Seattle City Council Memorandum

48659

Date: January 16, 1978

To: All Councilmembers

From: Maryann Huhs

Subject: Police Use of Deadly Force

Overview

The Seattle City Council is among the first City Councils in the country to review publicly its police department's policy on the deadly force (when and under what circumstances police officers may shoot). Until now, development of deadly force policy has rested with internal police administration.

As with many issues, the greatest difficulty public officials may have in dealing with the deadly force issue is that differences of opinion do not arise from differences in fact, but from differences in basic values. The Council's task is to make an informed judgment tempered by competing interests, as expressed by the police, the community, the American Civil Liberties Union (ACLU), and other interested groups. This report summarizes the divergent opinions and their rationales, as a tool for Councilmembers in balancing the interests and developing the deadly force policy best suited to the City of Seattle.

The report is organized in accordance with the following outline:

I. Background of City Involvement in Deadly Force Issue.

II. History of Deadly Force in the United States.

III. Alternative Policies Regarding Use of Deadly Force in Apprehension of Felony Suspects.

- A. Any Felony Policy
- B. Enumerated Felony Policy
- C. Policy Based on Danger
- D. Self-Defense Policy

IV. Other Considerations in Selecting a Policy Regarding Use of Deadly Force in Apprehension of Felony Suspects.

- A. Analysis of Seattle Police Shooting Incidents -- Including Effects of Policies on Certain Groups of People.
- B. Deadly Force As a Deterrent.

48659

C. Risk of Civil and Criminal Actions Against the City and Its Officers.

D. Policies Which Are More Restrictive Than State Law.

E. Analysis Based on the Ranking of Risks.

V. Summary

I. Background of City Involvement in Deadly Force Issue

The decision to develop a policy governing the use of deadly force came in January, 1975 as a result of the Council's deliberations on the use of hollow point bullets. At the conclusion of these deliberations the Council recognized that more important than the type of ammunition used by the police was the issue of when and under what circumstances deadly force could be used. At approximately this same time the City was negotiating with the Seattle Police Guild. One issue in those negotiations was whether the Police Guild or the City should establish the Seattle Police Department's (SPD) shooting policy. On October 12, 1976, an arbitrator ruled that the development and adoption of a shooting policy is the responsibility of the City's elected officials. In January, 1977, Mayor Wes Uhlman submitted to the Council two reports: 1) a "Police Development Report on the Use of Deadly Force by Seattle Police," prepared by the Office of Policy Planning's (OPP) Law and Justice Planning Division, and 2) the "Use of Deadly Force Policy Study and Recommendation" prepared by the Seattle Police Department's Inspections and Planning Division. In transmitting the reports, the Mayor expressed support for the OPP recommendation subject to certain conditions.

On May 24, 1977, the PS&J Committee was briefed by the Mayor's representative on this issue. The briefing was followed by a public hearing on July 12, 1977, to give citizens an opportunity to comment on the police use of deadly force and to advise the PS&J Committee on the appropriate shooting policy. A panel of diverse experts on the use of deadly force discussed the issue at the August 23, 1977 meeting of the PS&J Committee; however, further action on the issue was postponed until January 31, 1978, due to Council review and adoption of the 1978 budget during the Fall of 1977.

For the purposes of Council discussion, deadly force can be defined as such force as under normal circumstances poses a high risk of death or serious injury to its human target, regardless of whether death, serious injury, or other harm actually results.[1] Practically speaking, police use of deadly force usually occurs when an officer fires his service weapon.

II. History of Deadly Force in the United States

When police departments were first established in the mid-nineteenth century, police officers were not armed. Nor were they allowed to use deadly force of any kind; however, this situation began to change in 1858, when a New York police officer used his personal gun to shoot a fleeing suspect. Prior to this police shooting incident, four police officers had been killed by criminals. In reaction to these assaults on police, a

grand jury exonerated the officer who shot the fleeing suspect, and New York police officers began to arm themselves with their personal guns. Similar developments occurred in Boston. After the Civil War, both urban police and frontier law enforcement officers generally carried the sidearms issued to them during the war, and by the end of the century, it was common for cities to issue service revolvers to their police.[2]

