

MAINE STATE LEGISLATURE

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ALERT

OCTOBER 1976

CRIMINAL DIVISION



**MESSAGE FROM THE
ATTORNEY GENERAL
JOSEPH E. BRENNAN**

FROM THE OFFICE OF
THE ATTORNEY GENERAL
OF THE STATE OF MAINE

USE OF FORCE I

Use of force, the topic of the main articles in this and next month's ALERT, is one of the most important areas of the law to law enforcement officers. Officers are given the privilege of carrying weapons and using force to maintain the peace and enforce the law. Together with this privilege goes the grave responsibility of using force only within the prescribed limits of the law.

The consequences of improper use of force, especially deadly force, can be devastating. The most important of these consequences is, of course, the possibility of injury or death to law enforcement officers or other persons. In addition, however, an officer's personal life and career may be adversely affected. Not only may an officer be convicted of crimes ranging from assault to criminal homicide in the first degree, but he may be held liable in damages in a civil suit for assault and battery, wrongful death, or some other civil wrong.

It is vitally important, then, that officers read and thoroughly learn the information in these articles on use of force. A complete understanding of *both* articles is necessary for an officer to properly carry out his official duties.

**JOSEPH E. BRENNAN
Attorney General**

This issue and next month's issue of ALERT deal with the use of force by law enforcement officers while performing their official duties. Two prior issues of ALERT and a portion of the Law Enforcement Officer's Manual contained information and advice to law enforcement officers on the use of force. That information and advice must now be disregarded because the newly enacted Maine Criminal Code changed Maine's law. Therefore, officers should disregard the main article of the March 1974 ALERT, entitled "DEADLY FORCE;" the August 1971 ALERT, pp. 5 and 6, dealing with the use of force in accomplishing an arrest; and the Law Enforcement Officer's Manual, Section II-A, pp. 16-18. Officers should make appropriate notations in the above-mentioned publications to indicate that the October and November 1976 ALERTs contain the current Maine law on the use of force.

BACKGROUND

Prior to the enactment of the Criminal Code, substantial confusion existed in Maine regarding the use of force by law enforcement officers in carrying out their official duties. Confusion existed because

no statutes or case law clearly indicated Maine's law on the subject. Consequently, judges, prosecutors, and law enforcement officers had to look to the common law for guidance. Unfortunately, the common law established principles for an older, more stable society, and these principles were modified substantially, though not uniformly, by state and federal courts in an attempt to adapt the principles to our twentieth century society.

The Maine Criminal Code attempts to avoid the confusion which resulted by providing specific rules dealing with the use of force by law enforcement officers. The following discussion will explain the sections in the Code dealing with the use of force and their effect on the responsibilities of law enforcement officers.

ARREST AND THE USE OF FORCE

The lawful authority of a law enforcement officer to arrest provides the primary justification for the right of an officer to use force. An officer's authority to arrest *under a warrant* comes from the warrant itself. As long as an

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officer falls within the category of officers to whom the warrant is directed, he has authority to arrest according to the terms of the warrant.

The authority for officers to arrest *without a warrant* is set out in 17-A M.R.S.A. §15. That section is discussed in the April-May 1976 ALERT, pp. 2 and 3. For purposes of convenience, 17-A M.R.S.A. §15 is set out in its entirety below:

§15 Warrantless arrests by a law enforcement officer

1. Except as otherwise specifically provided, a law enforcement officer shall have the authority to arrest without a warrant:

A. Any person who he has probable cause to believe has committed or is committing:

(1) Criminal homicide in the first degree or criminal homicide in the 2nd degree; or

(2) Any Class A, Class B or Class C crime; and

B. Any person who has committed or is committing a Class D or Class E crime in his presence.

2. For the purposes of subsection 1, paragraph B, criminal conduct has been committed or is being committed in the presence of a law enforcement officer when one or more of the officer's senses afford him personal knowledge of facts which are sufficient to warrant a prudent and cautious law enforcement officer in believing that a Class D or Class E crime is being or has just been committed and that the person arrested has committed or is committing it. An arrest made pursuant to subsection 1, paragraph B, shall be made at the time of the commission of the criminal conduct, or some part thereof, or within a reasonable time thereafter or upon fresh pursuit.

