

Use of Force Position Paper

**Legislative Considerations and
Recommendations**

Introduction

Managing uses of force by officers is one of the most difficult challenges facing law enforcement agencies. The responsibility of law enforcement officers to enforce the law, protect the public, and guard their own safety and that of innocent bystanders is very challenging. Interactions with uncooperative subjects who are physically resistant present situations that may quickly escalate.

Ideally, an officer is able to gain cooperation in such situations through the use of verbal persuasion and other de-escalation skills. However, if physical force is necessary, an officer's use of force to gain control and compliance of subjects in these and other circumstances must be objectively reasonable.

As guardians of their communities, officers must make it their top priority to protect both themselves and the people they serve from danger, while also enforcing the laws of the jurisdiction.

However, there are situations where the use of force is unavoidable. In these instances, officers must "use only the amount of force that is objectively reasonable to effectively bring an incident under control, while protecting the safety of the officer and others."

Introduced in *Graham v. Connor*, the "objectively reasonable" standard establishes the necessity for the use and level of force to be based on the individual officer's evaluation of the situation considering the totality of the circumstances. This evaluation as to whether or not force is justified is based on what was reasonably believed by the officer, to include what information others communicated to the officer, at the time the force was used and "upon what a reasonably prudent officer would use under the same or similar circumstances."

This standard is not intended to be an analysis after the incident has ended of circumstances not known to the officer at the time the force was utilized. The totality of the circumstances can include, but is not limited to, the immediate threat to the safety of the officer or others; whether the subject is actively resisting; the time available for the officer to make decisions in circumstances that are tense, uncertain, and rapidly evolving; the seriousness of the crime(s) involved; whether the subject is attempting to evade or escape; and the danger the subject poses to the community.

Other factors may include prior law enforcement contacts with the subject or location; the number of officers versus the number of subjects; age, size, and relative strength of the subject versus the officer; specialized knowledge, skills, or abilities of the officer; injury or level of exhaustion of the officer; whether the subject appears to be affected by mental illness or under the influence of alcohol or other drugs; environmental factors such as lighting, terrain, radio communications, and crowd-related issues; and the subject's proximity to potential weapons.

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The decision to employ any force, including the use of firearms, may be considered excessive by law and agency policy or both, if it knowingly exceeds a degree of force that reasonably appeared necessary based on the specific situation. **It is important to note that in *Graham*, the U.S. Supreme Court recognized that law enforcement officers do not need to use the minimum amount of force in any given situation; rather, the officer must use a force option that is reasonable based upon the totality of the circumstances known to the officer at the time the force was used.** Use-of-force decisions are made under exceedingly varied scenarios and often on a split-second basis. Based on this fact, state and federal courts have recognized that law enforcement officers must be provided with the necessary knowledge and training to make such decisions, in addition to attaining proficiency with firearms and other less-lethal force equipment and force techniques that might be used in the line of duty.

State Efforts to Alter the *Graham v. Connor* Standard

The IACP has significant concerns with any legislation or proposed legislation that creates an unachievable standard for use of deadly force that is in direct conflict with the established standard of “objectively reasonable under the totality of the circumstances,” set forth by Supreme Court, *Graham v. Connor*. There are reports that some states are considering introducing legislation to alter the *Graham v. Connor* decision or have already introduced legislation.

For example, there are two bills pending in California. Assembly Bill 392 would redefine the circumstances under which a homicide by a peace officer is deemed justifiable to include when the killing is in self-defense or the defense of another, consistent with the existing legal standard for self-defense, or when the killing is necessary to prevent the escape of a fleeing felon whose immediate apprehension is necessary to prevent death or serious injury. The bill would additionally bar the use of this defense if the peace officer acted in a criminally negligent manner that caused the death, including if the officer’s criminally negligent actions created the necessity for the use of deadly force. The critical verbiage is this: “(d) (1) A peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary.”

As defined in the bill, “necessary” means that, given the totality of the circumstances, an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the peace officer or to another person.

A dueling bill was also introduced in California, the Law enforcement: use of deadly force: training: policies (Senate Bill 230), by Senator Anna Caballero on February 5, 2019. This legislation will set first-in-the-nation requirements for departments to adopt use-of-force policies and participate in trainings that include comprehensive and clear guidance related to de-escalation tactics, reasonable alternatives to deadly force, proportionality, rendering medical aid, an

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officer's duty to intercede and prevent excessive use of force, interactions with vulnerable populations, reporting requirements, and more. This legislation is being supported by law enforcement, including the California Police Chiefs Association; Peace Officers Research Association of California; and the Sacramento County Deputy Sheriffs Association.

