



# Ethics Roll Call

To Champion the Nobility of Policing

SUMMER 2013

No oppression is so heavy or long lasting as that which is inflicted by the perversion and exorbitance of legal authority.

— Joseph Addison —

## **Electronic Control Devices : Do we go there too quickly?**

**By T. Neil Moore**

The use of force by peace officers is never a pretty sight. Even the most justified use of force incident raises the concern of citizens who are not familiar with the violent nature of a use of force encounter. When officers engage in anything that looks like even a questionable use of force, watch the tension in your community increase exponentially. The use of force and the type of force employed by our officers, like so many of the decisions made in policing, is constrained by ethical considerations, policy directives, state and constitutional law. From the mechanics of using force, the defensive tactics and firearms instructors throughout the nation do a wonderful job of preparing young peace officers to serve the public. Much of the research on the way we train peace officers for use of force encounters leaves us with the impression that clearly, officers perform in the field as they are trained. However, can we say that when electronic control devices are added to the tools available to officers who need to gain the compliance of a resistive offender? I am fearful that there is a trend emerging in our nation that has left some officers with the impression that to quell actions as simple as verbal non-compliance by a citizen, the officer can go directly to a conducted energy device to establish order.

I raise this issue because, as we have seen in the past, bad practice makes bad law. The continued inappropriate or ill-timed use of the tools available to our officers to control use of force incidents will result in additional constraints or even the elimination of certain tools by the courts. The use of saps, blackjacks and sap-gloves

were once common among our colleagues in an earlier era but, I digress.

Our citizens allow us, the police, to enforce social order through the legitimized use of force. The overwhelming assumption in allowing the police to use force is that the use of force will be undertaken in such a manner that it conforms to the standards that have been established by statute and court decision. Our citizens allow us to use appropriate levels of force to maintain the social order. As our organizations have evolved, as police practitioners and academics have studied the practice of policing, as we have responded to the needs of citizens and their concerns, we have made policing a better profession. To that end, all peace officers, from the chief or sheriff to the officer on the street should understand the necessity to strictly follow the guidelines that govern the use of force. The use of force taught in our police academies emphasizes the conditions when officers may use force against a non-compliant subject. Furthermore, it instructs that officers may use that amount of force necessary to overcome the resistance being offered by a non-compliant offender. Our agencies and state training authorities have developed use-of-force continuums to help define and teach the various levels of force that may be used in the legitimate exercise of the duties of a peace officer. While several different models of use-of-force continuums exist, the elements below help to conceptualize guidelines with which we are all familiar. Most use-of-force continuums in our nation are comprised of the following elements:

**Officer Presence** — No force is used. Yes, a certain percentage of the public will come into compliance based on the mere presence of a peace officer.

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**Verbalization** — No physical force is used at this stage. The focus of the officer's attention is not signaling an escalation to a physical encounter. The officer is gaining compliance by providing presence and verbal direction; "May I see your driver's license and vehicle registration please?"; "sir, please stand over there. I will be with you in just a minute."; "stop, don't move and let me see your hands!" Depending on the perception of threat the officer may change voice modulation and control and even non-verbal cues.

**Empty-Hand Control** —the peace officer is now at a stage where physical force is necessary to gain compliance. Often, our policies and instruction talk about a distinction between "soft-handed or soft techniques" and "hard-handed or hard techniques". For the former, the officer may be grasping the subject at the elbow, perhaps using holds or even joint locks to restrain the person who is now demonstrating a willingness to physically resist the officer. For the latter, the officer is now seeing physical conduct and active resistance that should be prompting punches or even kicks to gain control over the suspect.

**Less-Lethal Methods** —while all agencies should have policies that provide specific direction regarding when less-lethal methods should be used, less-lethal would be authorized as the degree of resistance escalates. Suspect resistance is very physical and the peace officer must use less-lethal technologies to gain control of a situation. Three potential options emerge at this stage of the continuum: the officer may use *blunt impact weapons* like a baton to the more heavily muscled areas of the body or to key areas that produce pain compliance as taught in pressure point control tactics or active counter-measures training; the officer may use a *chemical agent* like OC spray; or the officer may use *electronic control devices* that provide a high voltage, low amperage dose of electricity from a distance

**Lethal Force** — at this stage of the confrontation, the suspect has clearly identified himself or herself as a threat to the office or a third party. Furthermore, that threat poses a high probability of serious bodily injury or death to either the officer or the third party. Some agency policies discuss the display of the officer's sidearm or other firearm as a step in the continuum and indeed sometimes compliance can be achieved by that display. In many other instances the firearm must be employed to immediately stop the threat.

