REPORT OF THE ATTORNEY GENERAL'S TASK FORCE ON THE USE OF FORCE IN LAW ENFORCEMENT

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IN LAW ENFORCEMENT

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FOREWORD

> Respect for the law and confidence in public officers cannot be compelled. These attributes stand as a voluntary tribute to just laws and integrity in public office. While they exist both the law and the official will retain public trust.[1]

There is no context in which the relationship between the performance of public officers and public support for its officers is more complex than when a law enforcement officer uses force. Law enforcement officers are required to prevent crimes and apprehend criminals. Performance of these duties necessarily requires officers to confront and apprehend persons who violate the law, persons who do not always willingly submit to lawful authority. The public expects officers faced with resistance to use reasonable force when necessary, yet demands that officers refrain from using unnecessary or unreasonable force in confrontations with citizens.

Recognizing that shared dissatisfaction concerning such encounters and their aftermath threatened to erode public confidence in and undermine the morale and effectiveness of law enforcement officers, Attorney General Robert J. Del Tufo began to assemble this Task Force in the fall of 1990. Its members include representatives of community and civil rights groups as well as representatives of the criminal justice system. In April of 1991, the Attorney General asked us to begin our work of reviewing current practices and procedures in order to recommend

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[1] Hayes v. Hudson County Board of Freeholders, 116 N.J. Super. 21, 26 (App. Div. 1971) (quoting People ex rel. Keenan v. McGuane, 13 Ill. 2d 520, 150 N.E.2d 168, 177 (1958)).

reform that would "renew the traditional sense of trust between the public and law enforcement community" and "restore a sense of common cause between law-abiding citizens and law-abiding law enforcement officers."

After much study and debate we report our findings and offer recommendations that we believe will serve to strengthen the mutual trust and confidence upon which effective law enforcement depends. While each of us, if given sole responsibility, might have called for greater or different reforms in particular areas, we agree that the measures we propose, if fairly implemented throughout the State, will have that effect.

We are regretfully mindful that no empirical data, however accurate, and no changes in procedures or in the substance of the law relating to the use of force, however diligently pursued, can result in completely defusing the potential for violence inherent in police confrontations, particularly in crime-ridden neighborhoods. Anger, frustration and fear which may lie at or just below the surface in some communities can quickly escalate, with or without specific cause, when police arrive on the scene. It is not surprising that in such highly-charged emotional circumstances reason does not always prevail; indeed, the likelihood of irrational conduct can become dangerously high. It is in this context that law enforcement officers are often called upon to do their job.

There is a desperate but largely neglected need for social, economic and political action to deal with the sense of privation and despair that permeates life for a large segment of our

society and which adds to the risk of violence. It is of course far beyond the role of this Task Force to deal with these underlying root causes. We can only acknowledge their existence and join those who insist that these significant problems be addressed with a sense of urgency. Within the limited framework of our assigned responsibility, we have recommended reform designed to promote a sense of fairness and restraint without jeopardizing the public welfare.

THE ATTORNEY GENERAL'S
TASK FORCE ON
THE USE OF FORCE IN LAW ENFORCEMENT

THE ATTORNEY GENERAL'S
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INTRODUCTION AND OVERVIEW

The Issues

"One of the fundamental duties of a police department, from Chief of police to patrolman, is to be on the lookout for infractions of the law and to use due diligence in discovering and reporting them, and in the proper case, arresting the perpetrator and lodging and prosecuting a proper complaint."[2] "A police officer has the recognized duty to use all reasonable means to enforce the laws applicable in his jurisdiction, and to apprehend violators."[3] Officers, unlike private citizens confronted with danger, are under "a legal compulsion to act" and not "free to turn away."[4] Indeed, they risk administrative, civil or criminal charge if they do.[5] They are "armed and required to act,"[6] to make split-second judgments in tense and rapidly evolving circumstances,[7] so that society, through enforcement of its laws, remains secure.

When law enforcement officers abuse their legal authority to use force, however, the "law enforcer becomes lawless."[8] The

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[2] State v. Donovan, 132 N.J.L. 319, 321 (Sup. Ct. 1945).

[3] State v. Cohen, 32 N.J. 1, 9 (1960).

[4] State v. Williams, 29 N.J. 27, 36 (1959).

[5] See State v. Donovan, 132 N.J.L. 319 (Sup. Ct. 1945).

[6] State v. Williams, 29 N.J. at 36.

[7] Graham v. Connor, __ U.S. __, 109 S. Ct. 1865, 1872 (1989).

[8] State v. Stevens, 203 N.J. Super. 59 (App. Div. 1984).

result is "violence, oppression and injustice."[9] While such incidents are rare, the impact of a single incident is great. As one police department's manual advises its officers:

> The success of a police department is largely measured by the degree of support and cooperation it receives from the people of the community which it serves. It is of paramount importance that we secure the confidence, respect, and approbation of the public. The cultivation of such desirable attitudes is dependent upon proper performance of duty by all members of the department.[10]

It is obvious that "every segment of the community suffers when the public loses confidence in the very people to whom they should be looking for protection."[11]

To avoid an unwarranted undermining of confidence in all officers on the basis of isolated incidents of abuse of authority, an officer who has violated the law must be brought to justice.[12] To avoid undermining the morale of other officers who must continue to protect the public under difficult circumstances, the process employed must be fair.

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[9] Ibid.

[10] Foreword to the Washington Township Police Department Rules and Regulations, quoted in Policeman's Benevolent Association v. Township of Washington, 850 F. 2d 133, 138 (3d Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 1637 (1989).

[11] Glasser, On the Line: Police Brutality and its Remedies, Preface (1991).

[12] See State v. Stevens, 203 N.J. Super. 59, 65-66 (App. Div. 1984).

The Establishment and Responsibilities of this Task Force

Attorney General Robert J. Del Tufo assembled community leaders, law enforcement officials, police union representatives, civil rights leaders, law professors and practicing attorneys to serve as his Task Force on the Use of Force in Law Enforcement. He established this Task Force to address concerns regarding the use of force and the manner in which incidents involving its suspected abuse are investigated and prosecuted -- concerns expressed by both the general public and law enforcement officers.

With the goal of renewing "the traditional sense of trust between the public and law enforcement community" and restoring "a sense of common cause between law-abiding citizens and law-abiding law enforcement officers," the Attorney General asked this Task Force to recommend reform that would address the concerns of the public and law enforcement officers. Our recommendations were to be based on an evaluation of information concerning the use of force by law enforcement officers, the methods of selecting and training law enforcement officers, the procedures for investigating and prosecuting incidents involving abuse of force and the sufficiency of laws authorizing the use of force and punishing its abuse.[13]

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[13] See Summary of the presentation of Attorney General Robert J. Del Tufo to the United Sates Commission on Civil Rights, Trenton, New Jersey, April 8, 1991. Letter from Attorney General Del Tufo to members of the Task Force dated April 4, 1991.

Background

The establishment of this Task Force is the most recent in a long history of efforts in this State to better protect the public by improving the administration of criminal justice. In 1961, the Legislature established the Police Training Commission to ensure that all law enforcement officers in this State received the educational and clinical training necessary to insure the health, safety and welfare of the citizens of this State.[14] In 1970, "in order to secure the benefits of uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State," the Legislature charged the Attorney General with the responsibility of providing for "the general supervision of criminal justice."[15]

For more than a decade, the Attorneys General of this State, through the Divisions of Criminal Justice, State Police and Civil Rights, and in cooperation with the county prosecutors, the Police Training Commission and law enforcement agencies throughout the State, have worked to provide officers with the training and guidance necessary to perform their duties safely, in compliance with the law and in a manner that minimizes friction with and warrants the confidence of the public. These efforts include:

Development and frequent refinement of Attorney General Guidelines, directives and training materials on the use of force;

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[14] N.J.S.A. 52:17B-66.

[15] N.J.S.A. 52:17B-98, 52:17B-112.

Development of Attorney General Guidelines on high-speed chases;

Development of improved and more frequent delivery of firearms training, which includes training in the legal restrictions on the use of force;

The gathering and analysis of data concerning suits filed against New Jersey police officers and concerning discharge of firearms, for the purpose of improving training designed to prevent excessive use of force;

The development of procedures through which the Division of Criminal Justice provides monitors and provides assistance in investigation of complaints concerning misconduct by law enforcement officers;

The development, in cooperation with the Anti-Defamation League of B'nai B'rith, standards and training materials on all aspects of bias crime;

A community-awareness program which, through the cooperation of the Divisions of Criminal Justice, State Police and Civil Rights and the United States Department of Justice, lead to the development of programs concerning conflict identification and resolution, and police professionalism and cultural-diversity awareness;

Initiatives such as Urban-Initiative/Fighting Back, which involve close cooperation between law enforcement officers and community members;

Efforts to improve the selection of officers, including Attorney General Guidelines on drug testing; and

Development of standards for disciplinary procedures and internal investigations to be employed in instances involving allegations of misconduct by a law enforcement officer.

Against this background, the Task Force began its work.

Task Force Approach

The Task Force convened for the first time on April 23, 1991. It was apparent to all that the causes for discontent with current practice, procedures and law governing the use of force and the investigation and prosecution of complaints were complex and that sensible suggestions for reform would require detailed study.

Accordingly, the Task Force divided into four subcommittees, each responsible for providing the full group with detailed findings and recommendations.

Recognizing the need to understand the frequency and the circumstances under which officers in this State use force, the Task Force assigned one subcommittee to prepare a report on that issue.

Recognizing that the proper selection and training of officers is essential to their ability to perform, the Task Force asked another group to study and recommend any needed reform in current selection and training policies.

Mindful that the need for full and fair investigation of all suspected incidents of improper use of force is critical to both the public and law enforcement officers alike, the Task Force asked a third subcommittee to investigate procedures for handling such incidents.

Finally, recognizing that law governing the use of force and the punishment of officers who abuse it might be inadequate and contribute to concern on the part of the public and officers alike, the Task Force asked the fourth subcommittee to evaluate the law.

Each subcommittee reviewed relevant factual data, policies, procedures and training materials currently employed in New Jersey, model policies prepared by experts in the area and scholarly publications. Two of the subcommittees conducted surveys designed to gather additional factual data.

Drafts of each subcommittee report were distributed prior to Task Force meetings and each draft report was extensively discussed by the full Task Force. The subcommittee reports were then re-drafted and refined in light of the recommendations of the other members of the Task Force and represented for approval of the full Task Force. The full Task Force met seven times between April 23, 1991 and April 13, 1992.

The four chapters that follow are a product of this process.

Overview of Findings And Recommendations

Chapter One: Information Concerning Use of Force

Chapter One of this Report summarizes and analyzes available data concerning the frequency with which law enforcement officers in this State employ deadly, non-deadly and excessive force.

Law enforcement officers use deadly force in an extremely small percentage of their encounters with members of the public. Based on data supplied by 502 of the 543 law enforcement agencies in this State, in 1990, law enforcement officers in this State handled over 8,500,000 calls for service and discharged their firearms in only 167 incidents. Stated differently, when compared with the number of officers involved, only one of every 161 officers was involved in a firearms discharge incident in 1990. It is clear that use of deadly force is a rare event.

While it is fair to conclude that deadly force is rarely used, due to the absence of standard procedures for reporting use of non-deadly force and the lack of any common understanding as to what contact -- ranging from handcuffing an arrestee in compliance with department policy to physical altercations -- should be considered a use of non-deadly force, the Task Force is unable to report with certainty on the frequency of the use of non-deadly force. Nonetheless, on the basis of available information, published studies conducted elsewhere, complaints filed with law enforcement agencies and a two-year study of suits filed in federal and State court against New Jersey law enforcement officers, the Task Force believes that the use of

non-deadly force is also infrequent when compared with the total number of police/citizen contacts.

Again due to lack of common definitions and uniform standards for recording complaints and dispositions of complaints alleging excessive force, the Task Force cannot report with any degree of certainty the frequency with which law enforcement officers use excessive force or even the frequency of allegations that such force is employed. A total of 576 suits were filed against law enforcement officers employed in this State during the two-year period of 1985 and 1986, 43% alleged assault and battery. Considering that information and the limited available information concerning complaints recorded by law enforcement agencies throughout the State, the Task Force can only conclude that complaints which the agencies record as involving excessive force are infrequent when viewed in the context of all police/citizen contact, and that the number of these complaints has changed little between 1988 and 1990.

Despite these data, it is apparent that public perception of the frequency with which law enforcement officers use brutal force is quite different. A high percentage of people surveyed in a recent, nationwide Gallup Poll believe that incidents like the one involving Rodney King, which was captured on videotape in March of 1991, occur at least somewhat frequently.

But public opinion on police brutality is also difficult to decipher. While 68% of those responding to the Gallup Poll believed that incidents like the one in Los Angeles occur very or somewhat frequently, only 20% of the respondents believed that

incidents of that nature occur in their community and only 20% responded affirmatively when asked if they knew a person who had been treated similarly.

The Task Force has concluded that the quality of data pertaining to the use of force must be improved in order to gain any real understanding of the nature or magnitude of any problem concerning the use of force in law enforcement. Accurate information is also essential to understanding and perhaps closing the gap between reported incidents of excessive force and public perception of the frequency with which excessive force is used.

Accordingly, the Task Force recommends the following:

- A committee of criminal justice professionals should be appointed to identify and define information concerning the use of force that law enforcement officers and law enforcement agencies should be required to report and collect. The committee also should design methods to assist law enforcement agencies in collecting, compiling utilizing the data gathered.

- Standard definitions identifying levels of force that officers must report should be developed.

- All law enforcement officers should be required to file reports concerning the use of such force and all law enforcement agencies should be required to collect and maintain these reports.

- All citizen complaints alleging excessive use of force and information concerning the disposition of such complaints should be recorded.

- Each law enforcement agency should be required to file an annual report with the county prosecutor indicating the total number of incidents involving use of force, the total number of incidents involving firearms discharges and the total number of incidents involving alleged use of excessive force. These reports should be made available to the public.

- **Each county prosecutor's annual report to the Attorney General should include the data reported by law enforcement agencies.**

Chapter Two: Selection and Training of Law Enforcement Officers

Law enforcement officers are entrusted with "exercising the most awesome and dangerous power that a democratic state possesses with respect to its residents--the power to use lawful force to arrest and detain them."[16] The selection and training of persons who will be given this authority is clearly critical. Individual officers are the key factor in the performance of duties that demand the exercise of sound discretion under potentially confrontational circumstances.

A. Selection. State law establishes minimum standards for the selection of law enforcement officers -- they must be citizens, of good character, sound body and good health, be able to read, write and speak English and have sufficient intelligence and skill to successfully complete the basic training course mandated by the Police Training Commission.

Despite this attention to selection of officers who are fit and qualified, psychological testing to screen-out persons who lack the emotional stability and psychological fitness needed to carry out the duties of a law enforcement officer or endure the stress of the conditions in which these officers perform is not uniformly required. Numerous studies indicate the importance of such screening.

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[16] Policeman's Benevolent Association of New Jersey v. Washington Township, 850 F.2d 133 (3d Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 1637 (1989).

The Task Force also discussed whether psychological tests should be administered subsequent to an officer's appointment in order to determine whether veteran officers remain fit and qualified. The evidence of the utility of such tests, when compared to careful evaluation of the performance of individual officers, is less clear. And, because the views of individual members of the Task Force ranged from support for routine, universal psychological testing to opposition to any such testing, the Task Force generally agreed that there was insufficient evidence to recommend a uniform policy on in-service psychological testing.

Thus, the Task Force recommends the following:

- **The Attorney General should seek to introduce Legislation requiring the Police Training Commission to establish standards for psychological testing and requiring all law enforcement agencies to administer tests meeting those standards prior to appointing a candidate as a police officer.**

- **The Division of Criminal Justice should bring together experts to develop a model policy concerning in-service psychological testing, and police departments should be encouraged to develop and implement policies concerning in-service psychological testing that provide clear criteria as to when such testing is warranted.**

B. Training. Given its mission, the Task Force focused on the adequacy of basic and in-service training addressing the use of force in law enforcement. The basic course, which addresses police community relations, patrol concepts, unarmed defense, baton use, firearms use and all aspects of the law governing the use of force, is well-developed and continually refined in light of legal developments and improvements in law enforcement

techniques designed to reduce the need for the use of force. Efforts such as those currently underway to stress the use of verbal communication skills as a means of de-escalating the need for the use of force should be continued.

In-service training on the proper use of firearms is statutorily required on an annual basis, but due to Attorney General directive, this training is delivered on a semiannual basis and has been extended to include re-training on the law governing the use of force. While some law enforcement agencies provide additional in-service training, there is no uniformity in this regard. And, although the Department of Law and Public Safety has developed in-service training programs on police professionalism and cultural diversity awareness, which are being offered throughout the State, the program is not mandatory. Further, there are currently no programs designed to explain the importance and nature of the police function to members of the community or to educate local public officials responsible for civilian oversight of police departments concerning their responsibilities.

Accordingly, the Task Force recommends the following:

- **The Attorney General should seek the introduction of legislation directing the Police Training Commission to develop in-service training requirements and mandating that all law enforcement officers successfully complete that training.**

- **The Legislation should provide funding for in-service training.**

- **Police Training Commission staff should be directed to continue to review and revise use of force curricula to incorporate the latest**

legal and technical developments, in particular development of verbal communication skills. And, the Attorney General should continue to update directives and guidelines concerning the use of force to reflect changes in the law.

- **The continued development and delivery of training and public awareness programs dealing with cultural diversity, the role of the police officer and the responsibilities of local government officials for oversight of police departments should be encouraged.**

C. Training of Officers Responsible for Internal Affairs Investigations. As discussed below, Chapter 3 of this Report recommends full-implementation of the "Internal Affairs Policy and Procedures" recently developed through the cooperative efforts of the Division of Criminal Justice and the New Jersey State Association of Chiefs of Police and issued by Attorney General Del Tufo. Successful implementation of the substantial improvements outlined in these current procedures will require training of the officers assigned this task. **Accordingly, the Task Force recommends the following:**

- **The Division of Criminal Justice should develop standardized guidelines for internal affairs training and this training should be made available to all officers assigned to conduct internal affairs investigations.**

Chapter Three: Investigation of Complaints Concerning Excessive Force

The manner in which a law enforcement agency polices itself and responds to citizen complaints concerning the use of excessive force is critical to the morale and effectiveness of officers and to the public's trust and confidence in law enforcement. Members of the community and fellow officers must

feel free to make legitimate complaints and to bring problems to the attention of responsible officials. If problems concerning the use of force are to be identified and addressed, officers and citizens alike must be confident that the filing of a complaint will lead to a thorough, objective investigation and a just result.

Prior to the recent issuance of "Internal Affairs Policy and Procedures" and to Attorney General Del Tufo's directive requiring all law enforcement and prosecutorial agencies in the State to conscientiously implement the standards and procedures for receipt, investigation and disposition of use of force complaints contained therein, there were no uniform practices. The Task Force considers this lack of uniformity to be the most significant factor contributing to the perception, which law enforcement officers and citizens seem to share, that the system is not fair and does not lead to just results. It has led some members of the public to conclude that the system shields officers who abuse their authority and it has led some officers to conclude that even a proper use of force will be presumed abusive.

The Task Force has concluded that implementation of the policies and procedures outlined in "Internal Affairs Policy and Procedures" as amplified in Attorney General Del Tufo's accompanying directives to law enforcement officials and county prosecutors will do much to remedy these problems. Together these documents establish a uniform, statewide system for handling complaints. Under this system, all complaints must be

recorded and thoroughly investigated by officers trained in both criminal investigations and administrative proceedings. The result of the investigation must be reported to the complainant and recorded for inclusion in an annual report which must be provided to the county prosecutor.

The document provides for an additional measure of uniformity, predictability and fairness by establishing standards for officials to apply in determining when an officer named in a complaint or involved in an incident involving discharge of a firearm or a suspected use of excessive force should be reassigned or suspended.