Once a law enforcement officer has the authority to arrest, he has the right to use force, with certain limitations, to accomplish the

arrest. He has this right whether the arrest is made with or without a warrant. Without the authority to arrest, the law enforcement officer's right to use force is no greater than that of an ordinary citizen. (Use of force by ordinary citizens is presented in next month's article.) It is therefore important for law enforcement officers to review and understand the law relating to authority to arrest. In addition to the discussion in the April-May 1976 ALERT mentioned above, law enforcement officers should review the applicable parts of section II-A of the Law Enforcement Officer's Manual.

CRIMINAL CODE §107

As previously mentioned, the Maine Criminal Code clarifies the circumstances under which a law enforcement officer may use force to perform his duties and the degree of force he may use. 17-A M.R.S.A. §107 contains the provisions on use of force in law enforcement and reads in part as follows:

§107. Physical force in law enforcement

1. A law enforcement officer is justified in using a reasonable degree of nondeadly force upon another person:

A. When and to the extent that he reasonably believes it necessary to effect an arrest or to prevent escape from custody of an arrested person, unless he knows that the arrest or detention is illegal; or

B. To defend himself or a 3rd person from what he reasonably believes to be the imminent use of nondeadly force encountered while attempting to effect such an arrest or while seeking to prevent such an escape.

2. A law enforcement officer is justified in using deadly force only when he reasonably believes such force is necessary:

A. To defend himself or a 3rd person from what he reasonably believes is the imminent use of deadly force; or

B. To effect an arrest or prevent the escape from arrest of a person whom he reasonably believes

(1) has committed a crime involving the use or threatened use of deadly force, or is using a deadly weapon in attempting to escape, or otherwise indicates that he is likely seriously to endanger human life or to inflict serious bodily injury unless apprehended without delay; and

(2) he had made reasonable efforts to advise the person that he is a law enforcement officer attempting to effect an arrest or prevent the escape from arrest and has reasonable grounds to believe that the person is aware of this advice or he reasonably believes that the person to be arrested otherwise knows that he is a law enforcement officer attempting to effect an arrest or prevent the escape from arrest.

(3) For purposes of this paragraph, a reasonable belief that another has committed a crime involving use or threatened use of deadly force means such reasonable belief in facts, circumstances and the law which, if true, would constitute such an offense by such person. If the facts and circumstances reasonably believed would not constitute such an offense, an erroneous though reasonable belief that the law is otherwise justifies the use of force to make an arrest or prevent an escape.

Definitions

Several terms found in §107 are defined elsewhere in the Code and
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must be understood in order to properly apply §107. Some of these terms, which can be found in §2 of the Code, are defined as follows:

§2(5) 'Bodily injury' means physical pain, physical illness or any impairment of physical condition.

* * *

§2(8) 'Deadly force' means physical force which a person uses with the intent of causing, or which he knows to create a substantial risk of causing, death or serious bodily injury. Intentionally or recklessly discharging a firearm in the direction of another person or at a moving vehicle constitutes deadly force.

* * *

§2(9) 'Deadly weapon' or 'dangerous weapon' means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is capable of producing death or serious bodily injury. If the actor intentionally presents, in a covered or open manner, a thing as a deadly weapon, it shall be presumed that the thing was a deadly weapon.

* * *

§2(12-A) 'Firearm' means any weapon, whether loaded or unloaded, which will expel a projectile by the action of an explosive and includes any such weapon commonly referred to as a pistol, revolver, rifle, gun, machine gun or shotgun. Any weapon which can be readily made into a firearm by the insertion of a firing pin, or other similar thing in the actual possession of the actor or an accomplice, is a firearm.

* * *

§2(17) 'Law enforcement officer' means any person who by

virtue of his public employment is vested by law with a duty to maintain public order, to prosecute offenders, or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes.

§2(18) 'Nondeadly force' means any physical force which is not deadly force.

* * *

§2(23) 'Serious bodily injury' means a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ, or extended convalescence necessary for recovery of physical health.

