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Under the Radar: Proposed Use of Force Restrictions Greatest Defect in Police Reform Effort

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Senate (S2800) and House (H4860) bills share identical provisions regarding changes in the permissible use of force by police officers. While a lot of attention has been paid to "qualified immunity," these provisions, which radically restrict police use of force, have largely flown under the radar. In these bills, the Senate creates a new G.L. Chapter 147A while the House spreads identical language within several sections of a new Chapter 6E. The proposed changes would end the historical and current view, adopted by courts in literally thousands of well-reasoned decisions, that the use of force by police must be reasonable based on the total circumstances.

The legislature's new language. "A law enforcement officer shall not use physical force upon another person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is necessary to: (i) effect the lawful arrest of a person; (ii) prevent the escape from custody of a person; or (iii) prevent imminent harm and the amount of force used is proportional to the threat of imminent harm." See S2800, proposed 147A, § 2(b); H4860, proposed 6E, § 14(a).

The 8 major drawbacks of this proposed standard.

1. **Officers will no longer be able to physically detain and/or frisk suspects based on reasonable suspicion, often done with public safety at the forefront.** The new standard forbids the many, many instances when reasonable force is permitted to detain a suspect for an investigation, and/or frisk them for weapons, and/or handcuff them for safety based on reasonable suspicion. It is incomprehensible that a statutory codification of use of force would not accommodate police interventions (detentions and frisks) that have been permissible under federal and state constitutions, and thousands of court decisions, for decades. See, e.g., *Comm. v. Williams,* 422 Mass. 111 (1996). *Comm. v. Campbell,* 69 Mass. App. Ct. 212 (2007). *Comm. v. Hernandez,* 77 Mass. App. Ct. 259 (2010).

2. **Officers' ability to use protective custody will be removed.** The new standard will not authorize *any* force to effect protective custody for alcohol or drug incapacitation, even though it is a common and important public safety intervention by officers. In fact, since the protective custody laws, found in Chapters 111B and 111E, explicitly state that protective custody is not an arrest, the new law's lack of coverage for this police activity will spawn needless litigation.

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3. **Officers will be very limited in their ability to manage dangerous mental health encounters.** The new law does not authorize use of force for this purpose. Responding officers cannot resort to force in cases where a person might be suicidal and/or dangerous because of his or her mental condition and in desperate need of evaluation and maybe hospitalization. See G.L. c. 123, § 12.[1]

4. **Using force to prevent a crime in progress will no longer be an option.** The definition of "imminent harm" -- in both Senate and House versions – requires (absent an arrest or escape) that officers face a situation in which there is a risk of "serious physical injury or death." This means that a risk of non-deadly, physical force would no longer justify *any* police force. The result: Officers who have to forcefully intervene to prevent an assault and battery or even an indecent assault and battery could be disciplined, decertified, and even sued on the basis that the anticipated crimes did not risk "serious physical injury or death."[2] This is not splitting hairs or academic speculation. The language of the proposed law contains little nuance or accommodation to the variety of interventions faced by police every day where physical force may be necessary.

5. **Arrests will likely increase because an inflexible standard will limit intervention and mitigation steps.** Since no use of force will be permitted to simply stop a crime from occurring -- unless an arrest is made – this new statute, ironically, will force officers to make more arrests (exactly what legislative advocates didn't want). Let us explain: Under the proposed law, officers will have to be instructed that any use of force – absent a risk of serious injury or death – is forbidden unless they make an arrest. Many times, in the past, officers have had to employ reasonable force to stop a crime in progress – like disorderly, A&B, weapons possession, even theft – and then decided to let the offender(s) walk away with a warning, or agree to enter a diversion program, or receive a summons in the mail. Now, those same officers will be forced to make an arrest or worry that any force, no matter how reasonable, might subject them to lawsuit and de-certification if later perceived to be outside the new standard.

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[1] This does not even address the times when officers, through their community caretaking authority, use reasonable force to restrain a person for medical treatment or based on a public health emergency, like COVID-19. See *Hill v. Miracle*, 853 F.3d 306 (6th Cir. 2017). 105 CMR 300.210(G) (police may assist public health officials enforcing an oral "isolation and quarantine order").