As the generic use-of-force continuum above describes the basic components of many very specific agency continuums found throughout our nation, the next logical question becomes when do the police exert too much force, when is force excessive? Generally, we know

that the courts have concluded that use of force will be measured using an objective reasonableness standard (see *Graham v. Connor*, 490 U.S. 386, 1989 at pages 392 -399). More specifically the court advised at pages 396 and 397, "...(c) The Fourth Amendment 'reasonableness' inquiry is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation." So, the actions of our officers will be judged using a reasonable officer standard.

The court also recognized that use of force situations can evolve very quickly. So how do our defensive tactics and firearms instructors help officers prepare to defend themselves against the threat to them or a third party? Many, if not all, will teach to a standard. Teaching to standard includes the necessity of teaching and supporting current agency policy on use of force encounters. In addition to reinforcing agency policy, instructors must reinforce the standard of using the amount of force necessary to overcome the resistance being offered. Once the resistance stops, the officer's actions should stop, otherwise the force becomes excessive. One of the wonderful aspects of policing in the 21<sup>st</sup> century is the "everyone has a camera" phenomena. Conversely, one of the difficulties of policing in the 21<sup>st</sup> century is the "everyone has a camera" phenomena. Video footage of officer behavior abounds in our society. A great deal of that footage finds its way to various internet sites. In most cases, the video demonstrates the proper use of force. In a few instances, video becomes the officer's undoing. Today the average citizen needs to merely Google search terms like police misconduct, police use of force, police excessive force, police using tasers and engage the search video icon. The video availability seems endless. As "objective officers" we can watch this video and arrive at our own conclusions. The footage from dash cameras, body cameras and from citizens filming police actions can demonstrate that we act as we train or it can demonstrate deviations from accepted practice and policy.

If one examines the use-of-force continuum again, it is obvious that the position of less-lethal methods after the use of empty hand controls implies that the force the officer is experiencing from the suspect has escalated. The officer is not gaining compliance through the use of empty hand force and must now resort to sterner measures. Our defensive tactics instructors are also very good about reminding us that the continuum is a guide and that officers do not have to rigidly work their

I count him braver  
who overcomes his  
desires than him who  
conquers his enemies;  
for the hardest victory  
is over self.

— Aristotle —

way through each level of the continuum as they analyze the force they will need to employ to control a particular situation. That sound advice keeps officers alive. The essence of using the continuum as a guide is that the officer must assess the situation she or he is encountering and use the appropriate level of force. There is the rub with conducted energy devices.

Recent references to officers using electronic control devices prompted a visit to Google looking for specific cases of officers using these tools. In one instance an officer faced verbal non-compliance from a motorist who questioned why he had to put his hands on the side of a truck. The officer then warned, "Prepare to be tased." The distinctive sound of the CED being employed then preceded the immediate spasm of the motorist. In a second observation from an incident several months old, a verbally non-compliant person with his hands in the air suffers the use of the ECD seconds later receives a quick kick to the face. In both instances there was no observed move by the officer to gain control of these suspects using even the mildest of empty hand control techniques. In discussing this sort of scenario with a current defensive tactics instructor, he too was concerned that such scenarios are playing themselves out with increased frequency.

Ethically and legally our officers may use the amount of force necessary to overcome the resistance being offered by a non-compliant person as we perform our legitimate duties. If this trend of quickly moving to less-lethal force (especially electronic control devices) exists with increasing frequency in our many agencies, the time for inquiry is upon us. We, as a profession, can inquire and change training, policy or both if we find ambiguity in either arena. We can also encourage discipline where an officer consciously decides to ignore both. Conducted energy devices provide peace officers with one more tool that keep communities and officers safe. If we do nothing, others are more than willing to help us decide this issue.