In order to ensure that all perceive investigations of serious matters to be objective and fair, the uniform policy requires immediate notification and involvement of the county prosecutor or the Attorney General, through his Division of Criminal Justice, when an investigation involves the discharge of a firearm resulting in injury or any use of force resulting in serious injury or death.

Finally, in directing that "any matter which involves factors indicating the possible use of unjustified force by a law enforcement officer which resulted in death or serious bodily injury should ordinarily be presented to the grand jury for review and disposition, particularly in cases involving factual disputes," the Attorney General has provided for an independent community judgment of these serious matters that should ensure citizens that law enforcement officials and the elected public officials responsible for their supervision are not shielding

officers. Application of this objective standard for referring matters to the grand jury should also do much to eliminate concern on the part of officers that individual cases are presented to the grand jury on an arbitrary basis.

While the Task Force studied and debated the question of establishing civilian review boards to consider allegations of police misconduct, it agreed that the uniform system so recently established in this State should be tested first. In this regard, the Task Force considers it quite significant that each police agency in this State, under current law, is subject to oversight by and directly answerable to elected officials.

Accordingly, the Task Force, with minor modifications, recommends continuation of the conscientious implementation of the system for investigation and disposition of complaints recommended in "Internal Affairs Policy and Procedures" and of the Attorney General's directives concerning referral of cases to the county prosecutor, Division of Criminal Justice and grand jury. Chapter 3 of this report includes a proposed schedule for implementation and publication of reports detailing progress toward that goal. **The essential components of the system recommended are as follows:**

- **Every police agency should implement uniform procedures for accepting and investigating allegations of excessive force.**
- **All citizen complaints should be accepted, recorded and investigated thoroughly and objectively and with respect for the rights of officers under investigation.**
- **The investigations should be conducted by officers trained in both criminal and administrative investigations.**

- Complaint and incidents involving the possible use of excessive force or discharge of a firearm resulting in injury or death should be reported to and investigated with appropriate oversight by the County Prosecutor or the Division of Criminal Justice.

- Any matter which involves factors indicating the possible use of unjustified force by a law enforcement officer which resulted in death or serious bodily injury should ordinarily be presented to the grand jury for review and disposition, particularly in cases involving factual disputes.

- Law enforcement agencies should apply uniform standards to determine an officer's duty assignment pending the outcome of an investigation. These standards should include a presumption in favor of administrative reassignment in cases involving a use of force which results in death or serious bodily injury.

- Records of complaints, investigations and dispositions of matters involving suspected use of excessive force complaints should be kept.

- Dispositions and reasons for dispositions should be disclosed to the complainant and the officer.

- Each law enforcement agency should be required to complete an annual report summarizing, without identifying individuals, the number and types of complaints received and the dispositions of these complaints. The report should be made available to the public and filed with the county prosecutor.

- Each county prosecutor's annual report to the Attorney General should include a summary of the county's excessive force complaints and their dispositions.

- The uniform procedures for external oversight of investigations by county prosecutors, the Division of Criminal Justice and the grand jury should be implemented.

- Measures to implement the procedures and standards outlined above should be taken with all due diligence in accordance with the schedule for compliance included in Chapter 3 of this report.

Chapter Four: Law Governing the Use of Force

Society has an interest in the vigorous enforcement of its criminal laws. For this reason we authorize and require law enforcement officers to use reasonable force when necessary to perform their duties. In tense and uncertain circumstances often involving grave personal danger, we expect law enforcement officers to make split-second decisions and take appropriate action so that society may remain secure.

Society has an equally significant interest, however, in seeing that officers do not "unjustifiably" coerce, threaten, restrain, injure or kill in the name of law enforcement. Statutory and constitutional rules describe when and how much force law enforcement officers may use. These rules distinguish "justifiable" and appropriate from "unjustifiable" and inappropriate law enforcement conduct. Law enforcement officers must operate within the boundaries set by these rules. They have a duty to obey the law and to enforce it, and their adherence to both is essential to preservation of a free society.

A. The Need For Clarity. Given the importance of statutes defining when and how much force may be used in furtherance of law enforcement, the Task Force began with the assumption that these laws must be clear and understandable. Officers are often required to make split-second judgments in tense, uncertain, and rapidly evolving circumstances, and the law should clearly identify, not obfuscate, the judgments they must make.

Current statutes governing the use of force in law enforcement, self-defense, defense of others and defense of

property, each potentially applicable to the conduct of law enforcement officers in the performance of their duties, are too detailed and complex to be applied under circumstances requiring rapid judgment and quick action. The statutes describe when and the amount of force that may be used through a series of detailed and specific rules, each with numerous exceptions and limitations, and cross-references to exceptions and limitations.

The Task Force has concluded that these specific, detailed and confusing rules can be subsumed in, and more comprehensibly stated as, general principles incorporated in fewer statutory provisions.

Accordingly, the Task Force recommends the following:

- **Current detailed statutory rules and exceptions governing the use of force in law enforcement should be replaced with more comprehensible, general standards.**

- **Statutes governing the use of force in self-defense, defense of others and defense of property should be combined in order to avoid the need for confusing cross-references and should also be revised to replace detailed statutory rules and exceptions with more comprehensible, general standards.**

B. The Need for Consistency with Constitutional Standards.

As noted above, the use of force in law enforcement is subject to both statutory and constitutional restrictions. In 1985, in a decision rendered in the case of Tennessee v. Garner, the United States Supreme Court announced that a law enforcement officer's use of deadly force to apprehend a person suspected of a crime is constitutionally permissible only if a failure to effectuate the suspect's immediate arrest would pose a threat of serious

physical harm to the officer or others.

Current statutory law authorizes the use of deadly force in arrest on a different basis. It focuses on the crime committed rather than the danger posed by the suspect. As a result, New Jersey statutes permit the use of deadly force in some cases in which Garner would not, and prohibit its use in some cases where Garner would permit it.

Statutes similarly fail to account for constitutional restrictions on the use of non-deadly force. In 1989, in Graham v. Connor, the Supreme Court held that no force used in law enforcement is constitutionally permissible unless it is "reasonable under the circumstances." Current statutory law does not limit the use of non-deadly force in this manner.

Although these inconsistencies have been reconciled in guidelines issued by the Attorney General, the Task Force nonetheless recommends amending statutory law to conform with the constitutional standards. The current inconsistency creates an intolerable level of confusion where clear guidance is needed. Further, an officer who has acted in accordance with constitutional limitations should not be subject to punishment for a crime under the laws of this State, and the laws of this State should not authorize force that is inconsistent with the constitutional rights of its citizens.

Thus, the Task Force makes the following recommendations:

- **Statutory law defining when and the amount of force that may be used in law enforcement should be amended to state standards consistent with constitutional restrictions.**

- **Use of non-deadly force for law enforcement purposes should be justified only when immediately necessary and "reasonable under the circumstances" to accomplishment of an officer's lawful duty.**

- **Use of "deadly force" for law enforcement purposes should be justified when immediately necessary:**

  (a) to effect a lawful arrest of a person who would pose a substantial risk of serious bodily injury to any person if apprehension were delayed;

  (b) to prevent the commission of a crime involving a substantial risk of immediate death or serious bodily harm to any person; or

  (c) to prevent an escape from a prison.

C. Criminal Liability Commensurate with Culpability. The Task Force also examined current law in order to determine whether the law provided appropriate sanctions for law enforcement officers who use excessive force in the performance of their duty. Here, the Task Force began with the premise that the criminal law should distinguish between and provide different punishments for officers who intentionally inflict injury or cause death without justification, and officers who knowingly cause such injury because they believe, albeit unreasonably, that the circumstances with which they are confronted in the line of duty require the use of force.

Under current law, an officer who purposely or knowingly causes death because he mistakenly believes that the use of deadly force is necessary to protect the life of an innocent citizen, to effect the arrest of person who has just committed a homicide, or to preserve his own life from a threat encountered in the line of duty, has a complete defense if his mistake is

reasonable. If the officer's belief is reckless or even negligent, however, the officer is liable for murder if he knowingly causes death.

Recognizing the possible consequences of this rule to public safety officers, the Supreme Court recently suggested that the Legislature reconsider its recent abolition of a common law rule which provided a mitigation for officers who acted because of such unreasonable belief. After considering the consequences, the Task Force recommends reform.

Officers are under a legal compulsion to act and must make split-second decisions in circumstances that are tense and fraught with danger. An officer acting in furtherance of his lawful duties who believes, albeit unreasonably, that the circumstances justify his conduct is simply not as blameworthy as an officer who kills or injures without such a belief.

Accordingly, the Task Force recommends the following:

- **The law should be amended to provide a mitigation for officers acting in the lawful performance of their duties who negligently or recklessly believe that the circumstance justify the use of force.**

  An officer whose mistake is negligent should have a complete defense to any offense other than one requiring negligence as to any element-- for example, negligent injury with a deadly weapon.

  An officer whose mistake is reckless should have a complete defense to any crime other than one requiring recklessness or negligence as to any element -- for example, negligent injury with a deadly weapon or reckless manslaughter.

D. Specific Public Policy Judgments. Laws defining when and how much force may be used in law enforcement, together with those that define the extent of a law enforcement officer's duty to act and the extent of a suspect's duty to submit, embody society's view of the proper balance of its interests in preventing crime, apprehending criminals, protecting the public safety and preserving individual rights. The Task Force, for the most part, has attempted to recommend clarification of statutory law without altering the balance the Legislature has struck.

The Task Force is mindful, however, that the policy judgments incorporated in current law can be revised to reduce the likelihood of forceful encounters between police and citizens.

For example, if the public were willing to sacrifice vigorous enforcement of the criminal law in order to avoid forceful encounters, the law could absolve officers of the duty to arrest persons who resist or direct officers not to pursue suspects. Alternatively, if the public is unwilling to relieve officers of the duty to pursue persons who do not comply with lawful orders but is nonetheless interested in limiting dangerous chases and encounters, the law could be revised to discourage flight by imposing strict sanctions for non-compliance with orders to halt.

While the Task Force has not attempted to resolve these difficult questions of public policy, it recommends that the Attorney General consider whether it is appropriate to solicit additional public opinion on these issues.

- **The Attorney General should consider soliciting additional public opinion on the following issues:**

  1. Should law enforcement officers be absolved of the duty to arrest persons who resist or flee.

  2. Should the law be revised to impose strict sanctions for non-compliance with orders to halt or submit to arrest.

CONCLUSION

Attorney General Del Tufo gathered this diverse group together and asked us to review current practices, procedures and law relevant to the use of force in law enforcement in order to recommend reform. His goals were to "renew the traditional sense of trust between the public and the law enforcement community" and "restore a sense of common cause between law-abiding citizens and law-abiding law enforcement officers."

The report which follows represents our effort to fulfill these responsibilities. The issues with which we grappled were complex, and the process of reaching a consensus was difficult. Implementation of the recommendations outlined here will be no easier.

The members of the Task Force, encouraged and enriched by the exchange of views that led to this report, are confident that the goals of the Attorney General while elusive are, with vigilance and effort, attainable.

CHAPTER ONE

USE OF FORCE IN LAW ENFORCEMENT

The Task Force quickly recognized that an assessment of law enforcement use of force as it currently exists in New Jersey was a necessary foundation for any progress which would be forthcoming in dealing with this complex issue. The Task Force relied on various sources of information to determine the extent and nature of the use of force by law enforcement. The most important was a survey designed and administered by the Task Force to estimate the frequency with which force is actually utilized by law enforcement in New Jersey. The survey sought to gather information about calls for service, use of force incidents, complaints of excessive force and firearms discharge incidents. In addition, the Task Force reviewed existing research literature with regard to police use of force and collected published information pertaining to public perception of both the frequency of police use of excessive force and the appropriateness of using force in specified situations.

Much effort has been devoted to the study of deadly force incidents with one major study concluding, "it comes as no surprise that when compared to the total number of contacts police officers have with civilians, police-civilian shootings are extremely infrequent events."[17] The New Jersey Task Force survey results, reported later in this chapter, support this

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[17] Geller, W.A. (1982). Deadly Force: What we know. Journal of Police Science and Administration, 10(2), pp. 151-177.

New Jersey State Library

view. Police agencies responding to the New Jersey survey report that they handled 8,666,934[18] calls for service during 1990 and discharged their weapons in only 167 incidents. Stated otherwise, the use of deadly force by police officers in New Jersey is a rare event, occurring about once in every 52,000 calls for service. Additional information available to the Task Force further supports the conclusion that the discharge of a weapon at other persons by law enforcement officers in New Jersey is a rare occurrence. Agencies responding to Task Force survey items pertaining to calls for service and firearms discharges employ a total of 26,852 sworn law enforcement officers. Recalling that 167 shooting incidents were reported in the survey, another way to view the frequency of police use of firearms is by noting that only one of every 161 officers was involved in a firearms discharge incident during 1990.

While the literature is replete with studies regarding police use of deadly force, there are very few studies focusing on police use of non-deadly force. As a result, general information derived from the Task Force survey is needed to provide detail to existing published information and to shed light on the use of all levels of force by law enforcement officers in New Jersey. The Task Force recognizes that although complete and accurate information about police use of firearms is

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[18] The reported number of calls for service is thought to under represent actual police activities and citizen contacts. For example, some departments report self initiated activity while others include only those activities for which an officer was dispatched in response to a third party.

of critical importance, it alone is insufficient to properly address the entire range of issues raised by law enforcement's use of force. It is equally important that accurate and complete information be available regarding police use of less than deadly levels of force in the course of exercising their public safety responsibilities.

In 1987, the New York State Commission on Criminal Justice and the Use of Force drew similar conclusions. "Noting that most research focused on deadly force, the [New York] Commission decided to ask 'broader questions' about the frequency and nature of 'less than deadly force."[19] The New York Commission found that not only did police use deadly force infrequently, suggesting that the discharge of a weapon occurs perhaps once in a decade in smaller police agencies, but also concluded that police use of any force is rare. The survey conducted by the New York Commission indicated that police in New York State used force, primarily "pushing, grappling or wrestling with an unruly citizen," in approximately 5% of all arrests and in less than one-tenth of one percent of all police citizen encounters.[20]

In 1987, the Division of Criminal Justice conducted a study of civil liability suits filed against New Jersey law enforcement

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[19] Fischer, E. (ed) 1987. New York Panel Finds Abuse of Force by Police Not Systemic. In Criminal Justice Newsletter, 18(11).

[20] Ibid.

officers[21]. This effort was undertaken for the purpose of "defining future efforts in training and policy formulation as they relate to the issue of police liability."[22] During 1985 and 1986, a total of 576 suits were filed under state and federal law. Of these suits, assault and battery (43%) was the most commonly cited cause of action.

Generally, the use of force by law enforcement officers occurs infrequently. However, there is some suggestion that it is not always so infrequent an event for individual law enforcement officers. The Report of the Independent Commission of the Los Angeles Police Department[23] organized following the Rodney King incident on March 3, 1991, looked carefully at the use of force by that police department. The Commission relied on a Los Angeles Police Department requirement that all incidents involving police use of force beyond a firm grip be reported by the officer involved.

- There are 8,450 sworn law enforcement officers in the Los Angeles Police Department.
- During a 51 month period, 6,000 officers (71%) reported that they had used force greater than a firm grip.
- Of those 6,000 officers, two-thirds had used force less than 5 times during that 51 month period. However, 63 (1.1%) officers filed 20 or more use

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[21] Fisher, W.S., Kutner, S.L. and Wheat, J.I. (1989). Civil Liability of New Jersey Police Officers: An Overview. Criminal Justice Quarterly, 10(1).

[22] Ibid. at p. 45.

[23] Christopher, W., Arguelles, J.A., et al. (1991). Report of the Independent Commission on the Los Angeles Police Department.

of force reports for that same time period.

Understanding that the self reporting of incidents involving force may under represent the actual number of force incidents, the conclusion remains that a small proportion of officers are involved in a disproportionate number of force incidents.

Despite the infrequency with which the large majority of police use physical force, especially deadly force, public perception regarding such frequency is certainly important. A recent Gallup Poll[24], conducted in March 1991, about two weeks after the Los Angeles incident, provides timely information with regard to the public's perception of police brutality. The national poll involved telephone interviews of 1,005 randomly selected adults. The following information was obtained from this poll:

"How often do you think incidents like this [Los Angeles] happen in police departments...

Frequency	Across the Country	In Your Local Area
Very frequently	22%	5%
Somewhat frequently	46%	15%
Not very frequently	27%	45%
Not at all	2%	32%
No opinion	3%	3%

- More than two-thirds (68%) of respondents believe that incidents such as that in Los Angeles occur very or somewhat frequently across the country.

- Only one-fifth (20%) of those polled report that incidents similar to that in Los Angeles occur very or somewhat frequently in their local police department.

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[24] Gallup, A.M. (1991). Americans say police brutality frequent - but not locally. Gallup Poll News Service, 55(42b).

As is evident, respondents believe police brutality is a rather frequent occurrence nationally, but view it as a far less pervasive problem in their own police departments. In fact, almost one of every three (32%) respondents stated that brutality never occurs in their local police department.

Another way to assess the frequency of police brutality incidents is to question respondents about their personal knowledge of people who have been mistreated by the police. The Gallup poll asked respondents if they knew anyone who had been mistreated by the police, if a member of their family had ever been mistreated by the police or if they, themselves had been mistreated. The following are those responses:

Personal Knowledge of Individuals Mistreated or Abused by Police	Yes	No
Know someone	20%	80%
Family member	8%	92%
Respondent	5%	95%

While one of every five (20%) respondents report knowing someone who had been mistreated by the police, less than half that number report that a family member had been mistreated and only one of every 20 respondents report that they themselves had been mistreated.

As has become apparent throughout the Task Force effort, defining police brutality as a general concept is deceptively difficult, and the concept of brutality to which the respondents of the Gallup poll are answering is no less nebulous. Almost 25 years ago, Albert Reiss, a distinguished professor of sociology

at Yale University, noted that "What citizens mean by police brutality covers the full range of police practices...any practice that degrades their status, that restricts their freedom, that annoys or harasses them or that uses physical force that is frequently seen as unnecessary or unwarranted."[25]

Like the matter of brutality, even defining just what police use of force entails in general can be quite difficult. However, while all would agree that brutality on the part of police officers is conduct which should be universally condemned, use of force is at times both necessary and acceptable. To evaluate use of force, it is necessary to understand the situation within which it is used. Appropriateness with regard to the use of force at all, or with respect to the degree of force employed, can only be determined by an analysis of the conditions and facts evident at the time it is used. Any effort to make such assessments necessarily requires the availability of accurate and current information about police use of force in general. A threshold barrier to accumulating such information is the very way in which use of force is to be operationally defined. It must be done in a way which allows for necessary information about infrequent events to be accurately reported. At the same time, however, it cannot be defined in such a way as to require unnecessary reporting of all physical contact between police officers and citizens. For example, does reportable use of force

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[25] Reiss, A.J. (1968). Police Brutality, Answers to Big Questions. TRANS-action, 5(8) pp. 10-19

include handcuffing arrestees, which is a standard operating procedure in most police departments, or should the classification of use of force be limited to incidents which surpass a certain physical threshold and take place in an atmosphere of confrontation?

The police alone in our society bear the responsibility to use force when force is necessary to insure the public safety. We expect the police to use force. It is their duty. However, the use of force by police officers is dependent upon an assessment of the necessity of force given specific situations. To insure that officers are properly trained and familiar with a wide range of force techniques, and to be sure that they are cognizant of those situations in which force is appropriate, a key portion of the Police Training Commission approved basic course for police officers is devoted to this topic.

