

Use of force: A strategic approach to minimizing litigation costs

ENVISAGE
TECHNOLOGIES

January 14, 2015

Abstract

Use of force occurs in a relatively small number of interactions between the police and public, but the potential costs—in terms of dollars, reputations, and lives—demand that considerable time and resources be allocated toward its management. Through standards, education and technology, departments can effectively and proactively limit their exposure to these costs.

Introduction

According to the Bureau of Justice Statistics, approximately 40 million people in the United States experience direct contact with the police per year.¹ While a certain degree of friction should be anticipated whenever two or more people are forced to coexist in a stressful environment, the use or threatened use of force occurs relatively infrequently. In 2008, for example, fewer than two percent of these civilians reported any use of force during these encounters. However, the 776,000 people experiencing the use of force that year was a marked increase over the estimated 500,000 people subjected to such threats in 1996.²

While these figures demonstrate that frequent contact between police officers and the citizens they protect and serve is not inherently linked to

1. The Police–Public Contact Survey interviewed 79.9% of 72,566 eligible individuals ages 16 or older by telephone and in person (Eith & Durose, 2011).
2. This Census Bureau survey interviewed 6,421 residents age 12 or older, representing 216 million people (Greenfield, Langan & Smith, 1997).

the use of force, they do suggest that certain factors may be linked to its increased use over the past decade. By understanding the underlying causes of these trends, it is possible to create and implement changes which limit both the number and severity of use of force incidents.

Appropriate use of force is subjective

When standards are not well-defined, reasonable people may have different interpretations of what constitutes appropriate conduct. To illustrate, if a crash scene investigator tells an impatient witness to “stop bothering me,” it is unclear whether the appropriate response is to be quiet, talk to another officer, or leave the scene altogether.³ Because the clarity of a demand is directly related to a subject’s compliance, effective use of force policies depend on departments and officers explicitly communicating their expectations.

Moreover, when addressing use of force, internal standards must align with societal standards. Officers and members of the public have different sets of experience and expectations, and so it should come as little surprise that an estimated 74 percent of individuals who experienced threat or use of force believed the officer acted improperly.⁴ These confrontations may not only strain law enforcement’s relationship with that individual and the public, but can further result in extensive costs for investigation or litigation.

Those individuals believing that an officer acted improperly will file complaints approximately 14 percent of the time, which translates to roughly 6.6 complaints per hundred full-time sworn officers per year at large state and local law enforcement agencies.⁵ Though only eight percent of these complaints are sustained at any level, resources must be allocated for such a determination to be made. The oversight costs incurred by an internal investigation, compounded by average settlement amounts, translates to a price of roughly \$20,000 per complaint filed.⁶

It is important, therefore, for police departments to not only reduce the amount of unjustified use of force by officers, but any use of force which can be reasonably interpreted by the average citizen as inappropriate. As aforementioned, the appropriate degree of force for any particular incident is a subjective matter, so internal policies must be especially stringent to be an effective complaint-deterrent. To this end, directors should emphasize that while only 2.1 percent of arrests in which police use force involved weapons,⁷ these cases result in a disproportionately large share of complaints, injuries and liability.

3. In a multi-department inquiry, researchers recorded officers’ commands during ride-alongs and from dashboard cameras. Vague commands and those beginning with “stop” resulted in high rates of noncompliance (Shwarzkopf, 2008).
4. For PPCS respondents who were only shouted at or cursed by police, just 43% believed those actions were excessive (Eith & Durose, 2011).
5. During 2002, a total of 26,556 citizen complaints were received (Hickman, 2006).
6. According to thesis research by Tony Farrar, Chief of Police in Rialto, California, investigation costs varied widely across departments, from \$872 in Pittsburgh to \$8,571 in Berkeley (Ramirez, 2013).
7. The National Institute of Justice sponsored this study of 7,512 adult arrests at the local level to better understand the extent of nature of police use of force (NIJ, 1999).