IACP Concerns

The IACP has significant concerns with any legislation or proposed bills in the United States that create an unachievable standard for use of deadly force that is in direct conflict with the established standard of "objectively reasonable under the totality of the circumstances," set forth by Supreme Court, *Graham v. Connor*.

These proposed standards would result in endless scrutiny and second-guessing by investigators, prosecutors, and civil courts. Changing the standard by altering language from "reasonable force" to "necessary force" has a significant impact on interpretation. The creation of an unrealistic and ambiguous standard may cause hesitation in officers' responses, which could have grave circumstances.

While the change from "reasonable force" to "necessary force" might seem like an innocuous change, the two words have very different meanings. If the legal standard is changed from an objective "reasonable" standard to the subjective "necessary" standard, law enforcement officers could be faced with impossible decisions with unbearable consequences. Under the "necessary" standard, the evaluation of an officer's use-of-force choice and actions in those "split-second decisions," in life-threatening circumstances, would then be based on the ultimate outcome of the incidents.

Officers cannot be expected to determine, in the split-second available to them, whether the weapon is real, the knife is sharp, the attacker is skilled, or other such nuances when there is what reasonably appears to be an immediate threat to safety. The *Graham* case stated, "The calculus of reasonableness [allows] for the fact that police officers are often forced to make split-second decisions in circumstances that are tense, uncertain and rapidly evolving-about the amount of force that is necessary in a particular situation. If force that appears reasonable to the involved officer at the time and under the stress of the event is later found to be unnecessary, the officer should not face a penalty for his or her actions. A 20/20 hindsight analysis...in the peace of judge's chambers is expressly forbidden."

Any proposed legislation requiring police use of force only when "necessary," **is presuming a level of officer influence over circumstances that does not exist and strives to create a level of perfection that cannot possibly be obtained.** Another cost of the "necessary" standard will be officer hesitation, resulting in potential injury or death of law enforcement personnel and harm to the community or others nearby. "Necessary" could mean the officer has to exhaust all other less lethal options before using deadly force. This will be an impossible standard. Human

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performance in threat recognition, awareness, decision-making, and action takes time. Time is not always a luxury available in use-of-force situations.

In 2017, 46 officers were feloniously killed in the line of duty, and more than 60,000 were assaulted. Additionally, in 2018, 64 officers were feloniously killed in the line of duty, including 53 by gunfire.

An analysis conducted by the Department of Justice, Federal Bureau of Investigation from data from police shootings from 1985 to 2014 found that almost 70 percent were from distance under ten feet. Over 50 percent were from zero to five feet.

This data further supports the IACP commitment to training that uses distance and cover to control situations in certain circumstances.

However, any proposed legislation that would require peace officers to attempt to control an incident by using time, distance, cover, communications, and available resources in an effort to de-escalate a situation whenever it is safe, feasible, and reasonable to do so is in conflict with the latest tactics involving response to active shooters. Because of the lessons learned from several high-profile mass shooting and active shooter incidents across our nation, law enforcement agencies have adjusted training and policies to reflect a single officer response in certain circumstances because seconds count. No longer can our law enforcement officers let precious seconds pass before putting themselves at great risk to save lives. This proposed legislation could cause confusion, tentativeness, and hesitation when officers are making decisions in real time regarding active shooters and cost more loss of life.

IACP Position

The IACP opposes any effort to alter the *Graham v. Connor* standard. Any proposed legislation requiring police use of force only when “necessary” is presuming a level of officer influence over circumstances that does not exist and strives to create a level of perfection that cannot possibly be obtained. Additionally, altering the standard to only when “necessary” jeopardizes officer safety, and therefore community safety, as it will cause second-guessing, hesitation, and potential confusion in situations of danger where not only the officer’s life is in jeopardy but also those of bystanders.

The IACP does support legislation that promotes training for law enforcement officers in de-escalation and calming techniques, crisis intervention techniques, and response tactics when practical and safe for calls related to persons who are only threatening harm to themselves and do not pose danger to others.

Further, training should include and be expanded to include enhancements of an officer’s ability to tactically contain and control a situation using diffusing tactics and techniques to create time and distance in the appropriate circumstances. Most law enforcement agencies have policies in

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place on the use of less-than-lethal techniques and crisis intervention training to assist them in dealing with persons in mental crises. The IACP has seen a continued commitment by law enforcement in both philosophy, policy, and training regarding the use of deadly force.

Until recently, the *Washington Post* and other media outlets were the only sources tracking use-of-force incidents, which is simply unacceptable and may not always be reliable. That is why the IACP worked with the FBI to create the National Use of Force Data Collection effort to better identify and understand trends associated with use-of-force incidents and to ensure that all information is being accurately collected and tracked. Until we have an actual perception of the totality of incidents, trends, and other outlying factors it is premature to alter the standards set forth by the U.S. Supreme Court in *Graham v. Connor*.



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