- The use of force unit "presents New Jersey laws pertaining to the use of force as it applies to a police officer's duties. The trainee will be given situations where force, including deadly force, may be necessary and legally justifiable. The trainee will identify appropriate responses in each situation. The unit also covers the consequences that might result from the misuse of force."[26]

The public also generally recognizes that use of force by police officers is at times necessary and acknowledges that there are situations in which they approve of its use. The General Social Survey, conducted annually by the National Opinion

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[26] Division of Criminal Justice, Police Training Commission (1990). Basic Course for Police Officers.

Research Center[27] contains a series of questions designed to assess public perception of police use of force. Respondents were asked "Are there any situations in which you would approve of a policeman striking an adult, male citizen?" In addition, respondents were asked if they would "approve of a policeman striking a citizen under certain circumstances."

Attitudes Toward Police Use of Force

"Are there any situations you can imagine in which you would approve of a policeman striking an adult male citizen?"

	Yes	No	Not Sure
	70%	25%	5%
Would you approve of a policeman striking a citizen who:			
was attacking an officer with his fists	92%	6%	2%
was attempting to escape from custody	74%	21%	5%
said obscene things to police officer	12%	84%	4%
was being questioned in a murder case	11%	86%	3%

Use of force by police officers is of course not necessarily inappropriate behavior. As the survey makes clear, however, various situations embody a strong presumption for or against the appropriateness of police use of force. Use of force can only be

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[27] In Maguire, K., Flanagan, T.J., et al. (1991). Sourcebook of Criminal Justice Statistics - 1990. Albany: The Hindlang Criminal Justice Research Center.

judged in the context of the situation in which it is employed. For instance, during 1990, 5,214 persons were arrested for assaulting a police officer[28]. Obviously, circumstances such as these may result in the need for police officers to use force themselves. Force is but one technique among many available to police as they work to insure the public safety. While most would agree that force is not the tactic of choice when alternatives can be safely utilized, its use nonetheless is of paramount concern to law enforcement and the public in general. In an effort to obtain information relating specifically to use of force in New Jersey, the Task Force designed and administered a survey to develop baseline information which would assist in our understanding of the nature of this complex issue in our state.

POLICE/CITIZEN CONTACT AND USE OF FORCE SURVEY

Purpose

As would be expected, the Task Force initially sought information about use of force by law enforcement officers in New Jersey from existing, routinely collected data. It was immediately evident that existing information, such as criminal indictments alleging use of excessive force, would provide information pertaining to but one small segment of the general

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[28] Data were extracted from the Computerized Criminal History data base and include the number of arrest incidents involving a charge of 2C:12-16(5)(a) which states that a person is guilty of aggravated assault if he commits a simple assault upon "any law enforcement officer acting in the performance of his duties while in uniform or exhibiting evidence of his authority."

issue of police use of force. Further, existing data was of little value in aiding our understanding of the context within which force occurs in this state.

As a result of limitations of these existing data, the Task Force developed a survey instrument designed to collect general use of force data for a three year period of time: 1988, 1989 and 1990. The survey consisted of four very basic items:

total number of calls for service;
total number of incidents in which force was used;
total number of use of force complaints; and
total number of firearms discharges.

Distribution

The survey was mailed to 543 law enforcement agencies in New Jersey. These agencies include municipal police departments, sheriff's offices, college police, county police, park police and other law enforcement agencies such as the Division of State Police, Port Authority and Palisades Park police. A total of 502 police departments responded to the survey resulting in a response rate of 92%.

Responding Population

Respondents consisted of 502 law enforcement agencies. Collectively, these agencies include 95% of the sworn police officers in New Jersey and are responsible for providing police services to 95% of this state's population.

In order to acknowledge the fact that the nature of policing differs as a function of the characteristics of the area and population being policed, survey results are grouped by the

characteristics of the employing municipality or as non-municipal police agencies. These categories closely resemble those contained in Uniform Crime Reports: State of New Jersey 1990 which are described as follow:

Urban 100+	Urban police departments with 100 or more police officers located in or near densely populated areas with extensive development
Urban < 100	Urban police departments located in or near to densely populated areas with less than 100 officers
Suburban	Suburban police departments located in predominately residential areas without regard to the number of police officers
Rural	Rural police departments located in relatively small communities without regard to the number of police officers
Non-Municipal	Sheriff, county, college, state (including the New Jersey State Police), and other law enforcement agencies that do not have primary municipal law enforcement jurisdiction

Calls for Service

In general, the majority of law enforcement agencies were able to provide data regarding the number of calls for service handled by their department on an annual basis.[29] It must be emphasized, however, that not all departments included all activities in their annual totals. Some departments include self

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[29] Police departments were better able to provide recent information requested in the survey than they were information for previous years. For example, 45 (9.0%) responding departments were unable to provide the number of 1990 calls for service as compared to the 89 (17.7%) departments unable to provide 1988 data.

initiated activities as calls for service. For example, every time an officer stops a car and issues a motor vehicle summons, some departments include that as a call for service. Others, however, include only those activities for which an officer was dispatched in response to a third party request. While the types of calls included in these totals are not consistent from department to department, and thus under-report the total number of police/citizen encounters on an annual basis, they do accurately measure operationalized calls for service as defined by individual departments at this time. What is made clear is the absence of a consistent definition, among departments, of those units of police activities and citizen contacts which should be routinely recorded within individual agencies. The following table contains information regarding calls for service as reported by survey respondents.

CALLS FOR SERVICE

1990

Department	Response Total	Calls for Service[30]	Average
Urban 100 +	27	2,923,165	108,265.4
Urban < 100	119	1,187,399	9,978.1
Suburban	224	2,586,275	11,545.9
Rural	82	521,544	6,630.3
Non-Municipal	50	1,432,551	28,651.0
Total	502	8,666,934	17,264.8

1989

Department	Response Total	Calls for Service	Average
Urban 100 +	27	2,983,976	110,517.6
Urban < 100	119	1,180,688	9,921.7
Suburban	224	2,505,490	11,185.2
Rural	82	491,611	5,995.3
Non-Municipal	50	1,433,338	28,666.7
Total	502	8,595,103	17,121.7

1988

Department	Response Total	Calls for Service	Average
Urban 100 +	27	2,923,145	108,264.6
Urban < 100	119	1,151,917	9,679.9
Suburban	224	2,453,145	10,951.5
Rural	82	463,947	5,657.9
Non-Municipal	50	1,393,610	27,872.2
Total	502	8,385,764	16,704.7

Calls for service, more precisely defined as "police activity incidents," are considered the best available measure of

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[30] Calls for service were estimated for those responding departments unable to provide these data. The estimates were based on calls for service, agency classifications and number of police officers and account for only 5.7% of the total 1990 calls for service.

the volume of police/citizen contacts. Although specific activities which constitute a call for service are not consistent from department to department, calls for service nonetheless provide a useful basis for assessing the rate of use of force incidents as a proportion of police/citizen contacts.

- The number of calls for service has remained relatively stable over the three years for which data were collected.
- When these agencies are grouped by category, the average number of calls for service in 1990 range from 6,630 in rural police departments to 108,265 in urban police departments employing 100 or more officers.
- Almost half of all calls for service (47.6%) are handled by urban police departments.

Use of Force Incidents

The Task Force generally agrees that data regarding use of force incidents are not complete and are of only marginal utility. Specifically, only about half (54.6%) of responding departments provided any information in response to this item. In addition, the data fluctuates rather extremely within similarly grouped departments suggesting that a use of force incident is not defined, reported or collected in anything even approaching a standardized manner by responding departments. Despite the shortcomings of the data, it has been included in the report. However, caution must be exercised when attempting to use these data to make any generalizations regarding use of force as a strategy or tactic employed by police agencies or individual law enforcement officers in this state.

USE OF FORCE INCIDENTS

1990

Department	Responding Departments	Use of Force Incidents	Average
Urban 100 +	5	2,116	423.2
Urban < 100	43	4,207	97.8
Suburban	105	3,264	31.1
Rural	44	339	7.7
Non-Municipal	31	1,296	41.8
Total	228	11,222	49.2

1989

Department	Responding Departments	Use of Force Incidents	Average
Urban 100 +	5	2,018	403.6
Urban < 100	38	4,350	114.5
Suburban	100	2,863	28.6
Rural	43	314	7.3
Non-Municipal	31	1,699	54.8
Total	217	10,930	50.4

1988

Department	Responding Departments	Use of Force Incidents	Average
Urban 100 +	4	1,872	468.0
Urban < 100	35	3,534	101.0
Suburban	88	2,680	30.5
Rural	38	251	6.6
Non-Municipal	26	1,299	50.0
Total	191	9,636	50.5

- On average, incidents of use of force have remained almost constant over the three years for which data were collected.

- As has been noted in responses to previously reported survey items, urban police departments use force more frequently than any other categorized group.

- Urban police departments with 100 or more sworn officers use force more than four times as often as urban police departments with less than 100 officers and about ten times as often as non-municipal law enforcement agencies.

Excessive Use of Force

As with the preceding item, the Task Force is not as confident in the responses to this survey item as it is in survey information regarding calls for service and firearms discharges. As was true for calls for service, albeit to a lesser degree, there is not universal agreement as to just what constitutes a reportable complaint of excessive force. For example, some departments reported only those complaints for which formal charges were filed, while others reported all such reports filed by citizens regardless of disposition. In addition, fewer departments were able to respond to this item than calls for service. Specifically, 15.5% of responding departments were unable to respond to this survey item. The absence once again of a consistently accepted definition of excessive force complaints makes detailed analysis of these data quite difficult. Differing rates among departments could be either a reflection of the extent of this problem in an individual agency or could simply be a function of varying reporting or record keeping procedures.

EXCESSIVE USE OF FORCE

1990

Department	Responding Departments	Force Complaints	Average
Urban 100 +	19	562	30.0
Urban < 100	102	123	1.2
Suburban	185	134	0.7
Rural	73	60	0.8
Non-Municipal	45	189	4.2
Total	424	1,068	2.5

1989

Department	Responding Departments	Force Complaints	Average
Urban 100 +	18	513	29.0
Urban < 100	99	131	1.3
Suburban	179	101	0.6
Rural	70	35	0.5
Non-Municipal	45	244	5.4
Total	411	1,024	2.5

1988

Department	Responding Departments	Force Complaints	Average
Urban 100 +	17	472	28.0
Urban < 100	92	101	1.1
Suburban	171	79	0.5
Rural	66	22	0.3
Non-Municipal	44	127	2.9
Total	390	801	2.1

- Overall, complaints of excessive use of force have changed little over the three years for which data were collected.

- Complaints of excessive use of force have increased proportionately more among non-municipal law enforcement agencies than municipal police departments.

- Excessive use of force complaints, as operationalized by responding police departments occur infrequently.

- During 1990, more than one of every two (52.6%) allegations of police use of excessive force are made against the largest municipal police departments in New Jersey.

- In urban 100+ police departments, excessive use of force complaints ranged from 2 to 87 during calendar year 1990.

Firearms Discharge Activity

Of all the survey data collected, the Task Force considers information pertaining to firearms discharges to be the most valid and reliable. More than 92% of responding departments were able to provide these data. Furthermore, there is little confusion as to what constitutes the discharge of a weapon. The survey instrument defined a firearms discharge as any non-training firearm discharge incident by law enforcement personnel, including on and off duty, accidental or intentional, whether or not there was an injury. The chart which follows includes the total number of firearms discharge incidents reported for a three year period of time.

FIREARMS DISCHARGE ACTIVITY

1990

Department	Responding Departments	Firearms Discharge Incidents	Average
Urban 100 +	21	104	5.0
Urban < 100	112	24	0.2
Suburban	208	16	0.1
Rural	73	4	0.1
Non-Municipal	47	19	0.4
Total	460	167	0.4

1989

Department	Responding Departments	Firearms Discharge Incidents	Average
Urban 100 +	20	92	4.6
Urban < 100	110	21	0.2
Suburban	203	26	0.1
Rural	73	4	0.1
Non-Municipal	46	31	0.7
Total	457	174	0.4

1988

Department	Responding Departments	Firearms Discharge Incidents	Average
Urban 100 +	19	103	5.4
Urban < 100	109	12	0.1
Suburban	193	25	0.1
Rural	67	2	*
Non-Municipal	45	22	0.5
Total	433	164	0.4

* Less than .1

- The overall firearm discharge rate has remained constant over the three years for which data were collected.

- On average, each police department in New Jersey discharged a weapon less than once during 1990. In fact, there was only about one firearm discharge for every three departments in New Jersey.

- More specifically, only urban 100+ police departments discharged weapons frequently enough to be meaningfully measured on an annual basis.

- Each urban 100+ police department discharged a weapon on approximately 5 occasions in 1990. In fact, these departments are responsible for almost two of every three (62%) firearms discharge incidents in New Jersey during 1990.

- Of the 21 urban departments with 100 or more sworn officers, the number of firearms discharges in 1990 ranged from 0 to 48.

The survey conducted last spring by the New Jersey Task Force on the Use of Force yielded results very similar to those found in 1987 in New York.

The New York Commission on Criminal Justice and the Use of Force contracted with Dr. Elizabeth Croft, School of Criminal Justice at the Rochester Institute of Technology, to study "the frequency and nature of less than deadly force." This study included 1,762 incidents of use of force by police officers in Syracuse and Rochester during 1984 and 1985.[31] From these data, Dr. Croft concluded:

- Police use of force is infrequent, occurring in approximately five percent of arrests and in less that one-tenth of one percent of all police/citizen contacts.

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[31] New York State Commission on Criminal Justice and the Use of Force (1987). Report to the Governor. Albany, New York.

- Of the 1,762 use of force incidents examined in this study, five involved police officers shooting at persons.

- The type of force most commonly used was physical restraint, that is, pushing, grappling or wrestling with an unruly citizen, as opposed to beating with fists or striking with nightsticks.

The New York data were collected from just those two departments, Syracuse and Rochester, which require officers to report all use of force incidents. To provide for some comparisons with the New York data, data from New Jersey is limited to just those departments providing 1990 data for all items of interest; calls for service, use of force and use of excessive force[32]. By collecting both general and excessive force information, the Task force sought to distinguish those incidents in which allegations exist that police officers used force beyond that which was appropriate and necessary.

- In New Jersey, police use force infrequently.

- It is estimated that during 1990, New Jersey law enforcement officers used force in about one-half of one percent of reported calls for service.

The data collected by the Task Force suggest that use of force by police officers does occur and that even police officers themselves acknowledge that at times this use of force may be

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[32] In order to draw comparisons between the surveys, only those New Jersey departments providing responses to all three items; calls for service, use of force and use of excessive force for 1990 are included in this particular analysis. It should be noted that these 198 agencies can not necessarily be considered representative of all law enforcement agencies in New Jersey. New York's use of force sample is also not random.

excessive. Although accurate quantification of the actual amount of excessive force incidents is not possible with available data, the Task Force nonetheless believes that use of force occurs infrequently when compared to the total number of police/citizen contacts. It further believes, however, that the quality of the data pertaining to use of force must be improved if definitive conclusions are to be made.

RECOMMENDATIONS

I. All law enforcement officers should be required to report, and all law enforcement agencies should be required to collect information about incidents involving use of force.

After designing and mailing a survey questionnaire to every police department in the state requesting information pertaining to calls for service, use of physical force, complaints of excessive force and firearms discharge incidents, the Task Force was impressed with the willingness of police departments to provide this information. The survey, however, made the Task Force aware of both the absence of a standard definition for these activities and a standard mechanism for the reporting and collection of this vital information by law enforcement agencies in New Jersey.

II. A standard operational definition of use of force should be developed which includes thresholds beyond which incidents of force must be reported by police officers.

Understanding that use of force is defined differently from department to department, the Task Force recommends that a

standard definition of what constitutes use of force for reporting purposes be developed. The Task Force is also aware that use of force encompasses a broad range of police activities, from handcuffing arrestees in compliance with departmental standard operating procedures to discharging a weapon. The Task Force believes that a threshold barrier for reporting purposes is necessary to permit the reporting of necessary information about infrequent events without burdening police officers with a requirement to report all incidents of physical contact with civilians.

III. Information pertaining to complaints of excessive force received by law enforcement agencies as described in the "Internal Affairs Police and Procedures" chapter of the Police Management Manual[33] be maintained at the law enforcement agency.

While the Task force understands that police use of force is an acceptable and at times necessary tactic during confrontations with citizens, it does acknowledge that these tactics are sometimes used unnecessarily.

IV. All law enforcement agencies should prepare an annual use of force incident report and submit it to the county prosecutor. This summary report should contain the total number of incidents involving the use of any force, the total number of incidents involving use of excessive force and the total number of firearms discharges.

The Task Force believes that reporting and collecting information pertaining to use of force at the department level is

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[33] "Internal Affairs Policy and Procedure," Police Management Manual, Chapter 5, 1991.

but a first step. This information should be provided to the county prosecutor as well as being utilized at the department level. The county prosecutor is already required by statute to submit an annual report to the Attorney General. The county prosecutor should include in this annual report a summary of use of force incidents on a countywide basis.

Although firearms discharges are to a large extent included within the broad spectrum of use of force, The Task Force believes that deadly force is of such importance that it should be included as a separate item for external reporting purposes.

V. A committee of criminal justice professionals should be appointed to: identify specific items of information to be collected by every law enforcement agency in New Jersey, operationally define those items which must be reported, design methods to assist law enforcement agencies to collect this information and develop statewide guidelines for the utilization of information collected both within the individual police department and by the county prosecutor.

The Task Force strongly believes that information about use of force is of paramount importance to law enforcement agencies themselves. The Task Force suggests that agency use of these data will permit early identification of police officers who might be misusing force and thus require intervention such as remedial training, counseling or disciplinary action. In addition, the Task Force believes that these data might also be used to identify citizens who file a disproportionate number of unfounded excessive use of force complaints.

The Task Force is aware that the initial barrier to obtaining valid and reliable information about use of force in New Jersey is a lack of standardized definitions, reporting procedures and data collection methods. The Task Force believes it would be quite useful to develop a precise definition of police service units as well as operational descriptions of other force activities. The Task Force has taken note of the definition of force utilized by the Los Angeles Police Department for reporting purposes and believes it can serve as a useful starting point for this committee. "The Los Angeles Police Department guidelines regarding use of force identifies five levels of force; (1) verbalization; (2) firm grip; (3) compliance holds; (4) intermediate force, including the use of the baton, kicks, swarm, chemical spray, saps and taser; and (5) deadly force, including the modified carotid hold and firearms."[34] "A use of force report must be completed whenever an LAPD officer uses force greater than "firm grip" compliance.[35]

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[34] Christopher, W., Arguelles J.A., et al. (1991). Report of the Independent Commission on the Los Angeles Police Department, p. 26.

[35] Ibid. at p. 36.

CHAPTER TWO

SELECTION AND TRAINING OF POLICE OFFICERS

In addressing issues related to the selection and training of law enforcement officers, the Attorney General's Task Force on the Use of Force in Law Enforcement examined the following:

- The selection and screening process for law enforcement officers;
- Basic and in-service law enforcement training; and
- Internal affairs officer training.

Existing New Jersey law, the laws of other states, and surveys, reports and recommendations of various law enforcement organizations were reviewed and analyzed to determine what changes, if any, should be recommended to improve law enforcement in New Jersey.

The key factor in the delivery of police services is the individual police officer. A police officer is vested with considerable discretion in performing the many duties he or she may be called upon to undertake. Unlike many other professionals, the police officer is expected to become involved in potentially confrontational situations and move them toward resolution. In performing these varied duties and resolving confrontations, the police officer is authorized to use force when necessary. Given the importance of such authority, the use of psychological screening of police officers was examined as well as the training provided in the area of use of force. Police professionalism and community confidence in police are

enhanced if there are assurances that police officers are appropriately screened and selected. Noting the importance of the internal affairs process, the Task Force reviewed the detailed guidelines, "Internal Affairs Policy and Procedures,"[36] issued by the Attorney General this past summer and considered the need for training officers assigned to such a sensitive position.