### Ethics Corner

Sometimes in this space we simply raise an ethical issue for consideration, thought and possible feedback. Such seems to be the case with the presumption of innocence in our American system of law: "innocent until proven guilty." What precisely does that entail for the street officer when it comes to the treatment of suspects?

The sixth century *Digest of Justinian* (22.3.2) provides, as a general rule of evidence: *Ei incumbit probatio qui dicit, non qui negat*—"Proof lies on him who asserts, not on him who denies" (Watson, Alan, ed. 1998 [1985]. "22.3.2", *The Digest of Justinian*. Philadelphia: University of Pennsylvania Press. ISBN 0-8122-1636-9). When this rule is applied to criminal process, it places the burden of proof upon the accuser, from which it is deduced that the accused is presumed innocent until it can be shown otherwise.

This notion again crops up in common law, especially in a famous formulation by Blackstone: "All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer." (Sir William Blackstone, *Commentaries on the Laws of England*, Edited by Wm. Hardcastle Browne, Office of the Library of Congress, 1892)

And it is clearly how our American courts generally operate. But what does that imply for the police officer as they dispatch their duties and apprehend people who are suspected of breaking the law? Before these apprehended suspects are formally charged with a crime, judged in a court of law by a jury or a judge, and convicted, are these apprehended suspects innocent citizens of our realm and entitled to those rights and privileges thereunto pertaining? And if so, again just what does that entail in terms of the suspect's treatment at the hands of the sworn officers who must deal with them?

Let us know what you think and maybe we can get a discussion going in these pages for the next issue.

### The Rise of Radley Balko's Book: A Brief Review

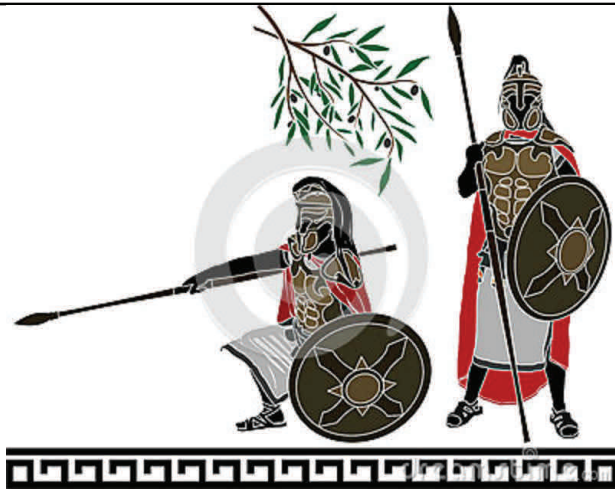
By Dan Primozic

Much is being made of Radley Balko's book and associated *Wall Street Journal* article concerning the *Rise of the Warrior Cop: The Militarization of America's Police Forces*. I will not go into great detail concerning my take on Balko's arguments. Merely, I will point to some of the issues that he brings forth that I think worth noting and then offer my personal assessments of his work in this domain.

Before I launch into my own thoughts, I would like to give some attention to Lance Eldridge and his *PoliceOne* article entitled "Police militarization and the rise of the

The Framers of the Bill of Rights did not purport to create rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be preexisting.

— Justice William J. Brennan Jr. —



warrior journalist.” (8/16/2013) There Eldridge makes the following observation:

There’s a lot wrong in Balko’s book, but there’s just enough right that law enforcement professionals should pay attention.

Newer officers should read his book if they want a glimpse into why officers are often seen as the problem and not the solution. Dismissing his work — along with the growing amount of reporting on police misconduct — is a mistake. Just because something is legal today doesn’t make it right in all circumstances. Depending daily on practices designed for use in extremes can only lead to bad law and political over-reaction, risking the loss of important law enforcement tactics, techniques, and procedures.

And related comments by the editors of the *ABA Journal* (July 13, 2013) also nicely set the stage for the establishing the need to read this book:

Today, police departments — or some of their key enforcement operations — appear to be on a war footing. Many dress in commando black, instead of the traditional blue. They own military-grade weapons, armored personnel carriers, helicopters and Humvees. Their training is military. They are in a war against crime and violence and terror that they argue never ends. Just ask those at the finish line of the Boston Marathon on April 15 . . . Whether or not you agree with him [Balko], it is an issue that Blako has been chronicling for years at the local and national levels. And in this particular moments of national introspection about the efficacy of traditional warfare against the threat of determined terrorists, Balko poses the question about its efficacy against common crime.

