dangerous" for the purpose of utilizing deadly force during an arrest? The answer to this question must, of course, be "No!" The following scenario is offered as an example: An officer sees a minor traffic violation occur and the officer pulls the errant driver over to give a citation. As the officer, who is standing at the driver‘s door window, requests to see the requisite driver‘s and operator‘s cards, the driver reaches into a coat pocket to retrieve the cards for the officer. As the driver does this, the officer catches a glimpse of two things, a marijuana cigarette on the car‘s consol, and a handgun being carried in a concealed holster on the driver [unbeknownst to the officer at that time the driver has a valid permit to carry a concealed weapon]. Reacting swiftly to these unforeseen circumstances the officer reaches for his own weapon and shouts a demand for the gun to be surrendered; the now-panicked driver--greatly startled by the officer‘s sudden command [and, possibly, by the prospect of going to jail for the potential drug charge!] turns quickly, startling the officer who loses his balance and falls away from the car. The two-way radio, which the officer had been carrying breaks, and is no longer useable. The driver--now even more

panicked by what has occurred, steps on the car's accelerator and proceeds to flee from the scene. The officer, no longer in a position to either control the situation or to halt the perpetrator's flight, remembers that under Pennsylvania law a person who is escaping, and who has a deadly weapon, is nominally within the purview of the language of Section 508 of the Crimes Code. Although the officer realizes that he can't use deadly force under Section 508(a)(1) since he is not in jeopardy of life or limb from the suspect, the officer then considers his recollection of Section 508(a)(1)(i); he quickly concludes: without the use of deadly force the suspect will escape; he, the officer, is not in a position to thwart the escape; and the escaping suspect is in possession of a deadly weapon! Deciding that the applicable law permits the use of deadly force in such a situation, the officer fires at the driver of the now--fast disappearing car and fatally wounds him.

Clearly, the threshold requirements of Tennessee v. Garner have not been met in the above example, and any injury or death caused by the officer so reacting is likely to have dire consequences on the perpetrator, the employing municipality and police department, and, lastly, upon the officer who fired--even if the officer's actions appeared to have been done in reliance on the statutory authority of Crimes Code section 508(a)(1). As was the officer in Tennessee v. Garner, it is likely that the hypothetical officer in the above

scenario would be found to have violated the Constitutional rights of the deceased actor.

It is this type of "misunderstanding" of the "applicable" law which must be addressed adequately in the "Use of Force" portions of all training classes and agency policies. It is not sufficient simply to teach the provisions of the statute or to say that it's "up to the legislature" to effect a remedy.

Recommendation for Constitutional Compliance

Clearly, legislatures must address this issue and bring applicable statutes into compliance with established constitutional law. To meet the established constitutional requirements, it is offered that the substitution of the word "and" in place of the word "or" at 18 Pa.C.S. Section 508(a)(1)(ii)--must be made. That change would read:

> (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, **and** otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

By changing the disjunctive word "or" to the conjunctive word "and" Section 508 takes on a more exacting standard consistent with Garner. Pennsylvania's Section 508, as written, appears on its face to permit the use of deadly force if the person to be arrested simply is attempting to escape and possesses a deadly weapon. The

authors submit that Garner, and the Model Penal Code, require more!

Use of Force Implications for Police Vehicle Pursuits

Deadly force can be applied a variety of ways, whether the weapon is a firearm, a club, a fist, or a vehicle. Each is capable of causing serious bodily injury or death. Alpert and Anderson (1986)

508 currently is written, deadly force may have been permissible in

strike the "armed" suspect with the police vehicle (i.e., use deadly force) to accomplish the arrest? The lawfulness of such an action will certainly be scrutinized under the auspices of the criteria set forth within Section 508 and the nine other states' statutes.

In two recent Pittsburgh, Pennsylvania cases, the "deadly weapon" being wielded by the respective deceased parties/suspects--which precipitated police shootings--was an "automobile;" these were the cases involving Pittsburgh Police Officer Jeffrey Cooperstein (death of Deron Grimmit, Sr.); and Pittsburgh Housing Police Officer John Charmo (death of Jerry Jackson). Similar incidents, unfortunately, are reported nationally.