As a result of these efforts, the Task Force is issuing recommendations in each of the areas considered. In general, these recommendations pertain to:

- Psychological screening for police applicants;
- Psychological testing to determine an officer's continued fitness for duty;
- Basic training for law enforcement officers;
- Mandatory in-service training for law enforcement officers; and
- Selection and training policy for internal affairs officers.

Psychological Screening

In order to accomplish their duties, including maintaining public order, providing community protection, and effecting arrests, police officers are authorized to use force. While police officers are entrusted to use force in performing their duties, safeguards are necessary to ensure the proper utilization of force.

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36 "Internal Affairs Policy and Procedures," Police Management Manual, Chapter 5.

State law establishes minimum qualifications and criteria for the appointment of police officers. Pursuant to N.J.S.A. 40A:14-122, a person can be appointed as a police officer only if that person is:

- a citizen of the United States;
- sound in body and of good health sufficient to satisfy the board of trustees of the police and firemen's retirement system of New Jersey as to eligibility for membership in the retirement system;
- able to read, write and speak the English language well and intelligently; and
- of good moral character, and has not been convicted of any criminal offense involving moral turpitude.

Other than these very basic requirements, there is no uniform criteria for screening and selecting police officers in New Jersey. Additionally, there is no uniformity in employment criteria for the various classifications of law enforcement officers, such as regular officers and special officers, because the enabling statutes were enacted at different times.

Currently there is no statutory requirement that police candidates undergo psychological testing before appointment as police officers in New Jersey. Some municipalities, however, have individually established requirements for such screening of police officer candidates. While no statutory requirement exists for psychological screening of regular, full-time police officers, N.J.S.A. 40A:14-146.10b(6) does require that Special Law Enforcement Officers must undergo the same psychological testing that is required of all regular police officers in the municipality in which they are appointed. Special officers hired

for a seasonal period by a resort municipality which requires psychological testing of its regular police officers are required by statute to undergo a psychological testing program approved by the Police Training Commission.

In order to examine state requirements for psychological testing of police officers, the National Association of Directors of Law Enforcement Standards and Training conducted a national survey in 1986. As a result of that survey, 16 states were identified as having requirements for a psychological examination of police candidates prior to appointment as police officers. Fifteen of those 16 states originally identified responded to a Division of Criminal Justice survey conducted in 1991 to determine by what means or authority the psychological examination is required. In addition, another state was identified as having a psychological examination requirement. Overall, the Division of Criminal Justice survey revealed that:

- Eight states require psychological examinations through state law;
- Five states require psychological examinations through regulations issued by the state's police standards agency or commission; and
- Three states, through self-imposed agency standards, have a statewide practice of requiring psychological examinations.

According to the results of another study pertaining to psychological screening, more than 50 per cent of the major police agencies, (i.e. agencies serving a city with a population over 100,000) in the United States have a psychological screening

process.[37]

Several major law enforcement organizations recommend psychological testing before a person is appointed a probationary police officer. The Commission of Accreditation for Law Enforcement Agencies, Inc., and its four major law enforcement executive membership associations, the International Association of Chiefs of Police, the National Organization of Black Law Enforcement Executives, the National Sheriffs' Association, and the Police Executive Research Forum, issued a mandatory standard for all police agencies on psychological testing. Standard 32.6.6 of the Commission's voluntary accreditation program directs that:

> An emotional stability and psychological fitness examination of each candidate be conducted, prior to appointment to probationary status, using valid, useful and nondiscriminatory procedures.
>
> Commentary: Law enforcement work is highly stressful and places officers in positions and situations of heavy responsibility. Psychiatric and psychological assessments are needed to screen out candidates who might not be able to carry out their responsibilities or endure the stress of the working conditions.[38]

The International Association of Directors of Law Enforcement Standards and Training (IADLEST), an association consisting of directors of the statewide POST (Police Officer

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[37] Bennett, L.A. (1990). The Untapped Potential of Psychological Assessments, The Police Chief Magazine, p. 231, (February 1990).

[38] Standards for Law Enforcement Agencies, Commission of Accreditation for Law Enforcement Agencies, Inc., (1988), p. 32-8

Standards and Training) agencies, also recommends psychological screening in its Model National Training Guidelines. In its commentary for this recommended standard, IADLEST noted:

> A psychological assessment is necessary to screen out candidates who may not be able to carry out their law enforcement responsibilities or endure the uniquely stressful working conditions or who lack the necessary emotional stability.[39]

Based on these findings, the Task Force recommends that legislation be proposed mandating psychological examination of a candidate before appointment as a police officer. The legislation should designate the Police Training Commission (PTC) as the agency to establish standards for such testing. Moreover, to ensure that psychological testing achieves its desired purpose, the Task Force believes that standards should be established that are consistent with the accepted standards of the American Psychological Association.

While the Task Force believes psychological testing should be utilized by police departments in attempting to employ only those persons who are able to meet the demands of this profession, such testing should not be used as a device to exclude applicants because of cultural diversity, race, or gender. A psychological recommendation should not be the sole basis for a hire or no hire decision. Rather, a recommendation based on psychological testing should be only one criteria among other selection criteria.

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[39] National Association of Directors of Law Enforcement Standards and Training, Draft of Model National Training Guidelines.

In addition to psychological screening for employment of police officers prior to appointment, the Task Force considered psychological fitness-for-duty testing among veteran police officers, with cause or reason. Psychological testing for fitness-for-duty is to determine whether the individual officer remains qualified to be a police officer. Generally, if an officer's behavior poses a risk of danger either to the officer or others, there could be sufficient cause or reason for such testing. Procedures to specify when testing takes place would be necessary.[40]

Psychological testing would aid in identifying potential problems and determining appropriate courses of action. However, policies and procedures must be in place not only to specify when testing should take place, but also to ensure that test results are appropriately utilized. Caution must be exercised to ensure that police officers are not arbitrarily or unfairly subjected to psychological testing procedures. These guidelines would provide direction concerning the action to be taken as a result of the psychological testing. Appropriate actions could range from a recommendation for counseling to a recommendation for a new assignment or even dismissal.

The need for psychological testing to assess an officer's

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[40] Factors indicating a need for fitness-for-duty psychological testing would include, but not necessarily be limited to, drug or alcohol abuse, obvious emotional disturbance, violence or threats of violence, abuse of authority, or a disproportionately high number of citizen complaints against an officer.

ability to appropriately perform assigned duties is illustrated by two court decisions. In Bonsignore v. City of New York[41], New York City was found liable for a shooting by a police officer who was mentally disturbed. On December 20, 1976, an off-duty police officer shot his wife with his off-duty revolver which he was required to carry 24 hours a day. The Second Circuit Court of Appeals upheld a jury verdict of $425,000 against the city on the ground that the city was negligent by failing to adopt adequate mechanisms for detecting officers who are mentally or emotionally unfit to carry firearms. In the 23 years Bonsignore was on the police force, he was never given a psychological examination. In Hild v. Bruner,[42] the New Jersey municipalities of Andover and Newton were found liable for a total of $40,000 in connection with a civil rights action brought against the two municipalities and three named police officers. The lawsuit charged that the officers had falsely arrested two people who were injured as a result of a struggle and the arrests. The court noted in its decision that the jury reasonably could have inferred that the failure of the town of Newton, N.J., "to conduct some kind of psychological tests of its police officers, at least after 1975 (when according to expert testimony, such testing became widely accepted), constituted gross negligence." Concerning the verdict against Andover, N.J., the court said that municipal officials

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[41] Bonsignore v. City of New York, 521 F.Supp. 394, 396, 398 (S.D. N.Y. 1981), aff'd, 683 F.2d 635 (2d Cir. 1982).

[42] Hild v. Bruner, 496 F.Supp. at 99 (citations omitted) (D.N.J. 1980).

knew that the named police officer had "aggressive tendencies" in the past. Moreover, based on testimony that the Andover police commissioner did not know whether police officers underwent psychological testing, the jury reasonably could have inferred that these facts indicated gross negligence on the part of Andover.

Recognizing the significance and importance of a police officer's ability to respond appropriately to the various situations which may arise in police work, the Task Force recommends that police departments develop and implement a policy concerning psychological testing of regular police officers. This policy should be clear as to when psychological testing of veteran officers is warranted. The Task Force further recommends that the Division of Criminal Justice bring together law enforcement representatives and experts as needed to develop a model policy for the use of in-service psychological testing.

RECOMMENDATIONS

VI. Legislation should be proposed mandating psychological examination of a candidate before appointment as a police officer. The legislation should designate the Police Training Commission (PTC) as the agency to establish standards for such testing.

VII. Police departments should be encouraged to develop and implement policy concerning psychological testing of regular police officers. The departmental policy should be clear as to when psychological testing of veteran officers is warranted. The Division of Criminal Justice should bring together a body of experts to develop a model policy for the use of in-service psychological testing.

Use of Force Training

The various types of training for law enforcement officers within the state were considered by the Task Force. Of particular concern was that training provided in the area of use of force. Both basic and in-service training for police officers were reviewed.

In reviewing basic training for police officers in New Jersey, the Task Force found that, in 1985, the state adopted the Performance Objectives System of Training (POST) for the compulsory Basic Course for Police Officers. The POST program relates specific training lessons to activities and tasks performed in the field by police officers to ensure the relevance and appropriateness of police recruit training. The Basic Course for Police Officers includes the following subjects relating to the use of force: unarmed defense, baton training, firearms training, police community relations, patrol concepts and agency training.

In 1985, along with introducing the Performance Objective System of Training, the use of force curriculum was revised and specific performance objectives were established to comply with the U.S. Supreme Court decision in Tennessee v. Garner.[43] The curriculum was, in turn, adopted for used in all police academies statewide in conjunction with the Attorney General Directive on Use of Force.

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[43] Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

In 1989, the use of force curriculum again underwent a major revision process. The revised curriculum, approved for use beginning March 1990, provides not only current, relevant performance objectives, but also a comprehensive guide for the academy instructor on the instruction and application of the use of force laws. These instructional units provide clear teaching concepts to explain the laws, rather than just reiterate them. Also, simulated situations, often based on actual court cases or real life examples, were incorporated to aid the trainee in understanding the concepts taught. In general, curriculum revisions were made to reflect current training techniques on use of force, to examine the legal justifications of force as statutorily required in N.J.S.A. 2C:3-1 et seq. and leading court decisions on the use of force, and to introduce the trainee to practical considerations in determining the appropriate options to be used in an encounter, with emphasis on the use of verbal persuasion as an effective option and a useful method for the de-escalation of force. Some specific features of the curriculum follow.

- Concept of Reasonableness. In this segment, the definition of reasonable force is discussed, along with the criteria for determining reasonable force.

- Escalation of Force. This segment covers the four levels of force (constructive or verbal, physical, mechanical and deadly force), as well as the importance of attempting lower levels of force to de-escalate the need for a higher level of force. The use of constructive or verbal force is emphasized as an often effective law enforcement strategy, as well as the option to attempt containment until backup officers can be summoned.

- Force to Effect an Arrest. The use of verbal force again is stressed as an effective level of force. The training curriculum makes it clear that an officer should develop a range of strategies for use, as conditions warrant, in matters where resistance is encountered.

- Deadly Force. Because of the serious consequences involved with this level of force, this training segment was designed to present a clear concept of when deadly force would be justified. The officer is taught to consider less drastic alternatives when there is no immediate need to use deadly force.

- Use of Force Liability. A segment on liability is incorporated to emphasize the consequences of the misuse of force, while also making it clear that an officer will have a qualified immunity if the force used is reasonable.

Based on its review of basic training, the Task Force found that police officers are adequately trained in the Basic Course for Police Officers in the use of verbal techniques, various items of defensive equipment, such as the use of the baton, and physical defensive tactics. Moreover, firearms training and requalification are adequately addressed through the Basic Course requirements and semi-annual requalification requirements issued pursuant to the Attorney General Directive. Periodic revisions made to the use of force curricula reflect refinements in the law or in officer strategies and techniques. While this Task Force is aware that curricula revisions are again underway to further stress the use of constructive force and to incorporate more verbal communication as a means of de-escalating a hostile situation, the Task Force nonetheless recommends that these efforts to improve use of force training continue in the future.

While New Jersey does have statutory provisions requiring

basic training for police officers, currently, there is no New Jersey statute requiring that a police officer receive in-service training. While some police departments in the state require in-service training, many do not. Bergen County is one county that does require in-service training for all police officers. For several years, that county has required that police officers complete 16 hours of in-service training annually. Statewide, the only required in-service training is for radar operations and firearms requalification. While annual firearms training is required in N.J.S.A. 2C:39-6j, an Attorney General Directive mandating semi-annual requalification augments the statutory requirement. The prescribed program established pursuant to Attorney General Directive consists of handgun requalification twice annually, under daylight conditions and night-firing conditions for handguns issued or authorized for use both on and off duty. The program also prescribes qualification requirements pertaining to shotguns, automatic weapons and semi-automatic weapons for those officers who are or might be required to carry an agency issued shotgun or an automatic or semi-automatic weapon in the course of their duties. The required qualification program also includes guidelines for classroom instruction and training. This training, to be conducted twice annually, is to consist of instruction in the use of force and an update of all relevant policies (state, county and agency policies), statutes, and court decisions. The program also requires law enforcement agencies to review semi-annually all of its firearms policies as

they pertain to warning shots; moving vehicles; removal of firearm from holster or display of firearm; surrender of firearm; disposal of animals; carrying of weapons, on and off duty; consumption of alcohol; use of prescription drugs; and covert operations.

To determine the status of in-service training nationwide, the New Jersey Law Enforcement Study Commission conducted a survey of all 50 states. Survey results indicate that 26 of 50 states legislatively mandate in-service training, exclusive of firearms re-qualification or other skill-oriented certification, such as radar or CPR, for police officers. The amount and type of training varied from state to state. The minimum number of hours required for this training ranged from 8 to 40 hours annually. In addition to the 26 states with mandatory in-service training programs, at least nine other states have instituted voluntary in-service training programs. The curriculum content for these courses, whether mandatory or voluntary, is generally optional or flexible. The state agency responsible for developing and administering police standards is generally responsible for developing and approving in-service training programs within the state.

Kansas is an example of one of those states surveyed that has a statutorily mandatory in-service training requirement. In satisfying the required 40 hours of in-service training, no more than 16 hours of training can be devoted to firearms training. While Mississippi has no state in-service training mandate, the

state's Police Officer Standards and Training Agency is commencing a voluntary in-service training program to address the continuing professional development of law enforcement officers. This 40-hour annual program will be phased in over the next five years.

Through its Standards for Law Enforcement Agencies program, the Commission of Accreditation for Law Enforcement Agencies, Inc. and its member organizations, including the International Association of Chiefs of Police, the National Organization of Black Law Enforcement Executives, the National Sheriffs' Association, and the Police Executive Research Forum, recommends mandatory in-service training.[44] The International Association of Directors of Law Enforcement Standards and Training (IADLEST), in its Model National Training Guidelines, has issued a similar recommendation. In general, these organizations recommend mandated annual retraining which covers firearms requalification, agency policy on the use of force, and the use of deadly force.

The need for continued firearms training to avoid civil liability for a violation of a person's constitutional rights was highlighted by the U.S. Supreme Court in Canton v. Harris.[45] The Court said that where city policy makers "know to a moral certainty" that their police officers will be required to use firearms to arrest fleeing felons and fail to train the officers

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[44] See note 4, supra, at 33-7.

[45] Canton v. Harris, 489 U.S. 381, 109 S.Ct. 1197, 103 L.Ed.2d 808 (1989).

on the limitations on the use of deadly force, this could be characterized as "deliberate indifference" to a person's constitutional rights. By extrapolation, this holding can be applied to the other force options, such as unarmed defense and baton tactics, because the use of these force options also can deprive a person of his or her constitutional rights.

While firearms are the predominant weapon involved in use of force training, there are other skills and techniques a police officer has access to and which should be carefully considered when reviewing training requirements. One such technique is verbal skills. It is this skill which the police officer uses most often.

In considering the type of in-service training needed for police officers, the Task Force agrees with a finding of the IACP/BJA National Law Enforcement Policy Center: "Civil rights litigation has made it abundantly clear that law enforcement agencies have a responsibility to ensure that police officers are adequately trained in the use of all weapons which they are permitted to carry on and off-duty." Police officers must be trained to respond appropriately to the various types of situations they will encounter on the street. Therefore, the officers must be trained in the use of a variety of equipment and techniques in order to respond properly to the situation at hand.

A need for continuing use of force in-service training involving not only firearms but other weapons as well is

illustrated by Parker v. District of Columbia.[46] In this case, a jury found the district liable for over $400,000 because it was deliberately indifferent to the officer's physical training program. The court on appeal noted that the record supported the jury's determination that the officer resorted to the use of his firearm to subdue Parker because the officer was unable physically to subdue Parker by less drastic means.

Recognizing the significance of verbal skills and communications in conjunction with police duties, emphasis in police training throughout the nation is being focused on development of a police officer's verbal skills. In every encounter an officer has with a citizen, whether related to a criminal activity or to a non-criminal activity, there is a verbal exchange between the officer and citizen. Over 90 percent of the encounters between a police officer and a citizen can be handled by verbal communication.[47] Communication skills are recognized as an effective force option for a police officer which, at times, can be more effective than other methods such as baton or the firearm.[48] Proficiency in the use of verbal skills as a force option can be acquired through training. A recommendation issued by the U.S. Department of Justice supports

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[46] Parker v. District of Columbia, 850 F.2d 708 (D.C. Cir. 1988), cert. denied, 489 U.S. 1065, 109 S.Ct. 1339, 103 L.Ed.2d 808 (1989).

[47] Thompson, G. J. and Stroud, M.J. (1984). Verbal Judo, Redirecting Behavior with Words.

[48] Clede, B. (1990). New Levels of Lethal Force. Law and Order.

this. In its report, Principles of Good Policing[49], the Department of Justice recommends that police departments incorporate in their in-service curricula training in verbal skills and negotiation as a means of resolving confrontational situations.

Due to the complexities of encounters police officers may be involved in, it is incumbent upon the officers to maintain proficiency in all types of skills and defensive equipment. This is particularly true for verbal skills, those skills which police officers use most frequently. However, when officers graduate from the police academy, there is no mandated retraining or requalification to insure continued proficiency in those skills. It is axiomatic that psycho-motor skills deteriorate when they are not exercised. Officers lacking confidence in their skills in verbal communication, unarmed defensive tactics or baton tactics have limited the force options available to them in resolving an encounter. Officers confident in such skills and tactics may be able to resolve the encounter by resorting to graduated levels of force. Continued training in these skills and all force options will assist the officers in preparing for and responding to the diversity of situations which may be encountered.

A joint study by the U.S. Department of Justice and the Colorado Law Enforcement Training Academy found that 86% of the

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[49] Principals of Good Policing: Avoiding Violence Between Police and Citizens. U.S. Department of Justice.

law enforcement departments polled considered overly aggressive behavior a result of lack of training. The study was undertaken to research and develop a training program which incorporates a system of violence reduction or intervention techniques. One factor documented from the study was that officers must have sufficient training and practice in all of the use of force techniques[50].

Police training is of critical importance in the control of police-community violence. According to a report, Principles of Good Policing, published by the U.S. Department of Justice, training in the "use of firearms is a key consideration [in the control of police community violence]. However, the training of police officers in general must go beyond the traditional practice of teaching a single response to complex situations. The focus should be on training a 'thinking police officer' who analyzes situations and responds in a manner based on a value system that is supported by organizational policy."