Balko’s purpose for the book is stated clearly in his “Introduction:”

Most Americans still believe we live in a free society and revere its core values. These principles are pretty well known: freedom of speech, religion, and the press; the right to a fair trial; representative democracy; equality before the law; and so on. . . These principles were enshrined in the Constitution and cherished by the framers *precisely because* they’re indispensable to a free society. This book answers the question: *How did we get here?* . . . How did we evolve from a country whose founding statesman were adamant about the dangers of armed, standing government forces — a country that enshrined the Fourth Amendment in the Bill of Rights and revered and protected the age-old notion that the home is a place of privacy and sanctuary — to a country where it has become acceptable for armed government agents dressed in battle garb to storm private homes in the middle of the night — not to apprehend violent fugitives or thwart terrorist attacks, but to enforce laws against non-violent, consensual activities? (Radley Balko, *Rise of the Warrior Cop: The Militarization of America’s Police Forces*, New York: Public Affairs, 2013, p. xiv)

Also in the “Introduction” of the book, Balko makes what seems to me to be a claim that needs more research and evidence But we shall comment further on this claim later:

Aggressive, SWAT-style tactics are now used to raid neighborhood poker games, doctor’s offices, bars and restaurants, and head shops, despite the fact that the targets of these raids pose little threat to anyone. This sort of force was once reserved as the last option to defuse a dangerous situation. It’s increasingly used as the first option to apprehend people who aren’t dangerous at all. (Balko, p. xii)

The first few chapters of the book should be required reading for all current and would-be police professionals and the political leaders who are in charge of them, because it contains the historical and legal roots of American policing. For instance he raises the important concept of the “Castle Doctrine” which is central to all the issues he raised in the previous quotation and to the issues that he raises in the rest of this work.

The Castle Doctrine simply refers to the age old adage from English common law that “a man’s [woman’s] home is his [her] castle.” But it goes back even further than that to Cicero’s pronouncement [translated] “What more sacred, what more strongly guarded by every holy feeling, than a man’s own home?” (Balko, p. 6) Thus Balko argues that implied in that pronouncement and adage is the concept of “before entering without

Peace is liberty in  
tranquility.

— Cicero —

permission, government agents must knock, announce and identify themselves, state their purpose, and give the occupants the opportunity to let them in peacefully.” (*Ibid.*)

Balko travels through a history and development of the Castle Doctrine into the establishment of the Third Amendment and on to its degeneration into what Balko sees as a violation of the Castle Doctrine and also of the Third Amendment into what he considers a contemporary all-too-frequent law enforcement overreaction to circumstances which cannot justify that overuse.



Though Balko’s arguments are interesting, bring up good ethical and legal issues for discussion, and are almost compelling, I have a few concerns that I must express about them.

One concern I have is that Balko might give the impression that police administration might be sending in SWAT teams almost upon a whim. The cost of outfitting and deploying a SWAT team is quite high. Even if a police leader had a strange desire to over-deploy their “warrior” teams, the exorbitant cost of doing so would surely prevent them from so doing.

Another concern I have is with the initial scenario Balko uses in his “Introduction.”

On February 11, 2010, in Columbia, Missouri, the police department’s SWAT team served a drug warrant at the home of Jonathan Whitworth, his wife, and their seven-year-old-son. Police claimed that eight days earlier they had received a tip from a confidential informant that Whitworth had a large supply of marijuana in his home. They then conducted a trash pull, which turned up marijuana “residue” in the family’s garbage. That was the basis for a violent, nighttime, forced entry raid on the couple’s home. The cops stormed in screaming, swearing, and firing their weapons, and within seconds of breaking down the door they intentionally shot and killed one of the family’s dogs, a pit bull. At least

one bullet ricocheted and struck the family’s pet pet corgi. The wounded dogs whimpered in agony. Upon learning that the police had killed one of his pets, Whitworth burst into tears. (*Ibid.*, pp. xii-xiii)

Let’s carefully examine the scenario that Balko offers above as a case with which he wants to prove that police are overusing their SWAT high risk teams and perhaps even jerk some tears from us concerning the death of Whitworth’s pet.