It is clear, therefore, that the relationship between police use of deadly force and JETe6fore, that the rele"n). 0 0 1 57.6 383.35 Tm3 the5 d

On the other hand, citizens value their freedom and want to be relatively free from government intrusions into their homes, businesses, and lives generally. In fact, the American Revolution was fueled significantly on the colonies‘ opposition to England‘s governmental abuses which were carried out in the name of "enforcing the law." The two, often-opposing goals of "crime control" versus "individual liberty," have come to represent the "balancing test" that the courts use to determine the extent to which government (through law enforcement) may intrude into citizens‘ lives and deprive them of liberty in the pursuit of controlling crime.

Simply put, the courts balance the degree of police intrusion against the need for it. As police power increases, individual liberty decreases. Conversely, as individual freedoms increase, police powers and ability to effectively control crime may be diminished.

Police use of deadly force by firearms is generally confined to two areas, shooting in self-defense and shooting to make an arrest. Although deadly force can be applied by police through means other than shooting (baton, choke holds, police vehicle, etc.) the authors have focused on the use of deadly force by shooting in order to make an arrest.

In general, when a police officer has probable cause to believe a crime has occurred s/he may make an arrest. At issue here, however, is the amount of force that the police lawfully may use to

v. Garner.

there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed." [Section 3.08(2)(b)(i),(iv), Proposed Official Draft (1962)].

The Defense of Life Standard

Griswold, (1985, 103) offers that the "Defense of Life Standard," under which law enforcement may not use deadly force "unless someone's life is in direct jeopardy even if the suspect has allegedly committed a heinous crime and was believed to be dangerous.‖ Clearly, this standard is the most restrictive.

These four models provide the underpinning philosophy for the use of force by law enforcement. In the Commonwealth of Pennsylvania, it is Crimes Code Section 508 which establishes the statutory parameters for the use of force by law enforcement officers. However, the authors submit that this section--as currently written—is in conflict with current U.S. Supreme Court rulings.

Law Enforcement Training Implications

The authors' argument that Pennsylvania and the companion states are inconsistent with established law as prescribed by United States Supreme Court rulings has profound policy and training ramifications.

It is critical that law enforcement agency policies are in compliance with both state and federal law because it is agency policy that directly guides officers' conduct in the field. Likewise, training is the management function which translates policy to

practice. It is problematic when law enforcement agencies promulgate policies which are consistent with state training commission materials, which in turn are presumed to be based on state statutes but which, as it has been argued here, are not in compliance with federal constitutional law. The policy and training issues will not be addressed by the law enforcement and training agencies until the legal foundation of these statutes are made explicitly clear.

Furthermore, since the state training commissions, apparently have not questioned the efficacy of their respective statutes and have been and continue to train police officers based on faulty statutory law, the academic, legal, and police communities must encourage and support legislative action to correct the statutory deficiencies raised in this paper.

It is essential that the training/educational materials promulgated by the states' training agencies make it clear immediately, that when such statutory provisions enacted by a legislative body [in this case--

interest of citizens, individual police officers, or law enforcement

Ironically, the statutes in Illinois, Missouri, and Pennsylvania and to a lesser degree the seven other states and the Model Penal Code, at first blush, may appear to be consistent with prevailing law. But Klotter and Edwards' caveat is appropriate for both the law enforcement and the legislative communities –the relevant use of force statutes in these states must be brought up-to-date and in compliance with Garner and other applicable decisions.

The Supreme Court adjusted the balance between government intrusion and individual liberties in the Garner decision. Statutes in the identified states do not reflect adequately this balance and allows law enforcement a level of intrusion greater than that permitted by the law of the land. The legislatures, police training and standards organizations, and agency policies must give this serious matter immediate attention. Failure to address this issue places citizens at risk of unlawful use of deadly force by police with a potential of suffering serious injuries and death. Likewise, law enforcement officers and agencies are at risk of criminal and civil litigation--all of which can be reduced significantly, if not avoided, by correcting this statutory error now.

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