Despite best efforts and practices, even the most stringent and carefully-executed use of force policies cannot guarantee that lives and resources will be saved. Between 2003 and 2005, there were an average of 365 law enforcement homicides per year.⁸ Based on an annual figure of 14 million arrests, police caused the death of an arrestee in approximately 1 out of every 40,000 arrests.

Despite the relative infrequency of these incidents, the recent media spotlight on the use of lethal force leads casual observers to believe that police are a danger to the public. This negative publicity was compounded by the fact that reliable lethal force statistics after 2005 do not exist, as there is no national database to which all law enforcement personnel must submit such reports.⁹

To address this issue, the Death in Custody Reporting Act of 2013—signed into law on December 18, 2014—will require all federal, state, and local agencies to report information to the U.S. Attorney General each quarter regarding the deaths of persons detained, arrested or in the custody of police.¹⁰ Nevertheless, with inappropriate use of lethal force exaggerated, prominent risk analyst Kent Osband concluded that “police officers have substantially more to fear from the public [. . .] than the public has to fear from police.”

Over the past decade, the FBI’s Uniform Crime Statistics reported an annual average of 51 deaths of police in the line of duty. Depending on demographic factors, police are between six and twenty-two times as likely to be killed by civilians than civilians are to be killed by police.¹¹

To law enforcement, perhaps the most distressing cause of lethal force incidents is a phenomenon known as suicide-by-cop (“SBC”), whereby a suspect intentionally provokes an officer to the extent that the use of lethal force becomes necessary.¹² A study by Dr. H. Range Hutson of Harvard Medical School indicated that these situations account for at least 27 percent of fatal officer-induced shootings,¹³ a figure which continues to trend upward.¹⁴

Recognizing a potential SBC before it happens is no easy matter. Provocation is an indicator, but amongst all people experiencing use of force, 22 percent verbally provoked the officer prior to the incident, and 12 percent disobeyed or interfered with the officer. Less than 0.1 percent of these individuals qualify as SBC, so officers cannot draw conclusions based on provocation alone.

8. All state and local departments nationwide were subject to mandatory disclosure of arrest-related deaths under the Death in Custody Reporting Act of 2000, which expired in 2006 (Mumola, 2007).

9. Participation in the FBI’s Supplementary Homicide Report is optional, so experts tend to regard its figures as minimums (Lind, 2014).

10. Required information will include the name, gender, race, ethnicity and age of the deceased; the date, time and location of the death; the law enforcement agency involved; and a brief description of the circumstances surrounding the death. Failure to report will result in loss of federal funding (Public Law 113-242).

11. The calculations assumed 800 civilian deaths and 630,000 active police officers (Osband, 2015).

12. An example of suspected SBC occurred recently in Florida, where a gun-wielding man approached officers while repeatedly telling them to “just do it” (Boroff, 2014).

13. Each of the L.A. County Sheriff’s Department’s 437 shooting cases handled between 1987 and 1997 were included in the study (Hutson, 1998).

14. Using a sample of 707 officer-induced shootings reported between March 2006 and January 2007, additional research estimates that more than 36% of incidents were the result of SBC (Mohandie, 2009).

The apparent possession of a gun or knife by a suspect should raise another red flag in an officer's mind, as 80 percent of SBC individuals actually possess a weapon,¹⁵ and another 19 percent pretended to possess a weapon. Notably, these individuals tend to escalate their violent behavior after police arrive, and even more after shots are fired. As a result, these individuals not only present a danger to themselves, but also have a one-in-three chance of causing injury or death to others, including police.

As difficult as it may be to identify SBC before an incident, it can be even more challenging to prove afterward. An officer may be objectively justified in using lethal force in a situation, but assuming that his subjective experience will seamlessly translate to the courtroom would be a mistake. Corroborating eyewitness testimony may be unavailable, psychiatric evaluations cannot be done *post mortem*, relevant background information may be ruled inadmissible, or juries may be sympathetic to the deceased's family. Accordingly, more than half of the reported cases in which police departments use SBC as a defense result in settlements or unfavorable verdicts.¹⁶ Use of force policies will not be completely effective unless they recognize and prepare for SBC.