Following an extensive study on the use of force, the San Diego Police Department published a report which has received national attention. The study was based on a concern about the number of confrontations between police and citizens which concluded in violent outcomes. The report also analyzed what non-lethal force options were available to the officers. The research

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[50] Nicoletti, J. (1990). Training for Deescalation of Force. The Police Chief Magazine.

for this report included visits to 15 law enforcement agencies, including the Federal Bureau of Investigation, and forums held to obtain information from the public and from police officers. Based on this research, recommendations pertaining to training were issued. Some of these recommendations include police training in verbal skills; use of video firearms simulators to evaluate officer's judgment and discretionary skills; more police training in confrontation management; increased training in non-lethal tactics and in alternative uses of force; and police re-qualification quarterly with all defensive equipment.

In response to the need for continuing police training, the Department of Law and Public Safety has developed a police professionalism and cultural diversity awareness program for law enforcement officers. This program, which includes segments on police professionalism, managing cultural diversity, attitudes and prejudices, and police-community relations and communications, is currently underway throughout the state. To ensure that this program is offered to as many police departments as possible throughout the state, it is recommended that a detailed, systematic training plan and schedule be developed. In addition, the Division of Criminal Justice is currently developing lesson plans for police in-service training which will incorporate verbal communication skills and some of the less than lethal force options a police officer may have to resort to on the street. These lesson plans are being designed for training on a departmental level. Both of these programs stress police

verbal skills and communications with community members. In conjunction with these efforts to improve police communications and relations with the community, it is also recommended that a system be established to promote public awareness of the role of police. One means of achieving this would be through Division of Criminal Justice participation in quarterly League of Municipalities seminars and other seminars for local government officials and citizens. Efforts to regularly educate local government officials as to their responsibilities for police oversight would further the goal of improving the delivery of police services. Similarly, efforts to promote greater public awareness of the role of police would also help to reduce public distrust of law enforcement officers.

While some jurisdictions within New Jersey may provide in-service training other than that required by the Attorney General's semi-annual firearms requalification program, the Task Force believes that legislation mandating in-service training for all police officers and authorizing the Police Training Commission (PTC) to establish statewide in-service training requirements is needed. While a number of topics warrant ongoing training, the Task Force believes that issues involving use of force training are of critical importance. Although some training needs will vary from department to department or county to county, the Task Force believes that use of force training should be uniform throughout the state. Topics which should be considered for inclusion in the use of force curriculum are:

simulated firearms training; conflict resolution techniques; de-escalation of force techniques; development of verbal skills; and development of physical force defensive tactics.

The Task Force also joins with the New Jersey Law Enforcement Study Commission in recognizing that funding for law enforcement training is a major issue. A key factor limiting police departments from conducting ongoing in-service training programs is the cost of the program. Even when instruction is provided in-house, there are costs ancillary to the instruction. Departmental costs could involve salaries for officers attending the training session and for relief officers to continue police services to the community while other officers are being trained.

Based on a survey of states nationwide, at least 17 states provide some means of dedicated funding for law enforcement training through criminal or motor vehicle fines as penalty assessments. Ten of the 26 states with mandatory in-service training utilize such a mechanism to fund training activities. Seven states which do not mandate in-service training also utilize such a mechanism to fund training activities. For the most part, these dedicated funds are used to cover the administrative and operational costs of a state central training academy or the state agency responsible for establishing police standards. In four instances, dedicated funds are distributed to local law enforcement agencies to conduct training or to reimburse trainee expenses such as tuition, travel and salary.

Since funding is essential to assist police agencies develop

and conduct the recommended training, the Task Force concurs with the Law Enforcement Study Commission's recommendation that various stable, ongoing funding sources be considered for inclusion in the proposed legislation.

RECOMMENDATIONS

VIII. Legislation should be proposed mandating in-service training for all police officers and authorizing the Police Training Commission to establish in-service training requirements.

IX. Various funding means should be examined and considered for inclusion in the proposed legislation concerning in-service training.

X. Police Training Commission staff should be encouraged to continue to review and revise the use of force curricula to incorporate the latest legal and technical developments in the use of force, in particular the development of communication skills.

XI. The continued development and delivery of statewide training and public awareness programs dealing with cultural diversity and the role of the police officer should be encouraged, including Division of Criminal Justice participation in League of Municipalities seminars and other local government seminars to educate local government officials as to their police oversight responsibilities.

Training of Internal Affairs Officers

In August 1991, Attorney General Robert J. Del Tufo directed that all law enforcement agencies in this state "adopt and conscientiously implement" the "Internal Affairs Policy and Procedures"[51] developed cooperatively by the Division of Criminal Justice and the New Jersey State Association of Chiefs of Police.

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[51] "Internal Affairs Policy and Procedure," Police Management Manual, Chapter 5.

These detailed guidelines, prepared for inclusion in the Police Management Manual, provide basic standards and uniform procedures for handling citizen complaints and investigating allegations of police misconduct. Among other things, the "Internal Affairs Policy and Procedures" directs that:

- A formal internal affairs unit or function in each police agency;
- Police departments accept citizen complaints, including anonymous complaints, at any time;
- All complaints about police officer conduct be thoroughly and objectively investigated to their logical conclusions; and
- The county prosecutor be immediately notified in the event of any allegation of criminal misconduct by a police officer or whenever a firearms discharge results in an injury or death.

The handling of citizen complaints regarding police officers is a key factor in establishing and maintaining good community relations. Not only is it important for general relationships, it is critical in the area of police-community violence. One way for police administrators to become aware of incidents involving the use of force, or situations that might escalate into violent encounters, is through citizen complaints. In order for this to be effective, members of the community must feel free to make complaints against officers. Citizens and police alike must have some assurance that complaints will be objectively investigated and dealt with by the department.[52]

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[52] "Internal Affairs Policy and Procedures," Police Management Manual, Chapter 5.

The responsible investigation of citizen complaints and internal affairs matters is essential to ensure the integrity of the criminal justice system and to fortify public confidence in the system. Those policies and procedures that direct that all police departments designate a unit or function to handle citizen complaints and internal investigations, also designate that those officers assigned to the internal affairs function should be properly selected and adequately trained. However, the Task Force is aware that very few internal affairs officers receive specialized training.

The detailed "Internal Affairs Policy and Procedures" promulgated by the Attorney General directs that the internal affairs officer be familiar with proper investigative techniques and legal standards for both administrative proceedings as well as criminal proceedings. This is necessary to ensure that the evidence obtained will be admissible in the proper tribunal and the rights of the officer under investigation will not inadvertently be violated. Internal affairs officers should be trained not only in the elements of criminal law, court procedures, rules of evidence and use of technical equipment, but also in the disciplinary and administrative law process. Each internal affairs officer must be skilled in interviewing and interrogation, observation, surveillance and report writing. In essence, it is essential that experienced investigators be assigned to the internal affairs function.

Personnel assigned to conduct internal affairs

investigations must hold the police responsibility to the community and professional commitment above personal and group loyalties. Internal affairs personnel must have unquestioned integrity as well as the ability to withstand the pressure associated with complex and sensitive investigations. It is also recommended that personnel assigned to the internal affairs function reflect the citizenry of the community.

Because of the significance of the internal affairs function and the need to have properly trained officers assigned to that function so as to ensure the quality and fairness of investigations concerning improper use of force and other allegations of misconduct, this Task Force recommends that the Division of Criminal Justice develop standardized guidelines for internal affairs training. Such training should be made available to all officers assigned to an internal affairs unit or function. Moreover, the Task Force recommends that those guidelines set forth in the "Internal Affairs Policy and Procedures" be applied and utilized by law enforcement agencies statewide.

RECOMMENDATIONS

XII. The Division of Criminal Justice should develop standardized guidelines for internal affairs training. Such training should be made available to all officers assigned to an internal affairs unit or function.

CHAPTER THREE

INVESTIGATION OF COMPLAINTS OF EXCESSIVE FORCE

Law enforcement is committed to providing services that are fair, effective, and impartially applied. To accomplish their often difficult tasks, law enforcement officers have been given unique responsibilities and authorities by our society. One such authority is the capacity to use the force that is reasonably necessary to accomplish their law enforcement duties, within limitations set by statute, court decisions and department policy.

Law enforcement officers make critical, split second decisions concerning the use of force, often under extremely adverse circumstances. The correct decision will ultimately rely on the individual officer's exercise of sound judgement. The development of the capacity to exercise such judgement is the goal of law enforcement's rigorous recruitment and selection process, its regimen of basic and in-service training, and effective supervision.

There is general agreement that recruitment and selection, training and supervision are the primary means of preventing misconduct in the area of use of force. However, when an allegation that an officer has used excessive force does arise, there must be an objective and consistent procedure for investigating these actions. All officers are of course subject to disciplinary action and possible criminal proceedings for violating their oath and trust. Yet, the public too often

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perceives that police misuse of force is commonplace, and that complaining about such misuse would only be ignored at best, and invoke active retaliation at worst. At the same time, many police officers also believe that complaints of excessive force are not impartially investigated. It is their perception that officers so accused cannot get a "fair shake," with investigative outcomes shaped more by public pressure than the facts of the case.

The intensity of public reaction to incidents of excessive force was well illustrated during the public hearings on the Rodney King incident, which involved a videotaped beating of a civilian by three uniformed officers of the Los Angeles Police Department in the presence of a sergeant and other officers. The incident elicited such public concern and outcry that the Independent Commission on the Los Angeles Police Department was created to examine all aspects of the law enforcement structure in Los Angeles that might have caused the incident or contributed to the problem of the use of excessive force by law enforcement. The Independent Commission concluded that no area of police operations received more adverse public comment or revealed more public frustration than the department's handling of excessive force complaints against members of its force.[53]

The effectiveness of law enforcement is dependent upon public approval and acceptance of police authority. There can be

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[53] Report of the Independent Commission on the Los Angeles Police Department, July 1991, p. xix.

no doubt that citizen confidence in the integrity of the police increases when police departments implement meaningful and effective procedures for reporting and investigating complaints of excessive force. This confidence engenders community support and facilitates the cooperation vital to the department's ability to achieve its goals.

An effective framework for handling use of force complaints also permits police officials to monitor officers' compliance with department policies and procedures. An appropriate internal investigation policy will ensure a fair and consistent avenue of redress for citizen complainants. Equally important, an internal investigation policy will ensure fairness and due process protection to officers accused of using excessive force.

Toward this end, police agencies should have formal procedures to accept from any citizen all complaints of alleged excessive force by an officer of that department. Following a thorough and impartial examination of all of the available facts, the officer should be either exonerated or held responsible for the alleged misconduct.

Recognizing this seemingly clear statement of the conditions that should exist, the Task Force was convinced that there were several issues that needed to be addressed in order to move in that direction.

- The Task Force needed to research existing standards and procedures for internal investigations of excessive force allegations and compare those to current

acceptable police management practices.

- The Task Force needed to examine the methods and procedures for conducting investigations of serious incidents to determine if the appropriate levels of oversight and intervention are in place.
- The Task Force needed to review the consistency and fairness of procedures governing the status and duties of law enforcement officers under investigation for allegations of excessive force.
- The Task Force needed to study the reporting and record keeping mechanisms on use of force complaints to determine the available data on the current problem.

The Task Force relied upon numerous sources of information, including individuals with recognized experience, a survey of local law enforcement agencies, and research publications to assist in compiling recommendations in this area.

Prior to completion of the Task Force's work, the Police Bureau of the Division of Criminal Justice, Department of Law and Public Safety, completed Chapter 5 of the Police Management Manual entitled "Internal Affairs Policy and Procedures" (hereinafter Chapter 5). The Police Management Manual is an ongoing project of the Police Bureau to deliver guidance and assistance to police executives in operating their agencies. The Police Management Manual began in 1985 with the release of Chapters 1 and 2, "Background Investigation" and "Model Rules and Regulations." Chapter 3, "Guide to Developing a Written

Directive System," was released in 1987. Chapter 4, "The Property and Evidence Function," was published in 1989. Each chapter of the Police Management Manual has been distributed to every municipal law enforcement executive in the State upon its completion.

On August 21, 1991, after notifying the Task Force, Attorney General Robert J. Del Tufo released Chapter 5. At that time, he directed law enforcement agencies throughout the State to "adopt and conscientiously implement" the standards and procedures in that document for investigating allegations of police misconduct in the area of excessive use of force allegations.[54] On the same day, he advised County Prosecutors of the manner in which they should proceed when notified, as required by Chapter 5, of an allegation of criminal misconduct by an officer or of an incident involving the discharge of a firearm that results in injury or death.[55]

Observations

The Task Force reached two broad conclusions with respect to a "break of confidence" among segments of both the public and law enforcement regarding the issue of excessive force. First, the Task Force recognizes that public confidence in law enforcement officers is jeopardized by the perception that officers who use excessive force may be shielded from the appropriate consequences

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[54] Letter from Robert J. Del Tufo to Chief Executives, August 14, 1991.

[55] Memorandum from Robert J. Del Tufo to County Prosecutors, August 21, 1991.

of such actions. Second, the Task Force recognizes that the ability of law enforcement officers to perform their duties can be significantly hindered by the fear that even a proper use of force may be presumed abusive, and that judgment of such police action will not be conducted in an atmosphere of objectivity.

In addition, the Task Force has also identified several specific problems in the current system for investigating and reacting to allegations of excessive force. The recommendations of the Task Force in this area are intended to correct the observations and problem areas outlined below. Moreover, the Task Force believes that by properly addressing these specific issues, important steps can be taken to address the general break of confidence noted above.

A. Lack of uniform standards and procedures

When the Task Force began its deliberations, there were no uniform, consistently applied standards or procedures for accepting, investigating, acting upon or reporting the final disposition of complaints alleging misconduct by law enforcement officers. Uniform standards and procedures are necessary to ensure the consistency and accountability essential for fair and objective treatment of all persons involved in the complaint process. Uniformity and predictability in the complaint process are the foundation of a truly impartial review of excessive force allegations. Perceptions of bias and impropriety are fueled when successive investigations are handled differently, opening up to question the reasons and motivations for each step in the

investigative process. The best interests of citizens and law enforcement officers are served by uniform complaint review procedures.

B. Status of law enforcement officers pending outcome of an excessive force allegation

Uniformity was also absent in existing policies regarding those law enforcement duties an officer should be allowed to perform while the subject of an active investigation into an excessive force allegation. Existing statutes and regulations do not provide adequate guidance in this area. The lack of consistency in this area fosters the public perception that decisions on such matters are not impartial, as well as feeding the perception of law enforcement officers that such decisions may be guided by public reaction to a given incident, rather than by an objective assessment of the facts. Further yet, inconsistency within a given police department may stigmatize an officer under investigation if his interim duties are different than those assigned to other officers involved in prior incidents.

C. Inadequate reporting and record keeping

Many police departments fail to maintain adequate records of complaints of misconduct and their subsequent disposition. This contributes to general dissatisfaction with the system. Individual citizens who file complaints and are not informed of the results of an investigation may assume the complaint was ignored. Law enforcement officers who are publicly and

unjustifiably charged, but quietly and privately cleared, may conclude that they and their fellow officers are subject to a system that allows citizens to wilfully file false complaints without the prospect of consequence.

The absence of accurate and complete records and reports also undermines the ability of responsible officials to identify and take action to deal with individual and general problems in their early stages. Without complete information, it is difficult for the law enforcement commander to recognize that a particular officer may have a tendency to use excessive force, or that a particular citizen has a proclivity for filing false and frivolous allegations. With complete and accurate information, law enforcement officials can identify problems early and address them with the appropriate discipline, training and procedural review.

D. Inadequate outside oversight of serious cases

New Jersey Statutes provide for a structure in which the "appropriate authority," a civilian, is responsible for the overall performance of a municipal police department.[56] In addition, the county prosecutor and the Attorney General, by virtue of the Criminal Justice Act of 1970, have oversight over municipal law enforcement.[57] Nevertheless, the public perception is that investigations of complaints involving the use of force are handled only within the accused officer's department, with no

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[56] N.J.S.A. 40A:14-118.

[57] N.J.S.A. 52:17B-97, et seq.

checks or balances by other segments of the criminal justice system. This perception can serve to undermine the public's confidence in the impartiality of the system, or in other words, its ability to police itself. Procedures for oversight, review, and when necessary, intervention into the investigatory process by outside authorities will ensure the integrity of investigations, and will also bolster the public's confidence in the process.

RECOMMENDATIONS

After extensive review and discussion of Chapter 5 of the Police Management Manual, "Internal Affairs Policy and Procedures," and the Attorney General's accompanying memoranda, the Task Force concludes that implementing the policy and procedures for handling complaints outlined in those documents will do much to remedy the problems identified and outlined above. The Task Force endorses Chapter 5 and, with the exceptions and additions noted below, incorporates it as a part of its final recommendations to the Attorney General. The Task Force recommends that each law enforcement agency be required to adopt and implement the following procedures.

XIII. Every police agency should establish uniform procedures for accepting and investigating excessive force allegations.

A uniform approach to dealing with allegations of excessive force by law enforcement officers is necessary to maintain confidence in the system. Providing uniform guidelines for the handling of complaints will ensure effective investigations as

well as fairness to both law enforcement officers and citizens.[58] Well-established, written policies and procedures based on statewide standards will eliminate the appearance of arbitrariness. Such procedures will fix the responsibility and accountability for internal investigations with the appropriate individual or unit, and provide a level of consistency sufficient to assure both the public and the police that the process is thorough and fair. The Task Force therefore recommends that all police agencies be required to adopt and implement uniform policies and procedures for accepting and investigating excessive force allegations consistent with the models in Chapter 5, "Internal Affairs Policy and Procedures."

XIV. All citizen reports alleging police officer misconduct should be accepted and appropriately recorded.

A uniform and open process for receiving complaints from the public is crucial to the establishment of a credible investigatory system. Recognizing this, the Task Force recommends that all citizen reports alleging police misconduct must be accepted when presented regardless of the time of day or day of the week, and that no effort to make such a report should be rejected based on a lack of timeliness in reporting or because it is initially deemed unfounded. Further, the Task Force recommends that an appropriate record be maintained for every report taken of an allegation of excessive force.

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[58] Police Executive Research Forum, Police Agency Handling of Citizen Complaints, "A Model Policy Statement," 1981, Foreword.

The Task Force recommends that police agencies be required to adopt and implement the procedures for accepting complaints, including anonymous reports, outlined in Chapter 5,[59] and to use a report form similar to the model form provided in Chapter 5,[60] with the following qualification. If the complainant's Social Security number is requested as part of the complaint form, the complainant must be informed that disclosure is not mandatory, and that the information may be used to verify the identity of the complainant.[61] In addition, during the follow-up investigation of a complaint, a trained internal affairs officer should inform a complainant about the possible consequence of making statements which the complainant does not believe to be true.

XV. All reports involving the possible use of excessive force or the discharge of a firearm resulting in injury or death should be thoroughly investigated and the appropriate notifications made.

Any citizen complaint or internal report involving criminal misconduct, the suspected use of excessive force, or the discharge of a firearm resulting in injury or death, must be investigated pursuant to the agency's internal affairs policy. The Task Force recommends that each agency be required to follow the procedures found in Chapter 5 for investigating these serious

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59 "Internal Affairs Policy and Procedures," Police Management Manual, Chapter 5, 1991, pp. 10-11, 36-37.

60 Ibid. at p 47.

61 5 U.S.C.A. § 552a note, "Privacy Act of 1974."

incidents.[62] As others have noted, incidents that fall into this category require uniform and thorough investigation because "the integrity of a police department and its relationship to the community is often measured by the professionalism and impartiality which it brings to investigations of police uses of force in general and deadly force in particular."[63]

The Task Force endorses the provision of Chapter 5 that calls for immediate notification of the county prosecutor in the event of any allegation of criminal misconduct by a police officer, or whenever a firearms discharge results in injury or death.[64] The Task Force also endorses the provision of the Attorney General that "...all investigations which involve the use of force by law enforcement officials which have resulted in death or serious bodily injury shall be immediately reported by the County Prosecutor to the Division of Criminal Justice for review, oversight, consultation, and participation as necessary."[65]

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62 "Internal Affairs Policy and Procedures," pp. 13-15, 41-44.