The legal right of the police to use deadly force has long been established under common law. The common law justification for police use of deadly force generally extends to five situations: self-defense, prevention of the commission of a crime, recapture of an escapee from an arrest or from a penal institution, stopping a riot, and effecting a felony arrest. Of these situations, none seems to be more frequently employed or more often criticized than effecting an arrest. The rationale for sanctioning the use of deadly force against fleeing felony suspects, but not against misdemeanant suspects, was that all felonies were punishable by death. Previously, the only common law felonies were homicide, rape, arson, mayhem, robbery, burglary, larceny, prison breach, and rescue of a felon. Today, a felony is broadly defined as any offense punishable by death or a prison term of one year or more. As early as 1857, courts indicated that it was inconsistent to allow police officers to impose a more severe penalty than could be imposed by the courts. However, there has been a reluctance to abolish the felony/misdemeanor distinction, because of its simplicity.[3]

In 1962, the American Law Institute issued its Model Penal Code which authorized the use of deadly force when arresting armed or violent felony suspects, in addition to self defense and defense of others. Today, most states have codified the common law, seven states have adopted the Model Penal Code, and seven others allow officers to use deadly force in apprehending persons suspected of "forcible felonies," which generally include such non-violent crimes as burglary. Washington State is among those that have codified common law.

Although most states have codified common law, many police departments have adopted policies that are more restrictive than State laws. In 1967, the President's Commission on Law Enforcement and Administration of Justice Task Force on Police recommended a firearms policy more restrictive than any state law, limiting the use of deadly force to self defense, defense of others and "to the apprehension of perpetrators who, in the course of their crimes threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed." The report recommended that the officer be "virtually certain," and not merely suspicious, that the crime was committed, and that the person pursued committed the crime. A number of police departments have adopted such a policy. Yet many departments do not[4] have written firearms policies, and still more have vague or ambiguous policies.

In a 1976 federal case Mattis v. Schnarr, the Eighth Circuit Court of Appeals (Washington State is in the Ninth Circuit) found the Missouri statute on shooting fleeing felons unconstitutional. The action was brought by the father of an unarmed burglary suspect who was shot and killed while fleeing from a golf course office at 1:20 a.m. The court held that the state cannot properly deprive an individual of life for committing a non-violent felony unless the police officer reasonably believes that the suspect will use deadly force against the officer or others. The ruling was vacated by the Supreme Court on procedural grounds, but a similar case, Wiley v. Memphis Police Department, Docket No. 76-1571, may be considered by the Supreme Court in terms of constitutional issues.[5]

III. Alternative Policies Regarding Use of Deadly Force in Apprehension of Felony Suspects

The most controversial issue requiring decision by the council is whether police officers may use deadly force to apprehend felony suspects. Other provisions of deadly force policies appear to be non-controversial, including the following:

- Police officers may use deadly force to defend themselves or other persons from threat of death or serious injury;
- Police officers may kill a dangerous animal or an animal so badly injured that humanity requires its removal from further suffering;
- Police officers may not shoot from a moving vehicle;
- Police officers may not fire warning shots;
- Police officers may not use deadly force to apprehend suspected misdemeanants, except for self-defense or defense of others.

With regard to apprehension of fleeing felons, Washington State law (RCW 9A.16.040) authorizes police officers to use deadly force as follows: (1) in obedience to the judgment of a competent court, (2) when necessary to overcome actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty, and (3) in capturing or recapturing a felony suspect or convicted felon. This statute was modified in Reese v. City of Seattle (1972) so that, "... deadly force may be used to apprehend a fleeing felon only after all other reasonable efforts have failed." A survey of fifty-four Washington counties and cities, conducted by the ACLU in 1977, indicated that 22 cities and counties had adopted policies that followed State law, while the remaining 32 cities and counties had more restrictive policies.

To facilitate Council review, we have grouped all possible policies with respect to the apprehension of felony suspects, into four basic categories, each of which is discussed in more detail below.

- Any Felony Policy -- Police officers may use deadly force in capturing or recapturing felony suspects or convicted felons, after all other reasonable efforts have failed. (This alternative reflects Washington State Law and is supported by the Seattle Police Guild.)
- Enumerated Felony Policy -- Police officers may use deadly force in capturing or recapturing a person suspected of committing an "inherently dangerous felony." (Seattle's current policy.)
- Policy Based on Danger -- Police officers may use deadly force in capturing or recapturing armed and/or dangerous felony suspects. (Police Foundation recommendation and OPP recommendation.)
- Self-Defense Policy -- Police officers may use deadly force in self-defense and defense of others. (ACLU recommendation.)