First and foremost we should be reminded that people who deal drugs as a business proposition often buy pit bulls, cut out their vocal chords and train them to attack cops silently and effectively in situations just like this one. Given that fact, I am certain that the shooting and killing of the pit bull was intentional, indeed (and warranted).

It should also be noted that the tipster said that Whitworth did not have a small, personal stash of pot in his home, but instead had a “large supply” which even left a detectable “residue” in his trash can. I doubt that anyone in policing would have sent in a high risk team if there was only a very minor user or dealer in the house. This fellow seems to have been in the “business.”

Thirdly it should also be noted that Whitworth seemed very upset about his dogs. If I were caught in that situation and bust, my predominant source of “bursting into tears” would have been the fact that my wife and my seven-year-old-son were on hand to witness and understand my degrading criminal activity and that I had put them at hazard by conducting this business at all, but especially from conducting it from their home. I would surely have tears about all that. I may then have sniffed a tad about the pit bull and the corgi which I also put at hazard by my actions.

Another concern I have is that these high risk teams are used precisely because the situation they are asked to deal with are *high risk*: meaning that the safety of the responding officers and the safety of the suspects are both in jeopardy from what the initial screenings of those situations seem to indicate. I am reminded of a local Dallas case from a few years back when :

Sr. Cpl. Norm Smith was gunned down in January 2009 while serving a felony warrant at a drug den in east Oak Cliff. He was 42 and an 18-year veteran of the department. . . The night Smith was killed, Smith went to Payne’s apartment door and knocked as an officer stood at each side of him. They and other officers at the complex were trying to serve an arrest warrant for a man in Payne’s apartment. The man, William Jobe, was wanted in a May 2007 Arlington robbery. From behind the door, police say, they heard Payne ask who was there. Smith gave a fake name to get Payne to open the door.

As Payne opened the door, the department has said, Smith yelled, “Police! Police!” But gunshots were immediately fired at the officers. Police say that the shooter, whom police later identified as Payne, tried to close the door and Smith pushed back. Smith was shot once in the head. The two officers alongside Smith — Senior Cpls. Mario

Good order is the foundation of all great things.

— Edmund Burke —

Gomez and Craig Redden — fired back toward the shooter and pulled Smith away. The shooter opened the door and fired again at the officers but missed. . . Minutes later, Payne and two other men — including Jobe — surrendered one at a time. Inside the apartment, police found a 38-caliber handgun, marijuana and cocaine. . . Police said that drugs were found near the toilet and that they believed some one was flushing them. (Jennifer Emily, "Trial starts Wednesday in killing of Dallas police Sr. Cpl. Norm Smith during 2009 drug raid," *The Dallas Morning News*, May 22, 2011)

Now let's look at this situation carefully. Note first that this was not a SWAT team intervention and that Sr. Cpl. Smith was aligned with the concept of the Castle Doctrine and knocked before any attempt at entry. He also yelled "police" twice before entry and before being shot in the head through the partially opened door. Note also that the shooter did not give up when he figured out that police were outside, but instead fired at the officers again. Not also that there were drugs and guns in the house and that there was evidence that the men inside the house were trying to dispose of them while the ruckus at the door went on. Note finally that there was no pit bull involved, nor a corgi and ,therefore, the only ones left to burst into tears were Norm Smith's wife, his fellow police officers and the good people of Dallas, Texas.

Does Balbo make much mention of cases like the one above which are all-too-common? Are they more common than those overuses that Balko would point to as far-too-common?

It seems to me that this is rich ground for research and not for rhetoric; for careful concern and consideration and not for carless deconstruction of the actions of the men and women, like Smith, who put themselves at hazard to enforce our laws and protect our constitutional rights (including the Third Amendment).