63 "Concepts and Issues Paper," Use of Force, International Association of Chiefs of Police, February 1989, p.6.

64 "Internal Affairs Policy and Procedures," pp. 13, 30.

65 Memorandum from Robert J. Del Tufo to County Prosecutors, August 21, 1991.

XVI. Police agencies should adopt uniform standards to determine the status of an officer's duties pending the outcome of an investigation. These standards should include a presumption in favor of administrative reassignment in cases involving use of force which result in death or serious bodily injury.

The Task Force debated at length the issue of what law enforcement duties an officer should be allowed to perform during the pendency of an excessive force investigation. The status of officers who are the subject of investigation is currently governed by N.J.S.A. 11A:2-13 to 11A:2-22, N.J.A.C. 4A:2-1.1 to 4A:2-4.3, and N.J.S.A. 40A:14-147 to 40A:14-151. These statutes and regulations address disciplinary actions, suspensions and terminations of civil service employees and non-civil service municipal law enforcement officials, but do not provide adequate guidance as to when administrative reassignment or suspension is appropriate.

The Task Force endorses consideration of the factors listed in Chapter 5 in determining the appropriate administrative status of an officer under investigation.[66] This would require that at least one of the following conditions be met before an officer is suspended:

1. The officer is unfit for duty;
2. The officer is a hazard to any person if permitted to remain on the job;
3. An immediate suspension is necessary to maintain

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[66] "Internal Affairs Policy and Procedures," p. 11.

safety, health, order or effective direction of public services; or

4. The officer has been formally charged with a crime of the first, second, or third degree, or a crime of the fourth degree on the job or directly related to the job.

In addition to the factors listed above, the Task Force recommends adding the following presumption: "In cases involving the use of force which results in death or serious bodily injury, there shall be a presumption in favor of administrative reassignment unless there are significant reasons for imposing a suspension, including but not limited to indictment, or other substantial evidence of guilt."

The Task Force recognizes that public safety issues must be balanced against the right of law enforcement officers not to be subject to unnecessary or unjustified suspensions from duty when under investigation. In addition, the Task Force recognizes that an inflexible rule governing the administrative reassignment of an officer under investigation would not be feasible for departments or agencies of all sizes.[67] Deciding whether or not to administratively reassign an officer under investigation also requires consideration of factors not expressly listed in Chapter 5, but relevant to the officer's fitness, the danger posed by the officer's presence and the need to suspend in order to maintain

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[67] Complaint Review Policy, International Association of Chiefs of Police, January 1989, p. 2.

safety and effective public services. Such factors include the weight of the evidence against the officer, community reaction to the incident and the size of the department. Until final disposition of the investigation or charges, the appropriate administrative status of an officer under investigation will turn on all of these factors. However, establishing a presumption in favor of administrative reassignment will ensure that officers who may have used unjustified force are removed from daily contact with the community. At the same time, such a policy will protect officers from disparate treatment and unjustified suspensions. Implicit in the proposed language is the fact that in most instances the return of an indictment will be sufficient grounds for suspending an officer pending final disposition of the investigation.

XVII. Reports, investigations and dispositions of excessive force complaints should be subject to specified reporting and record keeping requirements.

Mandatory reporting and record keeping is critical to the maintenance of a credible investigatory system. Accurate and timely reporting of use of force incidents is the essential first step in the process of monitoring and controlling the misuse of force.[68] The public perception that the current system does not adequately address allegations involving the use of excessive force in law enforcement cannot be remedied unless accurate records are maintained and appropriate information is made

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[68] "Concepts and Issues Paper," p. 6.

available to the public. Therefore, the Task Force recommends that (i) complaints alleging the use of excessive force, (ii) the status of investigations of the excessive use of force or discharge of a firearm, and (iii) the final disposition of all investigations, be subject to mandatory reporting and record keeping requirements.

As stated previously, the Task Force endorses the reporting requirements found in Chapter 5 and the accompanying documents which provide for the reporting of specific allegations to the county prosecutor and the Attorney General. Further, the Task Force recommends that, upon request, the complainant and the officer should be informed of the status of an ongoing investigation. Upon final disposition, the officer and the complainant should be advised of the results and of the basis for the disposition, to the extent possible given the necessary confidentiality of grand jury proceedings and law enforcement investigative reports.

The Task Force also endorses the provisions of Chapter 5 that require law enforcement agencies to compile and make available to the public an annual report summarizing, without identifying individuals involved, the types of complaints received and their dispositions.[69] The Task Force recommends that all law enforcement agencies be required to submit this annual report to the appropriate county prosecutor. The county prosecutor is already required by statute to submit an annual

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[69] "Internal Affairs Policy and Procedures," p. 36.

report to the Attorney General. The county prosecutor should include in this annual report a summary of excessive use of force complaints on a countywide basis. This will ensure additional general oversight of the investigatory process and permit the identification of potential problems that should be addressed through training or other involvement by the prosecutor.

The confidentiality of investigation reports, disciplinary proceedings, and grand jury proceedings is important to the privacy of officers investigated. In addition, this confidentiality is essential to ensure continued willingness of individuals to provide critical information. Therefore, the Task Force endorses the provisions of Chapter 5 concerning the confidentiality of such records.[70] In addition, the Task Force recommends that these provisions be supplemented to explicitly bar release of an officer's home address. The Task Force also recommends that guidance be included to help police departments determine the circumstances under which it is appropriate to release other information, such as the complainant's criminal record, previous allegations against the officer, and previous allegations by the complainant.

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[70] Ibid., p. 46. Section F, paragraph 5, provides that all disciplinary hearings shall be closed to the public unless the defendant officer requests an open hearing. This provision is in accord with the provision of the "Open Public Meetings Act" which excepts matters of employment, evaluation of performance, and disciplining of public officers from the Act. See N.J.S.A. 10:4-12(b)(8). See also Della Serra v. Borough of Mountainside, 196 N.J. Super. 6, 9-13 (App. Div. 1984); (State Police case).

XVIII. Uniform procedures should be implemented to provide for external oversight and intervention, when necessary, on certain allegations of excessive force.

In addition to internal investigations performed by specially trained officers within the police department, the Task Force recognizes that some degree of oversight, and at times intervention, into the investigatory process by outside authorities is necessary to ensure the objectivity and integrity of excessive force investigations. Uniform standards and procedures for review by agencies outside of the law enforcement agency sustaining the complaint will ensure that the process is neither consciously or unconsciously affected by the predispositions or biases of officials who directly or indirectly supervise the officer being investigated. This will help ensure the integrity of the process while enhancing public confidence in law enforcement's ability to impartially and objectively investigate the actions on its own.

As previously stated, the Task Force recommends that municipal police officials or officials in other countywide law enforcement agencies be required to notify the County Prosecutor immediately upon receipt of a complaint or report involving either possible criminal conduct on the part of an officer, or an officer's discharge of a firearm which results in injury or death.[71] The Task Force also endorses the measures of Chapter 5 and the Attorney General's memorandum of August 21, 1991, which

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[71] Ibid., pp. 13, 25, 30, 42.

specifically provide for intervention and oversight of such investigations by the County Prosecutor and the Division of Criminal Justice, Department of Law and Public Safety.

When notified of incidents involving suspected criminal conduct or the discharge of a firearm resulting in injury or death, the Prosecutor, at his or her discretion, will either assume responsibility for, or direct and supervise, or monitor the progress of the investigation until the matter is brought to final disposition. Further, in instances involving the discharge of a firearm or other use of force resulting in injury or death, the County Prosecutor will immediately notify and consult with the Division of Criminal Justice. As deemed appropriate by the Director, the Division of Criminal Justice should assist, participate in, or assume responsibility for the investigation and disposition of the matter.

Grand jury consideration of cases involving the possible use of excessive force represents an independent community consensus on whether the use of force was in fact justified under the circumstances. The Task Force endorses the standard set by the Attorney General for grand jury consideration of incidents which may involve use of excessive force. Therefore it recommends that "...a matter which involves factors indicating the possible use of unjustified force by a law enforcement officer which resulted in death or serious bodily injury should ordinarily be presented to a grand jury for review and disposition, especially in cases

involving factual disputes."[72] Providing for grand jury consideration of these matters should foster public confidence in the objectivity of the decision making process, as the ultimate decision on whether to indict will be made independent of law enforcement officials. Establishing uniform requirements for those conditions under which cases are to be presented should also reduce the apprehension and stigma law enforcement officers associate with grand jury investigations, as the process will, for the most part, be uniform and anticipated.

After researching and considering the option of establishing additional civilian oversight mechanisms to ensure the integrity of the investigative process, the Task Force recommends oversight and intervention by the county prosecutors, the Division of Criminal Justice, and grand juries as outlined above. The option of establishing civilian review boards was debated at length. The Task Force considered various reports, including: American Civil Liberties Union, On the Line, "Police Brutality and its Remedies" (April 1991); International Association of Civilian Oversight of Law Enforcement (IACOLE), Compendium of International Civilian Oversight Agencies (1989); and New York Civil Liberties Union, Police Abuse: The Need for Civilian Investigation and Oversight, (1990). However, it was ultimately agreed that it would be inappropriate to recommend civilian review boards without first attempting to address the

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[72] Memorandum from Robert J. Del Tufo to County Prosecutors, August 21, 1991.

inadequacies of the system through existing agencies which currently possess the capacity and authority to take whatever action might be appropriate. In this regard, the Task Force also considers it significant that each police agency in this State is, under current law, subject to policy oversight by civilians outside the police agency and answerable directly to the electorate or elected officials.[73]

Monitoring implementation

The Task Force believes that its central concerns can be remedied within the existing governmental structure by implementing the standards and procedures outlined above. The provisions mandating uniform procedures for accepting and investigating allegations of excessive force, and the provisions calling for intervention and oversight of investigations by impartial bodies will ensure that the investigation process is fair and objective. These provisions will ensure that officers accused of using excessive force will be given a "fair shake" and that their actions will be given a full and impartial review based on the facts. Of equal importance, these provisions will enhance the public perception of the investigation process as an

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[73] See N.J.S.A. 40A:14-118; N.J.S.A. 52:17B-4 and 52:17B-7. For example, pursuant to N.J.S.A. 40A:14-118, rules and regulations concerning the government of the police force and the discipline of its members must be promulgated by the "appropriate authority," and if a chief of police is established, the chief must be made "directly responsible" to the "appropriate authority" regarding the day-to-day operations of the police force. The "appropriate authority" is defined as the mayor, manager, or other appropriate executive or administrative officer, such as a full-time director of public safety.

impartial one, thus fostering confidence that the criminal justice system can adequately police itself. Relying on the proposed levels of investigation and consultation by internal affairs units, county prosecutors, the Division of Criminal Justice, and grand juries will also ensure that investigations are conducted by persons with both the expertise to do so in a thorough manner and the authority to discipline and prosecute in instances where the use of force is unjustified.

In order to insure conscientious compliance with the recommended measures, the Task Force suggests that the Attorney General adopt a specific schedule for implementation of the uniform policies and procedures for dealing with complaints of excessive force. The Task Force further suggests that the Attorney General conduct a review of the implementation process according to that schedule, and prepare a report of his findings. If, after a review of the Attorney General's findings, the Task Force concludes that the recommendations contained herein have not been successfully implemented, the Task Force recommends that the option of civilian review boards be re-evaluated.

A proposed schedule for compliance is shown below. It is assumed that implementation will begin upon release of the report of the Task Force.

Immediately	•	Each law enforcement agency shall promptly identify the officer(s) who have been selected to conduct internal investigations

and notify the county prosecutor of the officer(s) chosen.

6 months

- Each county prosecutor shall notify the Attorney General that agencies within their jurisdiction have complied with the selection of an internal affairs officer.

- The internal affairs training program to be developed by the Attorney General shall be completed.

1 year

- Law enforcement agency internal affairs officers shall be trained in the program developed by the Attorney General.

- Each County Prosecutor shall report the following to the Attorney General:

  (1) whether each department has filed complete and timely annual reports summarizing the complaints filed and their dispositions;

  (2) whether the Prosecutor or department head, after evaluating the reports, perceives any deficiencies in the

investigative process which should be addressed;

(3) the total number and type of complaints received in the county and the dispositions thereof; and

(4) a summary of any complaints from the public, law enforcement officers or other public officials concerning the investigatory process.

- The Attorney General shall report to the public a summary of the information received from the prosecutors.

CHAPTER FOUR

LAW GOVERNING THE USE OF FORCE

Society has an interest in the vigorous enforcement of its criminal laws.[74] These laws are intended "to forbid, prevent, and condemn conduct that unjustifiably inflicts or threatens serious harm to individual or public interests," and "to insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection."[75]

None of these purposes can be furthered unless law enforcement officers fulfill their duty "to be on the lookout for infractions of the law and to use due diligence in discovering and reporting them, and in the proper case, arresting the perpetrator and lodging and prosecuting a proper complaint."[76] For this reason we train, arm, authorize and require law enforcement officers to use reasonable force when necessary.[77]

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[74] Note, Criminal Procedure -- Search and Seizure -- Law Officer's Use of Deadly Force Against Nondangerous Fleeing Felon Held Violative of Fourth Amendment -- Tennessee v. Garner, 471 U.S. 1 (1985), 17 Seton Hall L. Rev. 758, (1987).

[75] N.J.S.A. 2C:1-2a.(1)-(2).

[76] State v. Donovan, 132 N.J.L. 319, 321 (Sup. Ct. 1945).

[77] See Graham v. Connor, ___ U.S. ___. 109 S. Ct. 1865, 1871 (1989) ("the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it"); State v. Williams, 29 N.J. 27, 38 (1959) (it is the "officer's right, indeed his duty, to use all force reasonably necessary to overcome resistance").

In tense and uncertain circumstances involving grave personal danger,[78] we expect them to make split-second decisions so that society may remain secure.[79]

Society has an equally significant, countervailing interest in seeing that the criminal law is not enforced so as to cause additional harm of the very sort it is designed to prevent -- harm to the individual and public interests that are implicated when any person "unjustifiably" coerces, threatens, restrains, injures or kills another.[80] Statutory and constitutional provisions defining when and how much force may be used in law enforcement distinguish "justifiable," appropriate and desirable, law enforcement conduct, from "unjustifiable," inappropriate and harmful, law enforcement conduct.[81] These rules, together with those that define the extent of a law enforcement officer's duty to act and the extent of a suspect's duty to submit, embody difficult and critical public policy judgments. They state society's determination of the proper balance of its interests in preventing crime, apprehending criminals, protecting the public

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78 Graham v. Connor, ___ U.S. ___, 109 S. Ct. 1865, 1872 (1989).

79 State v. Williams, 29 N.J. 27, 36-41 (1959).

80 See N.J.S.A. 2C:11-3, 2C:11-4, 2C:12-1, 2C:12-3, 2C:13-2, 2C:13-3.

81 See N.J.S.A. 2C:3-7; U.S. Const., amend. XIV; Graham v. Connor, ___ U.S. ___, 109 S. Ct. 1865 (1989); Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694 (1985).

safety and preserving individual rights.[82]

Law enforcement officers must operate within the confines of the rules implementing this delicate balance. "Every police officer has an inherent duty to obey the law and to enforce it. [Both are] essential to the preservation of a free society."[83]

Thus, while law enforcement officers are "armed and required to act,"[84] they are expected to use only authorized force.[85] Use of force that exceeds the limits set by statutory or constitutional rules, like neglect of duty, exposes officers to both criminal and civil liability.[86] And, while some individuals may ask the question, "Does society condone police brutality in exchange for getting criminals off the streets?,"[87] officers who seek to perform their duties within the limits of their authority are well aware that the law condemns and sanctions any

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[82] Graham v. Connor, ___ U.S. ___, 109 S. Ct. 1865, 1871 (1989); Tennessee v. Garner, 471 U.S. 1, 9-13 (1985); State v. Williams, 29 N.J. 27, 36-41 (1959).

[83] State v. Stevens, 203 N.J. Super. 59, 65 (Law Div. 1984).

[84] State v. Williams, 29 N.J. 27, 36 (1959).

[85] See Graham v. Connor, ___ U.S. ___, 109 S. Ct. 1865, 1871 (1989); State v. Cohen, 32 N.J. 1, 9 (1960).

[86] See generally Graham v. Connor, ___ U.S. ___, 109 S. Ct. 1865, 1871 (1989); Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 1701 (1985); State v. Cohen, 32 N.J. 1, 9 (1960); State v. Williams, 29 N.J. 27, 36-43 (1959); State v. Stevens, 203 N.J. Super. 59 (Law Div. 1984); Lear v. Township of Piscataway, 236 N.J. Super. 550 (App. Div. 1989); State v. Donovan, 132 N.J.L. 319 (Sup. Ct. 1945).

[87] Ricker, Behind the Silence: Does Society Condone Police Brutality in Exchange for Getting Criminals Off the Street," ABA Journal, July 1991 at 45.

"unreasonable" police conduct.

Given the importance of statutes governing the use of force to both law-abiding officers and law-abiding citizens, the Task Force studied and evaluated current law to determine whether statutory reform was required. Current law was measured against three standards deemed essential to the adequacy of statutory law addressing this critical issue.

A. Clarity -- Statutes defining when and how much force is authorized must be clear and understandable.

To permit adequate training of officers who "are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving,"[88] statutes should clearly identify, not obfuscate, the judgments they must make.

Because the public's respect for the law and its officers is dependent upon the fairness of the law and the lawfulness of the conduct of public officers,[89] the law governing the use of force must be comprehensible to the public.

B. Consistency with Constitutional Standards -- Statutes describing when and how much force may be used in furtherance of law enforcement should be consistent with constitutional rules.

Consistent standards will avoid confusion, better protect the rights of citizens and better protect officers and those who supervise and train them from civil liability.[90]

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[88] Graham v. Connor, ___ U.S. ___, 109 S. Ct. 1865, 1872 (1989).

[89] Hayes v. Hudson County Board of Freeholders, 116 N.J. Super. 21, 26 (App. Div. 1971) (quoting People ex rel. Keenan v. McGuane, 13 Ill. 2d 520, 150 N.E.2d 168, 177 (1958)).

[90] See generally Tennessee v. Garner, 471 U.S. 1 (1985); Davis v. Mason County, 927 F.2d 1473 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 275 (1991).

C. Criminal Liability Commensurate with Culpability -- The criminal law should distinguish between officers who intentionally injure or kill, without justification, and officers who cause injury o r death because they believe, albeit unreasonably, that performance of their duty or preservation of their life requires the use of force.
Because officers are under a legal compulsion to enforce the law and perform this duty under difficult circumstances requiring split-second judgments, the law should provide some mitigation when an officer commits a crime because of a culpable error in judgment.[91]

Current statutes do not clearly meet these standards, and the Task Force recommends reform. Statutes defining the right and amount of force that may be used in law enforcement must be clarified. Inconsistencies between New Jersey statutes and constitutional rules describing authorized force should be reconciled. And, statutes should be revised to clearly provide appropriate reductions in degree of criminal liability for an officer who commits an offense because of a reckless or negligent belief that circumstances justifying his conduct exist.

The reasons for and the precise nature of the reform suggested in each area are explained more fully in the remainder of this chapter. Draft statutes that would accomplish these reforms are included as an Appendix.

A. Clarity

Current statutory rules describing the circumstances under which law enforcement officers are authorized to use force and deadly force are found in Chapter 3 of Title 2C, New Jersey's Code of Criminal Justice, entitled General Principles of

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91 See State v. Williams, 29 N.J. 27 (1959).