A. Any Felony Policy

Under common law, the use of deadly force was authorized to apprehend someone reasonably believed to have committed a felony, since all felonies were originally punishable by death; however, a policy based strictly upon a felony/misdemeanor distinction may no longer be valid, for several reasons. First, during the late 19th and early 20th centuries, the felony category of crime was expanded to include non-violent crimes such as forgery, adultery, and bigamy, and it is probably excessive to allow deadly force to apprehend forgers, adulterers, and bigamists. Also, the death penalty has been abolished for most felonies, and it seems unreasonable to permit deadly force for apprehension, thereby exposing suspects to risk of death, for a crime whose punishment is minor.

Effects of Implementing this Policy

- Could facilitate arrests because it notifies suspects that flight is not a viable option;
- There is no conflict with policies of surrounding jurisdictions. (See discussion on page 12);
- Could reduce risk of civil and criminal actions against the City and its officers, since there is reduced opportunity for officers to violate it;
- Is less complex than any option except self defense and defense of others;
- Is currently being challenged in the courts;
- Could result in more people being shot and fatally wounded than under any other alternative;
- Would mean that use of deadly force is authorized in many more situations than in the 1800's when the policy was first developed, and in more situations than under the City's existing policy;
- Could technically be used against a person suspected of committing a non-dangerous felony such as larceny, burglary, income tax fraud, forgery, adultery, bigamy;
- Sanctions the sacrifice of life for the protection of property;
- Confronts the officer with determining whether a felony or a misdemeanor was committed; and
- Allows police officers to impose a more severe penalty than could be imposed by a court.

B. Enumerated Felony Policy

As a result of broadening the felony category, many police agencies have classified some felonies as dangerous, serious, or heinous, to differentiate them from less aggressive crimes. The City's existing policy authorizes the use of deadly force to apprehend a person suspected of committing "inherently dangerous felonies," such as murder, manslaughter, mayhem, felonious assault, robbery, burglary, kidnapping, arson, rape, and bombing; and to retake an escaped felon who has been committed for, or convicted of a felony. A former police chief has stated the reason for such a classification:

> . . . the rationale which supports the subclassification of felonies is that society will not tolerate the killing of a person escaping from a crime that would carry a three-year or four-year sentence or committing the common law offense of fleeing from a police officer, punishable by an even lighter sentence."[6]

However, subclassification on the basis of naming certain "inherently dangerous" crimes may not be reasonable, due to the broad definitions applied under law. For example, robbery is an inherently dangerous crime and is legally defined as the taking of property from a person by force, violence, fear, or threats. Based on this definition, robbery can range from one child stealing another child's lunch money to armed robbery of a grocery store. Destruction of a mailbox with firecrackers and dynamiting a bank are actions that may both be defined as bombing. Since the courts would not treat these acts uniformly, the City's deadly force policy should address these distinctions.

Effects of Implementing this Policy

- Would not permit deadly force to be used in arresting suspects of such nonviolent felonies such as forgery, adultery, and bigamy;
- Could reduce risk of civil or criminal actions against the City and its officers, since there is reduced opportunity for officers to violate it.
- Could result in questionable shootings under this policy, because the policy does not distinguish between the range of actions that fall within the definition of the enumerated crimes;
- Less people would be shot than under alternative A; but more people would be shot than under alternatives B and C;
- Would permit deadly force to be used against felony suspects who offer no resistance but merely flee. This principle is being challenged in the courts;
- Would allow police officers to impose more severe penalties than would be imposed by the courts; and
- Conflicts with policies of surrounding jurisdictions. (See discussion on page 12.)

C. Policy Based on Danger

The Office of Policy Planning recommends officers be authorized to use deadly force only to arrest or recapture armed or violent felony suspects or escapees. This policy is more restrictive than the City's existing policy, because, in most cases, it would preclude officers from using deadly force in cases involving non-violent crimes, such as bombing, burglary, or arson. Use of deadly force would be authorized under the OPP policy if the suspect were armed or if the suspect overtly threatened the use of violence. OPP's policy recommendation represents a major shift in approach from the City's existing deadly force policy because it is a policy based on danger rather than on the crime committed. The trend in most large cities is toward limiting the use of deadly force to situations involving self-defense, the defense of others, and the apprehension of suspects in violent or potentially deadly felonies.[7] The Police Foundation concluded, after a year-long study, that a policy based on the dangerousness of a suspect confronted by police is preferable to one based on the nature of the original defense, because a policy based on danger is clearer and more concise, can exclude many questionable shootings and need not require an officer to attempt too elaborate an evaluation of the facts before deciding whether to shoot.[8] Former Mayor Wes Uhlman concurred with OPP's recommendation with the stipulation that burglary and bombing be defined as violent felonies.