**The Meadows Foundation of Dallas Texas Presented the 2013 Ethical Achievement Award**

On Wednesday, September 11, 2013, at a luncheon held in their honor the Center for Law Enforcement Ethics at the Institute for Law Enforcement Administration presented the Meadows Foundation of Dallas, Texas with the 2013 Ethical Achievement Award. We at ILEA had the great privilege of honoring The Meadows Foundation for the generous funding they provided over twenty years ago to launch the much-needed Center for Law Enforcement Ethics. Mike McCoy, senior program officer accepted the award. Danny Chandler who is in charge of security for the Meadows Foundation facility was also on hand at the presentation.

Welcoming remarks were offered by Dr. Theron Bowman, Deputy City Manager and Former Chief of Police for the City of Arlington and also by President Michael J. Marchand of the Center for America and International Law whose gracious funding made the luncheon and award possible.

Since the Center's inception, the Institute for Law Enforcement Administration (ILEA) has trained over 12,000 law enforcement ethics trainers from across the United States, Canada and Great Britain and has also touched countless lives in our communities here in North Texas.

In addition to presenting the 2013 Ethical Achievement Award, we also heard from past participant in the Ethics Train-the-Trainer in Law Enforcement program, Joe Ellenberg, Assistant Police chief at McKinney Police Department, on what the Center for Law Enforcement Ethics has meant to him. Cheryl Dunlop, Doug Kowlaski, and David James who helped design and support the first ethics courses that the Center fielded also were in attendance as were the Ethics Train-the-Trainer participants who were taking the training on that day.

We were delighted to honor the Meadows Foundation for their vision and generosity which has yielded so many great results for the law enforcement profession.



*Mike McCoy (left) and Neil Moore (right) at the Ethical Achievement Award Ceremony.*

**Our up-coming ILEA Programs:**

**Police Resource Allocation and Deployment  
Patrol Staffing Methods for Law Enforcement Managers (October 8 - 11, 2013: Plano, Texas) <http://www.cailaw.org/institute-for-law-enforcement-administration/Events/2013/police-resource-allocation-and-deployment-OCT.html>**

**Administration and Management of Training (October 14 - 18, 2013: Plano, Texas) <http://www.cailaw.org/institute-for-law-enforcement-administration/Events/2013/administration-and-management-of-training-OCT.html>**

**Ethics Train-the-Trainer for Public Servants (October 28 - 30, 2013: Plano, Texas)** <http://www.cailaw.org/institute-for-law-enforcement-administration/Events/2013/ethics-train-the-trainer-ps.html>

**Reset the Clock: Replace Liability with Credibility**

**Comprehensive and Practical Employee Relations in Law Enforcement (October 31 - November 1, 2013: Plano, Texas)** <http://www.cailaw.org/institute-for-law-enforcement-administration/Events/2013/reset-the-clock-OCT.html>

**Internal Affairs, Professional Standards and Ethics**

**Safeguarding the Commitment to Excellence (November 4 - 8, 2013: Plano, Texas)** <http://www.cailaw.org/institute-for-law-enforcement-administration/Events/2013/internal-affairs-professional-standards-and-ethics-NOV.html>

**Police and Family Conference: Backing Up a Cop: Building Better Law Enforcement Relationships (November 9 - 10, 2013: Plano, Texas)**

<http://www.cailaw.org/institute-for-law-enforcement-administration/Events/2013/police-and-family-conference-JUL.html>

**Police-Media Relations**

**Make the Connection: Media Relations and a Healthy Public Image**

**(November 18 - 20, 2013: Plano, Texas)** <http://www.cailaw.org/institute-for-law-enforcement-administration/Events/2013/police-media-relations-NOV.html>

**Basic Police Supervision: Quality Supervisory Training... In Just One Week (December 2 - 6, 2013: Plano, Texas)** <https://www.cailaw.org/eventRegistration.html?e=502>

**Advanced PIO Training: Communicating in Crisis (December 16 - 18, 2013: Plano, Texas)** <http://www.cailaw.org/institute-for-law-enforcement-administration/Events/2013/advanced-pio-training-DEC.html>

**Social Media for Law Enforcement (December 19, 2013: Plano, Texas)**

<http://www.cailaw.org/institute-for-law-enforcement-administration/Events/2013/social-media-for-law-enforcement-DEC.html>





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