Justification. Conduct that would be criminal under other circumstances, is "justifiable" and not punishable if it is consistent with rules set forth in Chapter 3.[92] Prior to the adoption of the Code in 1979, the Legislature had never attempted to set forth rules to guide the use of force: the rules had been developed by the courts alone on a case-by-case basis.[93]

While the Legislature's goal was to "establish . . . standards both as to the right to use force and as to the amount of force which may be used,"[94] the statutes enacted are too detailed and too complex. As one Commentator explains:

> Unfortunately the law of justification is complicated and thus the Code provisions are complicated. Often one transaction may involve claims of justification under several sections . . . . The detailed provisions of each justification are slightly different and in situations where more than one is applicable each must be consulted separately. Finally, each section itself is complicated. Most include separate requirements for the use of force and deadly force and exceptions to and limitations on these requirements. The total effect is much like that of a tax code. A section should be read carefully several times before one assumes that anomalous results are produced by it.[95]

The Task Force agrees with this assessment of the complexity of the Code's justification defenses. It does not, however,

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[92] See, e.g., N.J.S.A. 2C:3-7 (use of force to effect an arrest, prevent an escape, prevent the commission of a crime).

[93] Final Report of the New Jersey Criminal Law Revision Commission, Vol. II: Commentary at 78-79 (1971) [hereinafter cited as Commission Report].

[94] Commission Report, supra note 20 at 79.

[95] J. Cannel, New Jersey Code of Criminal Justice, Comment to Chapter 3, at 124 (1992) [hereinafter Cannel].

concur with the implicit suggestion that defenses such as these, which provide the rules governing when and how much force officers may use, need be this complex.

The importance of the public interests served by vigorous law enforcement and injured by "unlawful" law enforcement demands rules that are clear enough to be applied by officers who, when confronted with danger, are "forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving."[96] In such dangerous and volatile circumstances, when there is "little time for detached reflection,"[97] no matter how thorough their training, we cannot expect law enforcement officers to apply a body of law that is so complex and intricate as to warrant comparison to a tax code.[98]

Further, the law must be comprehensible to the public. When the public perceives a particular use of force as excessive or a particular failure to act as dereliction of duty, the law must be sufficiently clear to allow the public to distinguish between an officer who should be punished and a law that should be

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[96] Graham v. Connor, ___ U.S. ___, 109 S. Ct. 1865, 1872 (1989).

[97] See Brown v. United States, 256 U.S. 335, 343 (1921) (where Justice Holmes criticizes the complexities of the retreat rule and notes that there is little time for detached reflection at the point of a knife).

[98] See Tennessee v. Garner, 471 U.S. 1, 20 (1985) (discussing the importance of clear standards); Cannel, at 124.

reformed.[99]

Accordingly, the Task Force examined the provisions of Chapter 3, judicial decisions and scholarly works with the goal of eliminating unnecessary and confusing complexity without significantly altering the standards expressed in current law.

1. Detailed Requirements, Exceptions and Limitations That Can Be More Clearly Stated as General Requirements.

Much of the complexity of current law is attributable to its reliance on detailed and specific rules, each with numerous exceptions and limitations, to describe the amount of and circumstances under which force may be used in furtherance of law enforcement. Most of these rules can be subsumed in, and more comprehensibly stated as general principles. For the most part, the detailed rules and exceptions limit the use of force in two ways:

1. The force used must be necessary to protect person or property from an unjustifiable threat or to accomplish a lawful duty, such as effecting an arrest or preventing crime;[100] and

2. The force used must be reasonable under the circumstances -- e.g., deadly force is permitted to avoid threats of death or serious bodily harm but not permitted to avoid threats to property alone.[101]

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[99] Hayes v. Hudson County Board of Freeholders, 116 N.J. Super. 21, 26 (App. Div. 1971) (quoting People ex rel. Keenan v. McGuane, 13 Ill. 2d 520, 150 N.E.2d 168, 177 (1958)).

[100] See N.J.S.A. 2C:3-4a., 2C:3-6a., b.(1), 2C:3-7a., b.(1)(a).

[101] See N.J.S.A. 2C:3-4b.(2); 2C:3-6b.(2),(3)(c), and d.; 2C:3-7b.(2); see also State v. Kelly, 97 N.J. 178, 198 (1984); State v. Fair, 45 N.J. 92-93 (1965); State v. Zellers, 7 N.J.L. 265, 293 (Sup. Ct. 1823); see generally P. Robinson, Criminal Law Defenses secs. 121, 131-135, 141-142 (1984).

General standards such as these are more easily understood and applied than the numerous specific rules, with accompanying exceptions and qualifications, currently employed in Chapter 3.

For example, N.J.S.A. 2C:3-7 currently grants authority to use deadly force in arrest only when the arrest is for commission or attempted commission of homicide, kidnaping, sexual assault, sexual contact, arson, robbery, or burglary of a dwelling.[102] A series of exceptions are then employed to limit this authority to instances where the perpetrator poses an imminent threat of deadly force to the officer or another, or the force is necessary to prevent the crime, or the force is necessary to prevent the perpetrator's escape.[103]

This complex approach seems roughly designed to authorize the use of deadly force in arrest only when such extreme force is necessary to accomplish the arrest of a suspect who would pose a substantial risk of serious bodily harm if not apprehended immediately.[104]

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[102] N.J.S.A. 2C:3-7b.(2)(c).

[103] N.J.S.A. 2C:3-7b.(2)(d)(i)-(iii).

[104] See Commission Report, supra note 20 at 91 (explaining that the list of crimes includes those that either demonstrate that the arrestee has used force against a person or that immediate apprehension is necessary). The list, however, both excludes some crimes that involve use of force -- e.g., some forms of aggravated assault, N.J.S.A. 2C:12-1 -- and includes some crimes that may involve no serious threat of bodily harm demonstrating a need for immediate apprehension -- e.g., some forms of sexual contact, N.J.S.A. 2C:14-3. See also Tennessee v. Garner, 451 U.S. 1, 14 (1985) (describing similar difficulties generated by relying on the distinction between felonies and misdemeanors to identify instances in which deadly force is appropriate).

Similarly, N.J.S.A. 2C:3-7 currently prohibits any use of force in arrest unless the officer "makes known the purpose of the arrest, or reasonably believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested."[105] This specific rule and its exceptions are merely examples of the application of the requirement that force is not authorized unless and until it is necessary -- i.e., when a demand to submit to arrest will suffice, the use of force is not necessary.

By setting forth this single illustration of the application of the requirement of "necessary" force, the statute obscures rather than clarifies the straightforward message that force is not justified unless necessary at the time and in the amount used. The reality is that no detailed list, however comprehensive, could adequately account for the variety of factual situations that arise in individual cases and impact on the basic decisions the officer must make -- is force necessary and how much force is necessary. Illustrations not only complicate the matter but also may mislead by suggesting that factors not identified are irrelevant.[106]

The consensus of the Task Force is that general standards

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[105] N.J.S.A. 2C:3-7b.(1)(a).

[106] For example, the statute does not direct an officer not in uniform to identify himself as an officer when doing so will avoid the need for using force. An officer focusing on the precise rules set forth in N.J.S.A. 2C:3-7, rather than the general rule that force should be used only when necessary, could easily determine that identification is irrelevant.

will provide better guidance than the current maze of detail included in the provisions of Chapter 3. The following standards are recommended:

> Use of non-deadly force for law enforcement purposes should be justified when immediately necessary and "reasonable under the circumstances" to accomplishment of the officer's lawful duty.
>
> Use of "deadly force" for law enforcement purposes should be justified when immediately necessary:
>
> to effect arrest of a person who would pose a substantial risk of serious bodily injury to any person if apprehension were delayed; or
>
> to prevent the commission of a crime involving a substantial risk of immediate death or serious bodily harm to any person.

These standards are generally consistent with but far more comprehensible than those set forth in Chapter 3.[107]

Because law enforcement officers are also called upon to defend themselves, others and property against imminent threat of harm, the provisions of Chapter 3 governing use of force for these purposes should be simplified in the manner discussed

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[107] To the extent that the standard for permissible use of deadly force focuses on the severity of the harm threatened by the suspect rather than the crime the suspect has committed, it imposes a more rational and understandable limitation than that imposed by current law. Furthermore, this standard is consistent with that which law enforcement officers are obligated to follow as a matter of constitutional law. See Tennessee v. Garner, 471 U.S. 1 (1985). The standard for use of non-deadly force is somewhat more restrictive than current law in that it requires that the force be both necessary and "reasonable under the circumstances." This restriction, however, is also consistent with constitutional limitations on the use of non-deadly force. See Graham v. Connor, ___ U.S. ___, 109 S. Ct. 1865 (1989).

above.[108] Further, the statutes defining the defenses of self, others and property should be combined in order to avoid the need for confusing cross-references, exceptions, and overlap between these defenses.[109]

2. Specific Policy Judgments That Cannot Be Stated In General Standards.

Several provisions of Chapter 3 have special significance that cannot be adequately expressed by general standards limiting justifiable force to necessary and reasonable force. These provisions promote specific public policy judgments concerning the use of force.[110] By either authorizing force that would otherwise be prohibited as unnecessary or unreasonable, or prohibiting force that would otherwise be authorized, these provisions significantly affect the amount of violence that will be tolerated in furtherance of individual or public interests.

Examples of such public policy exceptions include the following:

In order to prevent escalation of the use of force in

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[108] See N.J.S.A. 2C:3-4 (use of force in self-protection), 2C:3-5 (use of force for the protection of other persons), 2C:3-6 (use of force in defense of premises or personal property).

[109] The complexities of the cross-references are best demonstrated by the fact that proper application of a major limitation on the use of force in self-defense depends on a reference to a provision in the defense of property that does not even exist. See N.J.S.A. 2C:3-4b.(1)(b)(ii), 2C:3-6; see also State v. Holmes, 208 N.J. Super. 480 (App. Div. 1986) (discussing the significance of a cross-reference to the self-protection justification included in the statute authorizing use of force for the protection of third persons).

[110] See generally 2 P. Robinson, Criminal Law Defenses secs. 131(e), 142(f) (1984).

encounters with police officers,[111] current law does not authorize the use of force to resist an unlawful arrest unless the officer employs unlawful force. N.J.S.A. 2C:3-4b.(1)(a).

In order to allow vigorous enforcement of the law,[112] officers are authorized to use force to defend themselves even if they could avoid personal harm by failing to perform their duty. N.J.S.A. 2C:3-4b.(2)(b)(ii).

In order to give special recognition to the right to be free from attack in one's dwelling,[113] a person in a dwelling may use deadly force against an intruder even if the intruder does not threaten death or serious bodily harm. N.J.S.A. 2C:3-4c.(2)(a).

It is important to recognize that exceptions such as these can easily be altered to encourage or discourage the use of force in the protection of individual and societal interests.

For example, to further reduce the number of forceful encounters with police officers, this State could, as others have suggested,[114] authorize the use of force to resist an unlawful arrest only if the force employed by the officer threatens death or serious bodily injury. Or, if the public were willing to sacrifice vigorous enforcement of the criminal law in order to avoid forceful encounters between citizens and the police, the

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[111] See State v. Mulvihill, 57 N.J. 151, 155-58 (1970); Model Penal Code Sec. 3.04, Comment 19 (Tent. Draft No. 8, 1958).

[112] See Commission Report, supra note 20 at 87. In State v. Williams, 29 N.J. 27 (1959), the Supreme Court explained the rule as "founded in reason and public utility, for few men would quietly submit to arrest if in every case of resistance the party empowered to arrest was obliged to desist and leave the business undone." Id. at 39 (quoting Bullock v. State, 65 N.J.L. 557, 572 (E. & A. 1900)).

[113] This is the obvious intent of amendments to N.J.S.A. 2C:3-4 and 2C:3-6 adopted in Chapter 120 of the Laws of 1987.

[114] Model Penal Code sec. 3.04. The draft statutes included in the Appendix clarify, but do not significantly alter, the current rule.

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law could absolve officers of the duty to arrest persons who resist or could direct officers not to pursue suspects.[115] Alternatively, if the public is unwilling to relieve officers of the duty to pursue persons who do not comply with lawful orders but is nonetheless interested in limiting dangerous chases and encounters,[116] the law could be revised to impose strict sanctions for non-compliance with orders to halt.[117]

While the Task Force has not attempted to resolve these difficult questions of public policy, it must emphasize that such judgments are now included in the provisions of Chapter 3 and in laws defining the obligations of citizens and public officers. The judgments incorporated in these laws play a significant role in determining when and the amount of force that will be employed in encounters between citizens and police officers.

The Task Force recommends that the Attorney General consider whether it is appropriate to solicit public opinion on these

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[115] See State v. Williams, 29 N.J. 27, 38-39 (1959) (cautioning against adoption of a rule that would encourage officers to default in their duty to capture).

[116] There is evidence that investigatory stops by police officers on street patrol are an effective tool in reducing crime. See Dix, Nonarrest Investigatory Detentions In Search and Seizure Law, 1985 Duke L.J. 849, 852-53 (1985). Experience indicates, however, that such stops, on occasion, lead to flight and pursuit.

[117] As the Supreme Court recently noted, "Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged." California v. Hodari, ___ U.S. ___, 111 S. Ct. 1547, 1551 (1991). The New Jersey Legislature has moved toward this approach in increasing penalties for flight by auto following a signal to stop. See N.J.S.A. 2C:29-2 (offense of resisting arrest and eluding).

precise issues by requesting legislative hearings, by submitting public questions to the voters or by some other means.

3. Clarification of the Rules Defining Appropriate Force Accomplished by Distinguishing Justified Conduct From Conduct That the Actor Reasonably Believes is Justified.

The provisions of Chapter 3 currently define the circumstances under which a person may use force in terms of the actor's "reasonable belief." The frequent repetition of the "reasonable belief" language adds complexity to the statutory provisions and raises difficult questions of statutory construction.[118] Thus, in order to more clearly state the rules describing appropriate use of force, the Task Force recommends treating the issue of "reasonable belief" in a separate, single statutory provision.

There is an additional, and perhaps more important, benefit to be derived from distinguishing force that is in fact consistent with the rules from force that an officer reasonably, but mistakenly, believes is justified. In the first instance the conduct is proper under the law, and it is proper for all persons in similar situations in the future to use force. In the second instance the use of force was an understandable, reasonable mistake, and, while the person who made the reasonable mistake should not be punished, force should not be used under similar circumstances in the future. By providing separate defenses -- a

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[118] See, e.g., State v. Holmes, 208 N.J.Super. 480, 485-88 (App. Div. 1986) (determining the proper application of the reasonable belief requirement in a case involving defense of another person).

justification defense for proper conduct and an excuse defense for a person who makes a reasonable mistake -- the law reserves the label "justified" for conduct that is proper.[119] As a result, the public and officers alike will be able to distinguish a use of force that is approved from a use of force that is not. When an officer, because of a reasonable mistake, shoots an unarmed person, all will understand that the law does not authorize such conduct.

B. Consistency with Constitutional Standards

In a 1985 decision rendered in the case of Tennessee v. Garner,[120] the United States Supreme Court declared the demise of a common law rule permitting the use of deadly force whenever necessary to effect the arrest of a fleeing felon. Balancing the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion,"[121] the Court concluded that the use of deadly force is not sufficiently productive as a means of effective law enforcement or as a means of bringing an offender to justice, to justify taking the life of the offender.[122] On this basis, the Court held that it was constitutionally unreasonable to employ deadly force to apprehend

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[119] See generally 1 P. Robinson, Criminal Law Defenses secs. 24, 25, 27(e), 32(c),(d).

[120] Tennessee v. Garner, 471 U.S. 1 (1985).

[121] Tennessee v. Garner, 471 U.S. 1, 8 (1985) (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

[122] Tennessee v. Garner, 471 U.S. 1, 9-11 (1985)

a felon who poses no threat of serious physical harm.[123] The Court also held, however, that it would be constitutionally reasonable to use deadly force when necessary to prevent the escape of a suspect, if there is probable cause to believe -- either because the suspect has threatened the officer with a weapon or committed a crime involving the infliction or threatened infliction of serious bodily harm -- that failure to effectuate the suspect's immediate arrest would pose a threat of serious physical harm to the officer or others.[124]

As discussed above, N.J.S.A. 2C:3-7 authorizes the use of deadly force to effect an arrest on a different basis. Rather than stating a general rule concerning the danger posed by the suspect, the statute lists crimes -- homicide, kidnaping, sexual assault, sexual contact, robbery, arson, burglary of a dwelling or an attempt to commit any of those crimes -- and authorizes the use of deadly force if necessary to prevent the escape of a person who has committed an enumerated crime.[125]

While section 2C:3-7 is a more reasonable version of the common law rule invalidated in Garner, by focusing on the crime committed rather than the danger posed by the suspect it nonetheless permits the use of deadly force in some cases in

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123 Tennessee v. Garner, 471 U.S. 1, 11 -12 (1985)

124 Tennessee v. Garner, 471 U.S. 1, 11 -12 (1985)

125 N.J.S.A. 2C:3-7b.(2)(c)-(d)(iii).

which Garner would not.[126] Conversely, by limiting the use of deadly force in arrest to a specific list of crimes, section 2C:3-7 prohibits deadly force in some cases where Garner would permit it.[127] Thus, under current law, officers are required to follow inconsistent rules.

Although these inconsistencies have been reconciled in guidelines issued by the Attorney General, the Task Force nonetheless recommends amending statutory law to conform with the Garner standard. The current inconsistency creates an intolerable level of confusion where clear guidance is needed. More importantly, an officer who has acted in accordance with constitutional limitations should not be subject to punishment for a crime under the laws of this State, and the laws of this State should not authorize use of force that is inconsistent with

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[126] For example, under Garner, the use of deadly force to prevent the escape of a person who had committed burglary of a dwelling would not be deemed reasonable unless there was probable cause to believe that the suspect had inflicted or threatened to inflict serious bodily harm during the course of or flight from the commission of the offense. Tennessee v. Garner, 471 U.S. 1, 23-24 (1985). Other crimes enumerated in N.J.S.A. 2C:3-7b.(2)(c), may or may not be committed in a manner that satisfies the Garner standard. For example, some conduct prohibited as sexual assault and criminal sexual contact involve no threat or infliction of serious physical harm. See N.J.S.A. 2C:14-2, 2C:14-3.

[127] For example, under Garner an officer would be justified in using deadly force if necessary to apprehend a person who had inflicted serious bodily injury. See Tennessee v. Garner, 471 U.S. 1, 11 (1985). Under New Jersey law the crime could be aggravated assault or attempted murder. See N.J.S.A. 2C:11-3, 2C:5-1, 2C:12-1b.(1). As aggravated assault is not one of the crimes listed in 2C:3-7, the statute seems to require the officer to determine, at risk of criminal liability, whether there is reason to believe that the crime is attempted murder.

the constitutional rights of its citizens.[128] Finally, as discussed in section A. above, general standards of the sort set forth in Garner provide clearer and more meaningful guidance than the detailed rules set forth in section 2C:3-7.

For the same reasons, the Task Force recommends amendment of N.J.S.A. 2C:3-3 and 2C:3-7 to incorporate constitutional restrictions on the use of non-deadly force. In 1989, in Graham v. Connor,[129] the Supreme Court held that any force used in arrest, deadly or non-deadly, violates the Fourth Amendment unless the force employed is reasonable under the circumstances.[130]

It is important to stress that amending New Jersey's statutory law to incorporate the constitutional restrictions on the use of force will not make every violation of a constitutional right a crime. As discussed above, an officer who reasonably believes that circumstances justifying the use of force exist has a complete defense to any form of criminal liability. A belief is reasonable unless the actor is reckless

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[128] Law enforcement officials training or directing officers to adhere to Code standards that allow force prohibited under Garner and Graham, as well as the municipalities and counties that employ the officials, risk civil liability based on "deliberate indifference" to the rights and safety of the public evidenced by inadequate training. See, e.g., Davis v. Mason County, 927 F.2d 1473 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 275 (1991).

[129] Graham v. Connor, ___ U.S. ___, 109 S. Ct. 1865 (1989).