There are several policy options within the category of a Policy Based on Danger. While OPP and the Police Foundation both recommended policies based on the dangerousness of the suspect confronted by the police, they both recommend different policies. OPP recommends that police be authorized to use deadly force in apprehending armed or violent felony suspects. Under OPP's recommended policies, ". . . shooting is permitted to effect the arrest of certain crime suspects. The suspect would need to be either armed or would need to be the suspect of a violent crime. . . . Suspects of violent crimes are included by this policy, whether they are armed or not. In addition, armed suspects are included, whether the crime is violent or not (but only if violence is overtly threatened). The group of felony suspects that are not covered are the unarmed, non-violent ones." The Police Foundation recommends that police be authorized to use deadly force in apprehending armed and dangerous felony suspects. This policy is more restrictive than the OPP recommendations. Under this policy ". . . the subject must be armed and appear to be capable of inflicting death or serious injury."[9] (emphasis added)

The American Law Institute's Model Penal Code recommends a policy which is similar to the OPP recommendation. This policy authorizes officers to use deadly force in apprehending felony suspects when the crime for which the arrest is made involved the use or threatened use of deadly force, or there is a substantial risk the person to be arrested will cause death or serious bodily harm if apprehension is delayed.[10]

Selection of a policy based on danger would require the Council to decide what level of danger is necessary to justify the use of deadly force by an officer. Should the suspect be armed only, violent only, armed or violent, or armed and violent?

Effects of Implementing this Policy

- Is clearer and more concise than a policy based on the nature of the original offense;
- Eliminates many questionable shootings;
- Simplifies an officer's evaluation of the facts as compared with alternatives A and B;
- Reduces public clamor over lives being taken for property offenses;
- Would result in less shots fired as compared to alternative A and B, but more than under alternative D;
- Conflicts with policies of surrounding jurisdictions (see discussion, page 12); and
- Is not as simple as a self-defense only policy.

D. Self-Defense Policy

The most restrictive policy would permit police officers to shoot only in self-defense or defense of others. This policy is supported by the ACLU and has been implemented by the FBI and a limited number of other agencies. The major difference between this policy and a Policy Based on Danger is that under the latter policy deadly force is authorized against fleeing suspects if any future attempt at apprehension is likely to involve a substantial risk of death or serious injury to police or civilians. Under a Self-Defense Policy, the officer would not be allowed to shoot in the above instance, because compliance with this policy requires that the danger be immediate.

While no policy can assure that mistakes will not be made, a Self-Defense Policy reduces the chance of police using deadly force based upon an inccurate assessment of the gravity of the situation, because there is only one situation in which it is warranted. This is of particular concern because there is some evidence to indicate that overprediction of danger and violence is common among those who deal frequently and professionally with violence.[11] Probably the most powerful argument for a Self-Defense Policy is that even after conviction of murder, many states do not invoke the death penalty.[12] This appears to be the case in Washington, as no one has been executed in this state since 1962.

Effects of Implementing this Policy

- Is simple and requires few elaborations or exceptions;
- Fewer shots would be fired than under any other alternative and therefore fewer people would be killed (both suspects and police);

- Deadly force could not be used against felons who offered no resistance but merely fled;

- Eliminates public clamor over lives being taken for property offenses;

- Stronger likelihood that suspect will escape and continue to commit crimes;

- Could endanger police officers trying to arrest suspects by requiring that the officer hold his fire until directly threatened or attacked; and

- Conflicts with policies of surrounding jurisdictions (see discussion, page 12).

IV. Other Considerations in Selecting a Policy Regarding Use of Deadly Force in Apprehension of Felony Suspects

Some of the considerations listed in this section of the memo have been mentioned above, but are important enough to warrant greater discussion here.