Litigation risks and costs continue to rise

Use of force incidents increased by more than 50 percent between 1997 and 2008. One might expect that related litigation would mirror that trend and see corresponding growth. However, while the total number of cases alleging excessive use of force by police has risen over the same timeframe, it has been neither as steady nor predictable. Over the same period, such lawsuits nearly tripled before making a precipitous decline after 2009, returning to levels not seen for nearly twenty years.¹⁷

Perhaps some discrepancy can be written to chance, but when contextualized, the data begins to make sense. Namely, litigation rates are, to various degrees, shaped by the economy, case law, and national events.

Over 30,000 civil actions are filed against police every year, of which less than eight percent result in an unfavorable verdict.¹⁸ When narrowed strictly to cases alleging a failure to train officers, though, the numbers tell a different story.

A study found that in 1,525 of these cases reaching a verdict between 1989 and 1999, plaintiffs won about one-third of the time with an average verdict or settlement of more than \$450,000. Likewise, data from a sample of 143 claims which reached a verdict or settlement in 2010 revealed similar rates of plaintiff success, but the average recovery rose to more

15. SBC individuals shared many other characteristics, such as being male (95%), Caucasian (41%), divorced (43%), and previously communicating suicidal thoughts (87%) (Mohandie, 2009).

16. The plaintiff's average recovery in these cases exceeds \$1.2 million (LexisAdvance, 2014).

17. The variance is mostly attributable to the number of cases in which the defendant prevails, as the raw number of plaintiff victories has remained relatively constant over time (LexisAdvance, 2014).

18. The number of civil actions filed against police every year is more than 1000 percent higher than in 1967 (Gaines & Kappeler, 2014).

than \$798,000.¹⁹ Failure to train cases involving the excessive use of force—especially deadly force—by officers can be financially devastating to a department: over the past 25 years, prevailing plaintiffs collected an average sum of \$4,708,407.²⁰

Fair or not, this is why use of force commands so much attention from both sides of the political aisle. The more perplexing question, then, is why do litigants not give the same level of attention to all potential claims?

The unsteady frequency of these filings may be related, in part, to the health of the national economy. In the midst of the most recent recession, CIO warned of an impending increase in litigation, stating that “[w]henver there is economic turmoil, tempers flair [sic] and lawsuits fly.” Soon thereafter, Buffalo Business First reported that attorneys were seeing their caseloads increase “as more people file lawsuits and make claims, looking for financial settlements in tough fiscal times.”²¹

The numbers seem to bear out these predictions and opinions. Lawsuits against police departments alleging failure to train or excessive use of force peaked between 2007 and 2009 before dramatically falling off thereafter. During that time, the United States experienced below-average growth in GDP of 1.79 percent in 2007, -0.29 percent in 2008, and -2.80 percent in 2009, before a dramatic swing to 2.51 percent in 2010 (see Figure 1). Remarkably, this inverse relationship can be observed during other economic inflection points. Use of force cases against police declined through the late 1990s, bottoming out in 1999 before reversing the trend. From 1998-2000, the annual national GDP growth peaked at 4.45, 4.85 and 4.10 percent.