Some of these definitions require a brief comment. Officers should note that there are separate definitions for "bodily injury" (§2(5)) and "serious bodily injury" (§2(23)) and that the definition of serious bodily injury depends on the definition of bodily injury. Also, the definition of "deadly weapon" or "dangerous weapon" (§2(9)) depends partially upon the definition of "firearm" (§2(12-A)). Also the word "animate" in the definition of deadly weapon refers to something which is living. Therefore, a vicious dog or the hands of a person trained in karate might be deadly weapons, depending upon the manner in which they are used or are intended to be used. "Inanimate" deadly weapons would be non-living things such as guns, clubs, and knives. With one exception, the definition of "deadly force" (§2(8)) focuses on the actor's intent or knowledge of substantial risk and does not attempt to list the types of physical force which are deadly. The exception is the intentional or reckless discharging of a firearm in the direction of another person or at a moving vehicle, an act so

inherently dangerous that it is specifically included in the definition. Other examples of deadly force would be beating a person over the head with a metal pipe, stabbing or cutting a person with a knife, and holding a person's head under water for an extended period of time. Nondeadly force is any physical force which is not deadly force. Examples of nondeadly force are fighting with the fists, pushing, shoving, and grappling, and the use of hand-cuffs. Also, by specific provision in the Code, the use of mace and similar substances is defined to be nondeadly force.

17-A M.R.S.A. §101(3)—For purposes of this chapter, use by a law enforcement officer or a corrections officer of chemical mace or any similar substance composed of a mixture of gas and chemicals which has or is designed to have a disabling effect upon human beings is use of nondeadly force.

The definition of "law enforcement officer" is important because §107 (1) and (2) extend only to law enforcement officers. Among other things, the definition includes persons who have the power to arrest for crimes. Maine does not have a single, all-encompassing statute granting the power to arrest, but rather treats separately each branch of law enforcement. For example, 25 M.R.S.A. §1502 gives the state police arrest powers throughout the state, and 15 M.R.S.A. §704 gives sheriffs, their deputies, constables and municipal police officers the power to arrest in their respective jurisdictions. Law enforcement officers should be familiar with the statute granting them authority to arrest and should know where and when their authority may be exercised, because their right to use force under §107 (1) and (2) depends upon that authority.

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NONDEADLY FORCE

Arrest or Escape from Custody

In the vast majority of cases in which physical force is necessary to accomplish an arrest, nondeadly force will be the type of force used. 17-A M.R.S.A. §107(1)(A) permits the arresting officer to use nondeadly force to accomplish an arrest or prevent an escape under three conditions. First, the *degree* of nondeadly force must be *reasonable*. Reasonable force is that amount of force necessary to prevent persons from interfering with the officer's duties to arrest or prevent escapes. For example, less force will be justified in overcoming the resistance from a young, small child than from a large, strong adult. It should be noted that under §107(1)(A) an officer's authority to use nondeadly force is not limited to the person being arrested or the person escaping. The officer may use reasonable nondeadly force against *any* person who interferes with his attempt to arrest or prevent escape. Of course, if no resistance or interference is offered, no force is justified.

The second condition is that the officer reasonably believe that nondeadly force is *necessary* to effect an arrest or prevent escape. Essentially, this is a common sense limitation which means that if the officer knows that force is not necessary, he is not justified in using force even though other circumstances might justify its use. This commonly occurs when the arresting officer knows the resisting arrestee and knows of a way to persuade the arrestee to submit. For example, if an officer knows that a person is easily excitable but will calm down quickly, the officer should not use nondeadly force to arrest the person without first giving him a moment to calm down.

The third condition under §107(1)(A) involves the legality of the arrest. If the arresting officer knows that the arrest or detention

is illegal, he is not justified in using *any* force. Again, it is important for officers to know and apply the laws of arrest as found in 17-A M.R.S.A. §15 and as discussed in Section II-A of the Law Enforcement Officer's Manual.

Self-Defense and Defense of Other Persons

§107(1)(B) allows an arresting officer to defend himself or a third person from what he reasonably believes is the imminent use of nondeadly force. This is a self-defense section which gives an officer the right to act affirmatively to protect himself or a third person from the imminent use of nondeadly force while the officer is attempting to effect an arrest or prevent an escape. As under §107(1)(A), an officer has a right of self-defense under §107(1)(B) against *any* person who presents an imminent threat of nondeadly force and not just against the person being arrested or the person escaping. For example, if an officer is attempting to arrest a person and a friend of that person attacks the officer with his fists, the officer is justified in using nondeadly force against the friend. The amount of nondeadly force used to protect the arresting officer or a third person must be reasonable, that is, it must be only that amount of nondeadly force necessary to accomplish an adequate defense.