A. Analysis of Police Shooting Incidents — Including Effects of Policies on Certain Groups of People

One consideration when reviewing the policy alternatives is the effect the proposed alternatives will have had upon certain groups of people, had they been in effect during past police shooting incidents. There are two sources of data about Seattle shooting incidents: 1) the OPP study on the Use of Deadly Force by Seattle Police and, 2) the attached report prepared by the Seattle Police Department. It should be noted that the two reports cover two different time periods, and in some cases the data appear to conflict. According to the Seattle Police Department report, there were 90 incidents in which officers used deadly force against suspects between the period of January 1, 1973 and August 4, 1977. Approximately 115 officers were involved in these incidents. The incidents were distributed throughout the City as follows: 22 incidents occurred in the North precinct, 24 in the South Precinct, 26 in the East Central Precinct, and 18 in the West Central Precinct.

Juveniles. The OPP study states that the average age of suspects involved in police shooting incidents was 25 years. It is not known how many were under 18 years old. In a four-year national survey of police shootings, Arthur Kobler found that the average age of suspects shot was 29, but that the largest number of suspects were between the ages of 17 and 19.[13] Thus it may be that a large number of Seattle police shooting incidents involve young adults. In Seattle, 33 (or 37%) of the 90 shooting incidents occurred in trying to prevent the escape of a fleeing felon and/or an unarmed felon. Incidents reviewed by other studies indicate that many juveniles are shot while running away from the scene or from police officers.[14] Any policy allowing officers to shoot at fleeing felony suspects may result in the shootings of young adults. Some police departments' deadly force policies differentiate between juveniles and adults. Under such policies, officers are instructed not to use deadly force against juveniles except in self-defense. The need for this differentiation is especially acute under the

Any Felony or Enumerated Felony policy alternatives, because these policies allow officers to shoot at fleeing felons, including burglars. However, most burglars are younger than 18 years old; OPP estimates that 70% of Seattle burglaries are committed by juveniles.

The problem with requiring special treatment of juveniles is that it is not always easy to distinguish juveniles from adults. Many authorities agree that requesting an officer to make this distinction is a severe and undue burden, and that a Policy Based on Danger is the fairest way to deal with situations involving juveniles.[15] This is to because a Policy Based on Danger demands that deadly force be used only when officers or citizens are in danger. Under such a circumstance, it is not relevant whether the suspect is adult or juvenile. The Police Foundation report indicated that, in the end, police may be less likely to shoot at juveniles than before because a Policy Based on Danger virtually precludes shooting persons in flight. Of course, a Self-Defense Policy provides even more protection to fleeing juvenile suspects.

Unarmed suspects. There has been much concern about the shooting of unarmed suspects. OPP reported that 41% of their sample of Seattle shooting incidents involved unarmed suspects. SPD reported that over a four and one-half year period, 28% of the shooting incidents involved unarmed suspects. Arthur Kobler reported that in a national sample of fatal shooting incidents, 25% of the victims were unarmed, and the Police Foundation reported that of shooting incidents in seven cities, 43% of the victims were unarmed. However, of the eleven suspects killed by Seattle police between 1973 and 1977, ten were armed with firearms and one was armed with a weapon other than a firearm.

Minorities. In a paper on the Use of Deadly Force in Seattle, the ACLU noted that a disproportionate number of Seattle Police shooting victims were black.[16] Blacks account for 9% of Seattle's population, but according to the OPP study, they comprised 49% of the suspects shot at by Seattle police. The ACLU states that the trend in Seattle is for blacks to account for a decreasing proportion of serious felony arrests, yet the number of blacks shot at by police is disproportionate to the black percentage of serious felony arrests. The ACLU report concluded that under a restrictive deadly force policy, ". . . the proportion of blacks shot by police, (will be reduced) both because the officer's leeway in deciding whether or not to shoot will be greatly reduced and because there is evidence indicating that a smaller percentage of blacks shot by police had and used weapons than whites."

Total number of shooting incidents. If we assume that all things remain constant, and that there is compliance with the adopted policy, then we can roughly estimate the total number of shootings that would have occurred under each policy alternative, except the first. It is impossible to estimate how many would have occurred under alternative A, since it is less restrictive than the existing policy; however, it is likely there would probably have been more shootings. There would have been no change under an Enumerated Felony Policy (alternative B). It is difficult to determine how many shootings would have occurred under a Policy Based on Danger (alternative C), as we do not know how

many of the 33 fleeing felony suspects could be considered dangerous. However, we know that at least nine of the 33 fleeing felons were unarmed; thus there probably would have been fewer than 81 but more than 57 shooting incidents under this policy. There would have been 57 shooting incidents under a Self-Defense Policy (alternative D).