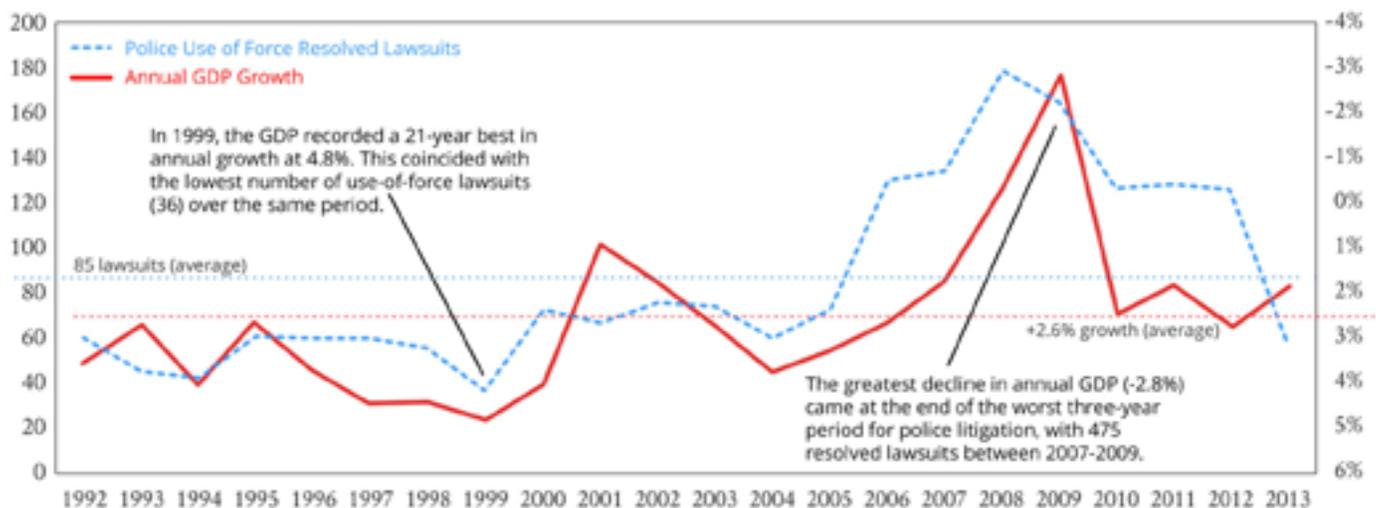
19. Using the Bureau of Labor Statistics' *CPI Inflation Calculator*, the increase in average recovery for plaintiffs since the initial study far outpaces the rate of inflation (Ross, 2000).

20. In contrast, the average settlement amount is \$1,006,522 (LexisAdvance, 2014).

21. A study by the American Society of Industrial Security found that 78 percent of corporate executives said the economy was impacting false injury claims and questionable lawsuits (Fink, 2011).

Figure 1. Over the past two decades, changes in national Gross Domestic Product signalled shifts in use of force litigation (World Bank Group and LexisAdvance, 2014).

Use of Force Litigation Relative to GDP Decline



Despite its apparent correlation between with number of lawsuits filed, GDP does not explain everything. The economy improved after 2009, but annual GDP growth has yet to exceed 3 percent in any of the years subsequent. Meanwhile, failure to train litigation rates neared historically low levels in 2013.

This possible trend acceleration may be related to the Supreme Court's holding in *Ashcroft v. Iqbal*. In its opinion, the Court affirmed that, under a theory of supervisory liability, government officials cannot be held liable for the unconstitutional conduct of their subordinates based solely on knowledge and acquiescence of that conduct. Even though the case did not involve the use of force or failure to train, it ostensibly provides a greater shield against liability for government defendants.

Assuming that there is steady economic growth and *Iqbal* is not overruled, should departments anticipate fewer lawsuits moving forward? The events which transpired in Ferguson, Missouri beginning on August 9, 2014 make that an unlikely proposition.

In the wake of the lethal shooting of Michael Brown and subsequent protests, Barbara Arnwine of the Lawyers' Committee for Civil Rights Under Law predicts that there will be "ripple after ripple of legal matters."²² First, there are the civil actions related to the actual shooting, which may allege failure to train or excessive use of force. At the next layer, there are those directly impacted by the protests.²³ Finally, there is the potential impact outside of Ferguson, with Arnwine suggesting that people may become "emboldened" by the protests and seek to assert their rights more aggressively.

22. Nine days after Brown's death, Arnwine anticipated legal response to protests after the shooting (Geidner, 2014).

23. On August 28, six plaintiffs alleging "wanton and excessive force" by police during the protests filed a complaint seeking \$40 million in damages (White, 2014).

Invest in technology

Computer software and hardware that may not even have existed a decade ago promise increased efficiency and diversity of knowledge, but adopting new technology can be a daunting task for many. However, keeping abreast of and implementing effective technology can save a department not only money otherwise spent on resources and litigation, but more importantly, lives.