[130] Graham v. Connor, ___ U.S. ___, 109 S. Ct. 1865, 1871-72 (1989).

or negligent in holding the belief.[131] For purposes of the criminal law, negligence requires a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation."[132]

In contrast, civil liability for excessive force will attach unless the officer's conduct is objectively reasonable.[133] Thus, by eliminating inconsistencies between statutory and constitutional rules defining when and how much force is authorized, the Legislature can provide officers with consistent guidance on appropriate force without improperly equating standards for criminal and civil liability.

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[131] A reasonable belief is one that is neither recklessly nor negligently held. N.J.S.A. 2C:1-14j.

[132] N.J.S.A. 2C:2-2b.(4).

[133] See Graham v. Connor, ___ U.S. ___, 109 S. Ct. 1865, 1872 (1989). An officer's "objective 'good faith' -- that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment -- may be relevant to" a defense of qualified immunity in a civil action for a violation of Fourth Amendment, 42 U.S.C.A. sec. 1983. Id. at 1873, n.12 (1989) (declining to address the exact scope of the qualified immunity defense in excessive force cases). The same standards of liability and qualified immunity would likely apply in an action filed under the New Jersey Tort Claims Act. See Lear v. Township of Piscataway, 236 N.J. Super. 550, 553-54 (App. Div. 1989) (equating standards of liability and qualified immunity under 42 U.S.C.A. sec. 1983 and the New Jersey Tort Claims Act in a case alleging excessive use of force in restraint of a pretrial detainee); Hayes v. Mercer County, 217 N.J. Super. 614, 621-23 (App. Div. 1987) (equating standards of liability and general qualified immunity under 42 U.S.C.A. sec. 1983 and the New Jersey Tort Claims Act); see also Kirk v. City of Newark, 109 N.J. 173, 186-87 (1988) (discussing qualified immunity as a defense to a claim under 42 U.S.C.A. sec. 1983 alleging insufficiency of probable cause for arrest).

C. Criminal Liability Commensurate with Culpability

Under current law, an officer who purposely or knowingly causes death because he mistakenly believes that the use of deadly force is necessary either to protect the life of an innocent citizen, or to effect the arrest of person who has just committed a homicide, or to preserve his own life from a threat encountered in the line of duty, has a complete defense if his mistake is reasonable.[134] If the officer's belief is reckless or even negligent, however, the officer is liable for murder.[135]

Recognizing "the possible consequences [of this rule] to public safety officers," the Supreme Court recently commended the "issue to the consideration of the Legislature."[136] The Task Force has considered these consequences and recommends reform. As discussed above, officers, unlike private citizens who are free to turn away, are under a legal compulsion to act and must make split-second decisions in circumstances that are tense and fraught with danger. An officer acting in furtherance of his lawful duties who believes, albeit unreasonably, that the

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[134] The law enforcement and self-defense justifications are available to a person who reasonably but mistakenly believes that the use of force is necessary. N.J.S.A. 2C:3-4, 2C:3-7.

[135] This assumes a purposeful or knowing homicide. N.J.S.A. 2C:3-11. If the mistaken actor is only aware of a substantial risk that his conduct will cause death, then the actor is reckless as to killing and reckless manslaughter is the crime. See N.J.S.A. 2C:2-2, 2C:11-4. In either case, there is no defense or mitigation available to an actor who unreasonably believes the force he uses is justified. See State v. Bowens, 108 N.J. 622 (1987).

[136] State v. Bowens, 108 N.J. 622, 634-35 (1987).

circumstances justify his conduct is simply not as blameworthy as an officer who kills or injures without such a belief.

Prior to the adoption of the Code of Criminal Justice in 1979, such officers were not subject to punishment for murder. Officers who killed because of a "good-faith but mistaken estimate of [their] right and duty to do so" or "an erroneous decision as to the need to kill" were guilty of manslaughter not murder.[137]

The explanation for this rule of mitigation was as follows:

> Police officers are not volunteers. They are armed and required to act to enforce the law. They may err in their judgment and exceed their authority in the sense that they misjudge the need for extreme measures or their right to resort to them. Yet, where the purpose is to comply with duty, it would be unreasonable to impose the measure of criminal responsibility applicable to the citizen whose involvement does not originate in a legal compulsion to act and who is free to turn away.
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> . . . .
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> . . . We return to the proposition that the offense of an officer so motivated is in essence a culpable error of judgment made in the stress of an encounter he did not invite.[138]

As the Supreme Court has recently noted, the Legislature's intent and purpose in eliminating a mitigation of this sort for law

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[137] State v. Williams, 29 N.J. 27, 36, 38-39 (1959). The common law mitigation was more liberal than the one proposed here. An officer who used more force than necessary was completely excused from liability unless the force was so excessive as to reveal "an utter disregard of the rights of the offender." Id. at 42. An officer who killed due to use of excessive force of that nature received a mitigation to manslaughter. Id.

[138] State v. Williams, 29 N.J. 27, 36, 43 (1959).

enforcement officers are far from clear.[139]

The Legislature did retain the analogous common law rule of passion/provocation, which provides a much broader mitigation for private citizens who unnecessarily kill when provoked -- for example, by physical confrontation, threat of violence or present or past attack against themselves, relatives or close friends.[140] In comparison,[141] it seems quite unjust -- especially since the only offense in this State punishing a person who negligently injures another is simple assault -- to deny a mitigation to an officer who believes, albeit recklessly or negligently, that circumstances encountered in the performance of his duties

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[139] See State v. Bowens, 108 N.J. 622, 630, 634-35.

[140] See, e.g., State v. Pitts, 116 N.J. 580, 604-06 (1989) (victim's insulting remarks, exchange of pushes and shoves, and victim's announcement that he was going to get his gun deemed adequate provocation); State v. Coyle, 119 N.J. 194, 225-26 (1990) (evidence that defendant after heated argument with the victim, killed the victim in an effort to protect his lover, the victim's wife, was sufficient to establish "adequate provocation" in a case where defendant repeatedly shot victim; evidence that victim had for a long period of time subjected his wife to abuse was also independently adequate); State v. Bishop, 225 N.J. Super. 596, 605 (App. Div. 1988) (evidence that defendant who stabbed a victim after entering a brawl in which no one else was armed but in which his nephew was being victimized was sufficient to establish adequate provocation); see generally State v. Mauricio, 117 N.J. 402, 414 (1990) (listing causes deemed to be sufficiently provocative).

[141] See State v. Williams, 29 N.J. 27, 42-43 (1959) (explaining the rule providing a mitigation for an officer who uses wanton excessive force in the performance of his duties as required by the "fair analogy" and "parity of considerations" between such an officer and a private citizen who acts under provocation).

require the use of justified force.[142]

Accordingly, the Task Force proposes a mitigation under which a law enforcement officer who has made a negligent mistake would have a complete defense to any crime other than one that required negligence as to any element -- for example, negligent injury with a deadly weapon. An officer whose mistake was reckless would have a complete defense to any crime other than one requiring recklessness or negligence as to any element -- for example, negligent injury with a deadly weapon or reckless manslaughter.[143]

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[142] While it would be defensible to extend this mitigation for mistake to private citizens, as the Supreme Court did under pre-Code law in State v. Powell, 84 N.J. 305 (1980), recent decisions on provocation/passion manslaughter indicate that this is not necessary. Although an honest but unreasonable belief in the need to use justified force does not in itself provide a mitigation, State v. Pitts, 116 N.J. 580, 604-05 (1989), a defendant who is provoked by battery or threats of serious harm will receive a mitigation based on passion/provocation. See, e.g., State v. Coyle, 119 N.J. 194, 224-26 (1990); State v. Pitts, 116 N.J. at 605-06; State v. Bishop, 225 N.J. Super. 596, 604 (App. Div. 1988). Given these judicial decisions on provocation, if the Legislature were to provide a mistaken justification defense for civilians it would be necessary to revise the law of provocation to avoid inconsistency and overlap. Such a revision is far beyond the scope of the charge given to this Task Force. Further, a significant majority of the members of the Task Force believe that private citizens, who unlike officers are under no legal compulsion to use force, have less need for mitigation based on mistaken use of force, State v. Williams, 29 N.J. 27, 36 (1959). However, three members of the Task Force do not share this view.

[143] The approach is similar to that advanced in the Model Penal Code and initially proposed by the New Jersey Criminal Law Revision Commission. See Model Penal Code sec. 3.09(2); Commission Report, supra note 20 at 82-83, 94-95. Several jurisdictions have followed the Model Penal Code on this point. See, e.g., Ark. Code Ann. sec. 5-2-614(1); Del. Code Ann. tit. 11, sec. 470(a); Hawaii Rev. Stat. sec. 703-310(1); Ky. Rev. Stat. Ann. sec. 503.120; Me. Rev. Stat. Ann. tit. 17A, sec.

This narrow mitigation for officers who believe, albeit unreasonably, that they are required to act in the performance of their duties is important to ensure that they, like private citizens, are punished for a crime that is consistent with their culpability.[144] Further, the mitigation is necessary to properly distinguish among officers. Current law improperly equates the seriousness of a crime committed by an officer who makes a grave error in judgment with the seriousness of the crime committed by an officer who kills or injures without a belief in the need to inflict serious injury. While both deserve punishment, they do not deserve the same punishment.

RECOMMENDATIONS

Laws defining when and how much force may be used in law enforcement, together with those that define the extent of a law

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10(3); Neb. Rev. Stat. sec. 28-1414(2); N.D. Cent. Code sec. 12.1-05-08; Guam Crim. & Corr. Code sec. 7.96(b). Others provide a mitigation from murder to manslaughter. See, e.g., Ill. Ann. Stat. ch. 38, para. 9-2; 18 Pa. Cons. Stat. Ann. sec. 2503(b). Others provide a special manslaughter offense that applies to persons who unnecessarily kill while resisting unjustified aggression. See, e.g., Fla. Stat. Ann. sec. 728.11; Miss. Code Ann. sec. 97-3-31; Okla. Stat. Ann. tit. 21, sec. 711(3); Wis. Stat. Ann. sec. 940.05.

[144] If there is concern that this mitigation will be too easily invoked, it could be addressed, as it is elsewhere in the Code, by requiring a defendant to establish his entitlement. See, e.g., 2C:2-8d. (intoxication defense must be established by clear and convincing evidence); 2C:2-12b. (entrapment defense must be established by a preponderance of the evidence). The burden of proving this mitigation, which does not negative an element of the offense, could be shifted to the defendant. See Patterson v. New York, 432 U.S. 197 (1977). By parity of considerations, however, if defendants are required to establish this mitigation, then it would seem appropriate to require defendants to establish the grounds for a mitigation based on passion/provocation.

enforcement officer's duty to act and the extent of a suspect's duty to submit, embody difficult and critical public policy judgments. They state society's determination of the proper balance of its interests in preventing crime, apprehending criminals, protecting the public safety and preserving individual rights. Given the importance of statutes governing the use of force, to both law-abiding officers and law-abiding citizens, the Task Force recommends the following reform.

A. Clarity

Current statutory rules governing when and how much force may be used by law enforcement officers are too complex and technical to be applied, as they must be, under tense, uncertain and rapidly-evolving circumstances. Current detailed rules and exceptions should be replaced with general comprehensible standards of the sort set forth in Appendix A.

Current statutory rules define appropriate force in terms of the officer's reasonable belief. This causes confusion between conduct that is consistent with the rules and conduct that an officer reasonably, but mistakenly, believes is consistent with the rules. Issues of appropriate force and reasonable belief should be separated to ensure that both the public and other officers understand the distinction between conduct that is justified and appropriate and conduct that, although inappropriate, is excused due to reasonable mistake.

Current law includes separate defenses for self-defense, defense of others and defense of property. To eliminate confusing cross-references and to avoid unnecessary repetition these defenses should be combined.

B. Consistency with Constitutional Standards

Statutory provisions describing when and how much force may be used in furtherance of law enforcement are inconsistent with controlling constitutional standards. In order to ensure that New Jersey law neither authorizes force that violates the constitutional rights of its citizens nor punishes its officers for the use of force that is constitutionally permissible, statutory law should be revised to conform with constitutional

standards.

C. Criminal Liability Commensurate with Culpability

Current law does not distinguish between officers who injure or kill, without justification, and officers who cause injury or death because they believe, albeit unreasonably, that performance of their duty or preservation of their life requires the use of force. In recognition of the fact that officers are under a legal compulsion to enforce the law and perform this duty under difficult circumstances requiring split-second judgments, statutes should be revised to provide for appropriate reductions in degree of criminal liability when an officer commits an offense because of a reckless or negligent belief that circumstances justifying his conduct exist. An analogous mitigation, passion/provocation, is provided for private citizens.

D. Public Policy Judgments

As noted above, the proper formulation of the laws we have reviewed involves difficult questions of public policy concerning the proper balance of the interests in preventing crime, apprehending criminals, protecting the public safety and preserving individual rights. For this reason the Task Force recommends that the Attorney General consider soliciting additional public opinion on the following issues:

1. Should the right to use force to resist an unlawful arrest be limited to instances where the force employed threatens serious bodily injury.

2. Should law enforcement officers be absolved of the duty to arrest persons who resist or flee.

3. Should the law be revised to impose strict sanctions for non-compliance with orders to halt or submit to arrest.

E. Attorney General Guidelines

As in the past, the Attorney General should revise guidelines governing the use of force to reflect changes in the law.

F. Training

Training programs should be revised, as they have been in the past, to keep pace with changes in the law.

APPENDIX A

Chapter 3. GENERAL PRINCIPLES OF JUSTIFICATION

PROPOSED AMENDMENTS RELEVANT TO USE OF FORCE BY LAW ENFORCEMENT OFFICERS

Section

2C:3-1 Justification and Excuse Affirmative Defenses; Civil Remedies Unaffected; Liability for Causing Circumstances Justifying or Excusing Conduct.

2C:3-3 Execution of Public Duty.

2C:3-4 Use of Force in Defense of Self, Others or Property (Combines 2C:3-4, 2C:3-5 and 2C:3-6).

2C:3-7 Use of Force in Law Enforcement.

2C:3-9 Mistaken Use of Force.

2C:3-11 Definitions.

2C:3-1. Justification and Excuse Affirmative Defenses; Civil Remedies Unaffected; Liability for Causing Defense Conditions.

a. The justification and excuse defenses provided in this chapter are affirmative defenses.

b. A justification or excuse defense under this chapter does not abolish or impair any remedy available in a civil action based upon the same conduct.

c. Notwithstanding the provisions of this chapter, a person is liable for an offense if, acting with the culpability required for the commission of that offense, he causes conditions that would otherwise constitute a defense to the offense.

2C:3-3. Execution of Public Duty.

a. Except as provided in subsections b. and c. of this section, conduct is justified when it is reasonable under the circumstances and immediately necessary to accomplish a duty or function required or authorized by:

(1) The law defining the duties or functions of a public officer or the assistance to be rendered to such officer in the performance of his duties;

(2) The law governing the execution of legal process;

(3) The judgment or order of a competent court or tribunal;

(4) The law governing the armed services or the lawful conduct of war; or

(5) Any other provision of law imposing a public duty.

b. The use of deadly force is not justifiable under this section unless expressly authorized by law.

c. The other sections of this chapter govern the use of force upon or toward the person of another for any of the purposes dealt with in such sections.

2C:3-4 Use of Force in Defense of Self, Another or Property. (Replaces former 2C:3-4, 2C:3-5 and 2C:3-6)

a. An actor's use of force, other than deadly force, against another person is justified when:

(1)(a) The person is using or is about to use unjustified force against the actor or a third person; or

(b) The person, by unjustifiably entering, remaining on, damaging or taking, is or is about to interfere with property or premises that are in the possession or under the control of the actor or a person on whose behalf he acts; and

(2) The force the actor employs is reasonable in relation to, and immediately necessary to protect against, the bodily harm or interference with property or premises threatened.

b. An actor's use of deadly force against another person is justified when:

(1) The person is using or is about to use unjustified force against the actor or a third person; and

(2) The use of deadly force is immediately necessary to protect the actor or the third person against

(a) death or serious bodily harm, or

(b) a threat of bodily harm from a person who has unlawfully entered and who unlawfully remains in a dwelling.

c. **Special Rules.** (1) The use of deadly force by an actor other than a public officer using lawful force in the performance of his duties is not "immediately necessary" if:

(a) The actor can avoid all risk of bodily harm to himself and the third person by

(i) complying with a demand to abstain from action he has no legal duty to take,

(ii) surrendering personal property or premises to a person acting under an honest claim of right the person has made known to the actor, or

(iii) retreating, unless he is in his dwelling or the dwelling of the third person and the threat is posed by a person who is not a cohabitant; or

(b) The third person would be required to comply, surrender or retreat pursuant to subsection c.(1)(a) if he were defending himself, and the actor has not attempted to cause the third person to do so.

(2) Except as provided in paragraph (1) of this subsection, no person is required to avoid harm threatened by unjustified conduct by refraining from lawful conduct or the performance of a legal duty or by taking action he has no legal duty to take.

2C:3-7. Use of Force in Law Enforcement. (CHANGES NOT SHOWN)

a. A law enforcement officer's use of force, other than deadly force, against another person is justified if the force employed is reasonable under the circumstances and immediately necessary to the lawful performance of a duty, including but not limited to conducting an investigation or search, effecting an arrest of the person, preventing the person's escape from the custody of an officer or a detention facility, preventing the person's commission of an offense, or bringing under control an unlawful or dangerous situation in which the person is involved.

(2) A law enforcement officer's use of deadly force against another person is justified when immediately necessary

(a) to effect a lawful arrest, if the person against whom the force is employed would pose a substantial risk of death or serious bodily harm to any person if apprehension were delayed;

(b) to prevent the commission of a crime, if the person against whom the force is employed is about to commit a crime involving a substantial risk of immediate death or serious bodily harm to any person, or

(c) to prevent the person's escape from a facility or institution for confinement of persons who have been charged with or convicted of a crime.

b. A private citizen's use of force, other than deadly force, against another person is justified if the force employed is reasonable under the circumstance and immediately necessary to effect a lawful citizen's arrest of the person.

2C:3-9. Excuse or Mitigation for Mistaken Belief (NEW)

a. Excuse for Reasonable Mistake. If an actor's conduct is not justified, but he reasonably believes that circumstances justifying his conduct under this chapter exist, the actor is excused and has a complete defense to any offense.

b. Mitigation for Unreasonable Mistake.

(1) If the conduct of a public officer acting in the performance of his duties is not justified, but the officer recklessly believes that circumstances justifying his conduct under this chapter exist, the officer is excused from liability for any offense other than an offense requiring recklessness or negligence as to any element.

(2) If the conduct of a public officer acting in the performance of his duties is not justified, but the officer negligently believes that circumstances justifying his conduct under this chapter exist, the officer is excused from liability

for any offense other than an offense requiring negligence as to any element.

2C:3-11. Definitions. (SUBSTANTIAL REVISION: Changes Not Shown)

In this chapter, unless a different meaning plainly is required:

a. Conduct is "unjustified" and an actor acts "unjustifiably" if his conduct, including confinement or possession, satisfies the objective elements of an offense and is not justified under the provisions of this chapter. The terms do not include the conduct of a law enforcement officer effecting an unlawful arrest, unless the officer employs more force than necessary to effect the arrest.

b. "Deadly force" means force that causes death or serious bodily harm or creates a substantial risk of causing death.

c. "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being the person's home or place of lodging.

d. "Serious bodily harm" means bodily harm which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ or which results from an aggravated sexual or sexual assault involving the use or threatened use of force or a deadly weapon.

e. "Bodily harm" means physical pain, or temporary disfigurement, or impairment of physical condition, or the harm of confinement, restraint, sexual assault or sexual contact.

f. The term "force" shall have its ordinary meaning and shall include all conduct involving or threatening bodily or serious bodily harm. Phrases such as use of force "against another person" and "against the actor of a third person" shall include force directed at property or premises when that force also involves or threatens bodily or serious bodily harm.

APPENDIX B

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