B. Deadly Force As a Deterrent

The major argument against limiting police officers' use of deadly force is that criminals will feel less restraint in committing crimes. No reliable data is available to support or refute this position. Crime rates are affected by a myriad of factors of which deadly force policy is only one. It is very difficult to isolate the effect of a City's deadly force policy from the other factors. For example, the police departments of Des Moines, Kelso, Kennewick, and Longview have all adopted very restrictive deadly force policies. The police chiefs of Des Moines and Kelso indicated that the number of offenses per capita has gone down since implementation of the restrictive deadly force policy, while major crimes per capita have increased in Longview and Kennewick. No one can be sure what factors affected these changes, but it is clear that adoption of a restrictive deadly force policy does not guarantee a specific change in the crime rate.

A second argument against limiting police officers' use of deadly force is that police officers will feel restrained in apprehending and arresting suspects, and that officers will sit in their cars rather than make arrests. A study of fifty different police agencies showed that ". . . cities with the highest arrest rates were just as likely to have the most restrictive policy on the use of deadly force as are the cities with the lowest arrest rates."[17] In fact, a slight tendency appeared for cities with higher arrest rates to have more restrictive police policies on the use of deadly force.

A counter-argument to the deterrence arguments, above, is that there are other ways to deter crime than through the use of force. The City of Seattle invests substantial effort and money each year in developing a criminal justice plan which identifies priority crimes, and programs for deterrence, prevention, and detection of these crimes. The Community Accountability Program, the Community Crime Prevention Program, and Hidden Camera Programs are three examples of such programs.

C. Risk of Civil and Criminal Actions Against the City and Its Officers

Judges and juries are placing greater emphasis on the individual's right to life and physical integrity. The number of civil suits filed against police departments and their officers rises each year, and almost 30 per cent of these filings contain some claims of excessive use of force.[18] In the case of Mattis v. Schnarr, the Eighth Circuit Court said that felonies are of an infinite variety and that a police officer cannot be constitutionally vested with the authority to kill any and all escaping felons. Rather, deadly force should be employed only in situations presenting grave threat to either the officer or the public at large.

Police Department and City policies on use of deadly force may be admissable as evidence against a police or City defendant in civil or criminal action resulting from a shooting incident and may also be used in the form of an instruction to the jury. Some argue that the more restrictive the policy, the more liability the City may face. However, liability could be found regardless of the City's policy, since the policy itself could be found unconstitutional by the courts (see, e.g., Mattis v. Schnarr, supra). Moreover, the risk of greater exposure to liability may be an argument for better implementation and enforcement of a restrictive policy, rather than an argument for a less restrictive policy.

D. Policies Which Are More Restrictive Than State Law

There has been much concern about local police shooting policies which are more restrictive than the requirements placed on police officers by State law. Dick Glien, a Seattle attorney, summarized his concerns and the concerns of many police associations:

> It is obvious that since not all police departments in the State of Washington have adopted the same shooting policies that a police officer may be justified in his decision to use deadly force in a given situation while a police officer from another jurisdiction in the same situation would be held liable in damages for using deadly force because he violated the department regulations.[19]

There are at least two solutions to the problem outlined above, neither of which is under the control of the City Council. One, according to Glein, would be for the legislature to establish a uniform policy on a State-wide basis. Another alternative would be for the state to enact a law declaring departmental shooting policies to be inadmissable in any trial other than a trial which is to review a disciplinary proceeding instituted by the employer against the officer who is accused of violating the shooting policy of that department. Assuming that these are viable, neither appears to be immediately forthcoming.