A longstanding criticism of law enforcement training academies is that graduates are not necessarily street-ready.²⁴ Students learn valuable skills, such as basic firearms training, but practical experience to apply that knowledge can take years to develop on the job. Advances in technology in recent decades have helped to bridge this disconnect by allowing officers to receive virtual experience in simulators, practicing these skills under highly-realistic and practical, yet safe, conditions.²⁵

24. Among the undeveloped attributes may be good instincts and a sense of mortality (Hawkes, 2014).

25. Solutions such as the VirTra V-300™ allow officers to practice skills necessary for use of force encounters in a lifelike 300-degree environment (VirTra, 2014).

Technology can assist officers not only during the training process, but also on the job. Departments are increasingly discovering that equipping officers with special hardware—specifically body-worn cameras (“BWC”)—can effectively minimize use of force and litigation related thereto. As of July 2013, 25 percent of departments polled were already using the technology, a figure which continues to trend upward.²⁶

The adoption of BWC may be at least partially a function of recent research in psychology and criminology which indicates that people are more likely to adhere to social norms when they perceive that they are being watched.²⁷ This phenomenon helps to explain why the mere presence of traffic cams reduce speeding by 65 percent and serious crashes by 44 percent.

In this vein, experimental use of BWC is worth mentioning. In Rialto, California, use of BWC led to a 60 percent reduction in use of force incidents, and an 88 percent reduction in complaints over a two-year period. Similarly, officers in Mesa, Arizona equipped with BWC had 75 percent fewer complaints than those without.

The cost-saving potential of BWC is compelling. When videotaped, officers are significantly less inclined to use weapons. When officers do not use weapons, they receive fewer complaints. When a department receives fewer complaints, it avoids litigation.²⁸ And even when use of force incidents occur, BWC may result in cost savings. While a typical investigation of a police shooting can last between two and three months, by internally reviewing the footage, the process can be finished in as little as two or three days.²⁹ When added up, these sums have resulted in a savings for some departments of approximately \$4 for every \$1 spent on these cameras.³⁰

While proponents of BWC point to increased transparency and reduced investigation costs as reasons for its widespread adoption, critics are quick to note shortcomings in these domains. With increased transparency comes privacy concerns, both for officers and the communities they serve.³¹ Moreover, while research has shown that officers equipped with BWC are less likely to use force, the resulting impact on officer safety remains very much a mystery.³² Owing to fewer complaints and easier access to evidence, investigation costs are reduced when a BWC program is implemented, but may not be enough to offset increased costs of technology for managing and maintaining this data.³³

Finally, the impact on litigation remains to be seen. Even if BWC result in fewer complaints and lawsuits being filed, the video of an incident may

26. Requests for VIEVU cameras jumped 70% following Ferguson (Gomez, 2014). Michael White, a professor at Arizona State University, noted that two-thirds of departments adopted TASERs within a decade of introduction (Mims, 2014).

27. This civilizing effect can be seen even when the stimulus is a mirror or even a poster with a pair of eyes (Farrar, 2013).

28. Chief of Police Mike Chitwood of Daytona Beach, Florida, notes, “By preventing these suits, the department has more money to spend on cars, technology, and other things that benefit officers” (PERF, 2014).

29. Time savings are anecdotal, based on U.S. departments adopting BWC (Mims, 2014). Perhaps unintentionally, BWC are also linked to officers conducting fewer stop and frisks, but writing many more tickets (Ready & Young, 2014).

30. The City of Rialto spent \$90,000 for 70 cameras, saving approximately \$400,000 due to fewer complaints (Ramirez, 2014).

31. Federal courts have not yet remarked on the limits of BWC (PERF, 2014).

32. The primary concern is whether officers would hesitate to use necessary force when recorded. Other potential risks include electrical shocks and spread of disease through shared cameras (PERF, 2014).