DEADLY FORCE

Law enforcement officers are justified in using deadly force only in the most extreme circumstances. The obvious reasons for the severe limitations on the use of deadly force are the potential death or injury of the officer and other persons, innocent and guilty, and the potential civil or criminal liability of the officer if deadly force is improperly employed. It is

therefore absolutely imperative that officers thoroughly know their rights and limitations regarding the use of deadly force.

There are only two very limited purposes for which a law enforcement officer may use deadly force under §107(2). Broadly stated, those purposes are (1) to defend himself or a third person, and (2) to effect an arrest or prevent the escape from arrest. The severe limitations on the use of force for these purposes will be discussed separately.

Self Defense or Defense of Other Persons

§107(2)(A) is a straightforward provision which allows a law enforcement officer to use deadly force to defend himself or a third person from what he reasonably believes is the imminent use of deadly force, when he reasonably believes such force is necessary. The basic thrust of this provision is that an officer may meet deadly force with deadly force. The officer's use of deadly force will not be justified, however, unless he meets the two "reasonableness" requirements. First, he must *reasonably believe* that deadly force is necessary. In other words, he must see no other reasonable way to adequately protect himself or a third person. Of course, situations involving the use of deadly force often arise suddenly, giving the officer insufficient time to weigh the reasons for and against the use of deadly force. In these emergency situations, the law requires only that the officer exercise his best judgment under the facts available to him. As long as the officer does not act wantonly or maliciously, he is not expected to unreasonably endanger his own life in the performance of his official duties.

Second, the officer must *reasonably believe* that he or a third person is in danger of the *imminent*

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use of deadly force by the attacker. Imminent use of deadly force means that there is an immediate threat that such force will be used. For example, assume that an officer and the operator of an automobile are standing outside the automobile arguing over a traffic infraction and the operator says, "I am going to get a gun out of my glove compartment and blow your head off." The officer would not be justified in using deadly force against the operator since there was no possible danger of the *imminent* use of deadly force against the officer. The proper procedure would be for the officer to attempt to calmly dissuade the person. An alternative procedure would be to arrest for a crime such as terrorizing (17-A M.R.S.A. §210) or Disorderly conduct (17-A M.R.S.A. §501) if the elements of the crime are present. Only if the person reasonably appeared intent on carrying out his threat and was in the automobile reaching for a gun or had a gun in hand would the officer be justified in using *deadly* force.

Effecting Arrest or Preventing Escape from Arrest

§107(2)(B) is a somewhat involved provision setting out the circumstances under which a law enforcement officer may use deadly force in effecting an arrest or preventing an escape from arrest. Because of the importance of this provision, it will be broken down into its component parts and each part will be discussed separately.

First, as in the use of deadly force for self-defense or defense of others, a law enforcement officer must reasonably believe that deadly force is necessary to accomplish his purpose. Again, this means that there must be no other way for the officer to adequately effect the arrest or prevent the escape. The key term here is "reasonably believes." If an officer uses deadly force maliciously or wantonly, he

may be both criminally and civilly liable for his acts.

Second, there are only three situations in which an officer may use deadly force against a person to effect an arrest or prevent an escape from arrest. They are:

- (1) The officer *reasonably believes* that the person has committed a crime involving the use or threatened use of deadly force;
- (2) The officer *reasonably believes* that the person is using a deadly weapon in attempting to escape; or
- (3) The officer *reasonably believes* that the person otherwise indicates that he is likely seriously to endanger human life or to inflict serious bodily injury unless apprehended without delay.

The term "reasonably believes" has been highlighted because an officer's use of deadly force will not be justified unless he believes, based on facts, circumstances, and the law, that one of the three listed situations exists. Mere rumor or suspicion will not justify the use of deadly force. Under situation (1), the officer must reasonably believe that the person actually committed some crime. Belief that a person was merely thinking about committing a crime or belief that a person has a criminal record or bad reputation will not suffice. Also, under situation (1), the officer must believe that the crime actually involved the use or threatened use of a deadly weapon. Mere belief that a person is dangerous or that he usually carries a weapon is not enough.