[2] Note the restrictive nature of "imminent harm": It requires "a person with the present ability, opportunity and apparent intent to immediately cause serious physical injury or death and is a risk that, based on the information available at the time, must be instantly confronted and addressed to prevent serious physical injury or death; provided however, that imminent harm shall not include fear of future serious physical injury or death." This language does not offer realistic guidance for the myriad situations where force may be necessary. See S2800, proposed 147A, § 1; H4860, proposed 6E, § 1.

6. **It is unrealistic and unwise to condition all use of force on "de-escalation."** The legislature looks to make, as a statutory precondition for *any* use of force, that officers attempt de-escalation — which is defined to include "waiting out a person" or "calling in medical or mental health professionals."[3]

   The only alternative is for police to *determine* that de-escalation tactics "are not feasible." Yet, feasibility is undefined in this proposed law. The elastic standard is an invitation for attorney-fueled lawsuits built on speculation about anything police "might have done." For decades, this type of "20/20 hindsight" has been rejected based on an understanding that police decisions are often "split second" in evolving circumstances. *Grahm v. Connor*, 490 Mass. 386 (1989). Also see *Roell v. Hamilton County*, 870 F.3d 471 (6th Cir. 2017) (complicated case in which officers dealt with mentally disturbed man; police response was reasonable; court acknowledged that it is easy to speculate on what would have made the response "perfect").[4]

   Ironically, Massachusetts law enforcement has embraced de-escalation for years and increased training in this area (in spite of law enforcement training dollars, through the legislature, being decreased in real terms over the past decade).

   Ultimately, de-escalation is a fluid concept that depends on a variety of factors — nature of the crime or situation under investigation, presence of weapons, prior record of suspect, presence of potential victims, police resources available and call for service caseload, among many others. In fact, court assessments on police use of force already take into account whether officers had the opportunity to de-escalate. *Brown v. Lewis*, 779 F.3d 401 (2015) (improper escalation of force given what police knew).

   At this time, a legislative list of mandated de-escalation tactics is counterproductive. The legislature could more usefully mandate and fund de-escalation training across all law enforcement disciplines. It has done this in other areas of policing — civil rights, domestic violence, and OUI come to mind — without changing the applicable legal standard that governs the underlying police activity. This approach has improved policing *without promoting litigation.*

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[3] De-escalation would be defined as "proactive actions and approaches used by an officer to stabilize a law enforcement situation so that more time, options and resources are available to gain a person's voluntary compliance and to reduce or eliminate the need to use force including, but not limited to, verbal persuasion, warnings, slowing down the pace of an incident, waiting out a person, creating distance between the officer and a threat and requesting additional resources to resolve the incident, including, but not limited to, calling in medical or mental health professionals to address a potential medical or mental health crisis." See S2800, proposed 147A, § 1; H4860, proposed 6E, § 1.

[4] *Roell* is instructive about why an overly precise definition of acceptable force and an affirmative obligation on police to prove that they did everything they could, would result in increased litigation and expense with little impact on public safety.

7. **An overly technical definition of acceptable force is unfair to the public, who rely on officers to intervene (sometimes without hesitation).** In both bills, decertification could be based solely on violations of this new force standard. The predictable result will be officers laying low, refusing to intervene in any questionable situation for fear that they will be the object of a decertification petition, civil lawsuit, or even criminal prosecution.

8. **It is unrealistic and unfair to impose a radically new standard without providing for a period of transition and education.** Both Senate and House bills include an emergency preamble making their new use of force rules effective immediately, without providing any funding or opportunity for officers to be trained on the substantial changes that will be brought about. This is akin to asking legislators to accept a sudden change in, for example, campaign finance laws without an education and adjustment period.

The problem is not the current and longstanding definition and application of reasonable force; the problem is that a small percentage of officers apply force unreasonably. We can understand the pressure on the legislature to act hard and fast at this time. Unfortunately, an overly restrictive standard is unlikely to deter the small number of officers who abuse their authority. At the same time, for the vast majority of officers, impinging on their ability to judiciously use force will cause more harm than good.

The better focus. The other legislative effort — training and decertification through a professional state agency — is a step in the right direction that deals with the real threat posed by the small number of officers who engage in misconduct.

Stay well,
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and
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