Another concern is that policies restricting police should not be more restrictive than laws restricting civilians. In the 1962 case of State v. Clark, 61 Wn. 2nd 138, a tavern owner killed a fleeing felon, and the Washington State Supreme Court held that the tavern owner was justified in shooting. Glien is concerned that a police officer could not shoot in the same instance, if the shooting policy of the department employing the officer restricted the use of deadly force. Glien envisions a situation in which a police officer answering an emergency call might hand his gun to a bystanding civilian to shoot a fleeing felon. Glien's concern may or may not be warranted, in the light of new State legislation (Section 8, Chapter 9.01 RCW), which reads as follows:

> No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself, his family, or his real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime.
>
> When a substantial question of self-defense in such a case shall exist which needs legal investigation or court action for the full determination of the facts, and the defendant's actions are subsequently found justified under the intent of this section, the state of Washington shall indemnify or reimburse such defendant for all loss of time, legal fees, or other expenses involved in his defense. (emphasis added)

"Reasonable means necessary" is not defined. Although some courts have held that it is not reasonable to use deadly force to protect property, it is unclear whether the Washington courts would rely upon the Clark case to justify civilian use of deadly force to halt fleeing felons. However, as a result of the reimbursement right granted by this statute, it is certain that the statute's defense will be employed by defendants and the "reasonable means necessary" language will have to be defined by the courts.

E. Analysis Based on the Ranking of Risk

OPP's report on the Use of Deadly Force by Seattle Police points out that ". . . There are several parties at risk in any police shooting incident, and the amount of risk assumed is subject to significant change from one alternative policy to the next . . ." Risk takers include victims, bystanders, officers, future victims, the City, and suspects. Differences of opinion with respect to selection of a deadly force policy arise from the fact that different groups perceive risks and rank the importance of these risks differently. For example, the Police Guild might rank "risk to the officer" very high, while the ACLU might rank "risk to suspects" higher than the Police Guild. To determine the level of danger which justifies the use of deadly force, the Council could decide which group or groups of persons should be exposed to the minimum and maximum risks.

V. Summary

The most controversial issue under review is when and under what circumstances Seattle police officers may use deadly force to apprehend felony suspects. There are four basic policy alternatives with respect to apprehension of felony suspects, each of which is discussed in more detail in this report. The four policy alternatives are briefly described below.

-- Any Felony Policy -- Police officers may use deadly force in capturing or recapturing felony suspects or convicted felons, after all other reasonable efforts have failed. (This alternative reflects Washington State Law and is supported by the Seattle Police Guild.

-- Enumerated Felony Policy -- Police officers may use deadly force in capturing or recapturing a person suspected of committing an "inherently dangerous felony." (Seattle's current policy.)

-- Policy Based on Danger -- Police officers may use deadly force in capturing or recapturing armed and/or dangerous felony suspects. (Police Foundation recommendation and OPP recommendation.)

-- Self-Defense Policy -- Police officers may use deadly force in self-defense and defense of others. (ACLU recommendation.)

The Council's immediate task is to select a policy alternative. Once this is done, additional work will be required to develop the policy in detail.

MH/ga

Attachments

FOOTNOTES

1 Milton, Catherine A., J.W. Halleck, J. Lardner, and G.L. Albrecht, Police Use of Deadly Force, Washington, D.C., Police Foundation, p. 41.

2 Sherman, Lawrence W., Research plan submitted in support of application for research grant, unpublished, p. 21.

3 Sherman, Lawrence W., ibid.

4 Milton, Catherine, et al., op. cit, pp. 45-48.

5 Sherman, Lawrence W., op. cit., p. 22.

6 Chapman, Samuel G., "Police Policy on the Use of Firearms," Police Patrol Readings, p. 541.

7 Milton, et al., op. cit.

8 Milton, et al., op. cit., p. 130.

9 Milton, et al., op. cit., p. 132.

10 Model Penal Code, Section 3.07(b), 1962, American Law Institute.

11 Milton, et al., op. cit., p. 133.

12 Seldon, Lauren, Letter to Randy Revelle dated April 4, 1977.

13 Kobler, Arthur C., "Figures (and Perhaps Some Facts) on Police Killings of Civilians in the United States, 1965-1969," Journal of Social Issues, Volume 31, Number 1, 1975, p. 188.

14 Milton, et al., op. cit., p. 134.

15 Milton, et al., op. cit., p. 133; Chapman, Samuel G., op. cit., p. 544.

16 Scanlan, Pat, and Tweedie, Jim, "The Use of Deadly Force in Seattle: When Is It Justified?", American Civil Liberties Union, p. 5.

17 Uelmen, Gerald F., "Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County," Volume 6, Loyola of Los Angeles Law Review, January 1973, p. 14.

18 Milton, et al., op. cit., p. 42.

19 Glien, Dick, "Shooting Policies . . . a Muddled Area," The Washington Policeman, Volume 6, Number 1, June 1977, p. 31.

END