33. While BWC requires an initial investment up to \$2000 per device, the biggest cost is data storage. A department with 250 officers using BWC for three years could produce 2.3 million videos (PERF, 2014).

have a negative influence on jurors, and the lack of video may be even more damaging.³⁴ Departments should carefully weigh these considerations before adopting a BWC program, and plan on implementing it incrementally to iron-out problems along the way.

Prioritize training and records

The use of force constitutes a seizure under the Fourth Amendment and is analyzed by courts under an objective reasonableness test.³⁵ Stated otherwise, the amount of force used in any police encounter must be reasonable in relation to the risks presented, so deadly force is acceptable only if an officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or others.³⁶ When an officer exceeds these bounds, supervisors and departments may be subject to liability.

In *City of Canton, Ohio v. Harris*, the U.S. Supreme Court required that there be deliberate indifference on behalf of supervisors or departments before any liability can attach to those entities. In this context, deliberate indifference means facilitating, approving, condoning, or turning a blind eye to actual or likely constitutional violations.

In determining liability for use of force incidents, “the focus [is] on the adequacy of the training program,” particularly whether the program is sufficient for tasks the employee is likely to encounter. A failure to train officers accordingly constitutes deliberate indifference and, therefore, is an actionable policy.³⁷ Extensive training about proper use of force, on the other hand, can circumvent this process and help a department avoid liability altogether.

Research indicates that aside from litigation costs, proper training minimizes the risks of both police and suspect injuries resulting from use of force.³⁸ But despite the cost-saving effect of training officers regarding use of force, there is a common tendency for department heads to disregard its importance. When budgets are downsized, funds earmarked for training are the second thing to be cut after travel expenses.³⁹ Moreover, 74 percent of respondents stated that they would rather keep officers on payroll than provide them with critical training. Such policies not only subject these officers and the public they serve to a greater chance of serious injury or death, but can compound a department’s financial troubles if its training deficiencies are targeted in litigation.⁴⁰

Of course, the best training practices in the world may not have the intended cost-saving effect without proper documentation to support

34. Cameras are unable to record tactile cues that indicate danger, do not follow the officer’s eyes, lack depth perception, and adjust to lighting conditions differently than humans (Force Science, 2014). Media depiction may give jurors an expectation that BWC are used everywhere, similar to the infamous “CSI effect” (Shelton, 2008).

35. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

36. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

37. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

38. Training can lead to “a significant difference” in officer conduct, as demonstrated by decreased injury rates following weapons training (Alpert & Dunham, 2000).

39. More than half of the respondents also planned to reduce spending on technology (PERF, 2010).

40. At least one researcher concluded that within 6-18 months after training budgets are trimmed, claims and lawsuits alleging failure to train will be appreciably higher (Rutledge, 2009).

them. After 3,000 civil litigations over a 35-year period, retired police lieutenant Curtis Cope concluded that “it is the *record* of the incident that is put on trial.”

The International Association of Chiefs of Police (IACP) agrees, warning that:

[p]olice administrators, departments, and parent jurisdictions may be held liable for the actions of their officers should they be unable to verify that appropriate and adequate training has been received and that officers have successfully passed any testing or certification requirements. Police departments must provide responsive training, and all records of training by officers must be maintained accurately for possible verification later.

Other administrative practices, such as writing a good use of force report, can also produce highly effective evidence in the courtroom.⁴¹

Conclusion

Many of the underlying causes of use of force litigation—the economy, case law, current events—are beyond the control of individual officers. The sheer volume of officer contact, indicative of growing responsibility and importance in communities, means that departments must ask not *if* an incident will occur, but rather *when* it will occur. However, by implementing policies that define and communicate the proper use of force, training that highlights better decision-making during use of force encounters, and technology that makes actions more legally defensible, departments will be better prepared to prevent and handle these incidents.

41. An estimated 99.58 percent of force events are justified, but poor use of force reports are blamed for a disproportionately high rate of successful lawsuits against police (Flosi, 2014).

To cite this article: Envisage Technologies. “Use of force: A strategic approach to minimizing litigation costs.” www.envisagenow.com/use-of-force, 14 January 2015.

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