Under situation (2), the officer must reasonably believe that the person is actually *using* a deadly weapon in attempting to escape. Mere belief that the person possesses a weapon or that he is dangerous is not enough.

Situation (3) allows law enforcement officers to use deadly force in dire emergencies involving danger to human life. The key terms are

"seriously endanger" and "serious bodily injury." Anything less will not justify the use of deadly force. Also under situation (3), the phrase "unless apprehended without delay" means that deadly force will not be justified unless the person presents an *immediate* serious danger to human life. A threat of serious danger at some time in the future will not suffice.

Third, §107(2)(B)(2) requires a law enforcement officer, before he uses deadly force to effect an arrest or prevent an escape, to make a reasonable effort to notify the person to be arrested in order to give him an opportunity to give himself up. The notice should consist of the officer informing the person that he is a law enforcement officer attempting to effect an arrest or prevent an escape from arrest. In addition, the officer must reasonably believe that the person is aware of this advice. This provision is designed to minimize the loss of life and injuries that may result when a law enforcement officer surprises a dangerous person while attempting to arrest him or prevent his escape. The provision gives the person an opportunity to surrender peacefully before deadly force is used to apprehend him.

The officer need not notify the person if the officer reasonably believes that the person otherwise knows that he is a law enforcement officer attempting to effect an arrest or prevent an escape from arrest. For example, if an officer is in uniform chasing a person who has been observed in the act of committing a crime, it would probably be unnecessary for the officer to give the person the required notice.

* * *

The conclusion of the discussion of use of force will appear in the November 1976 ALERT.

IMPORTANT RECENT DECISIONS

ARREST, SEARCH AND SEIZURE:

A § 2.4 Automobiles—Without a Warrant

Defendant was convicted of possession of marijuana. Local law enforcement officers impounded defendant's car after several parking violations. After observing a watch and other personal property lying open to view inside the car, officers inventoried the contents of the car, including the contents of the unlocked glove compartment, according to standard inventory procedures. Marijuana was found in a plastic bag in the glove compartment.

The U.S. Supreme Court held that the conduct of the police in inventorying the contents of the automobile impounded for traffic violations was not unreasonable. The court reasoned that the expectation of privacy in automobiles is less than that in homes or offices. Automobiles are subject to pervasive and continuing government regulations and controls and they travel public thoroughfares so that their occupants and contents are open to public view. The court said that the impoundment and inventorying of the contents of automobiles was permissible (1) to protect the owner's property while it remains in police custody; (2) to protect the police against claims or disputes over lost or stolen property; and (3) to protect the police and public from danger. It is proper for officers to examine an unlocked glove compartment during such inventories since it is a customary place for documents of ownership and registration as well as a place for temporary storage of valuables. *South Dakota v. Opperman*, U.S. , 96 S.Ct. 3092, 40 L.Ed. 2d 1000 (U.S. Supreme Court, July 1976).

COMMENT: This case reaffirms and expands upon the principles enunciated on pages III-D5 to III-D8 of the Law Enforcement Officer's Manual. First the authority of law enforcement officers to impound vehicles impeding traffic or threatening public safety and convenience is firmly established. Second, the right to inventory the contents of an impounded automobile, including the contents of an unlocked glove compartment, is approved. The purposes for which an inventory may be made are limited, however, to the protection of the owner's property, protection of the police against claims or disputes over lost or stolen property, and protection of the police and public from danger. These are the only purposes for which a warrantless inventory of an impounded automobile may be conducted. If an inventory is made as a pretext for searching for evidence, any seizure of evidence will be illegal and the evidence will be inadmissible in court. If the owner is available, does not want an inventory made, and wishes to arrange to protect his property in the automobile himself, officers should respect his wishes.

Also, officers should not open locked glove compartments or locked trunks to make inventories of their contents, because the protection of the property, themselves, and others would not ordinarily require it. But when an officer reasonably believes that the contents of an automobile or the contents of a locked compartment in an automobile present a danger to himself or others, he may make an inventory of those contents.

Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, State House, Augusta, Maine.

ALERT

The matter contained in this bulletin is intended for the use and information of all those involved in the criminal justice system. Nothing contained herein is to be construed as an official opinion or expression of policy by the Attorney General or any other law enforcement official of the State of Maine unless expressly so indicated.

Any change in personnel or change in address of present personnel should be reported to this office immediately.

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