

PERF's Ill-advised Guidance on Use of Force or Obey the Supreme Court: Except When Time to Defend Yourself and Innocent Others

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On January 29, 2016, the self-appointed group of “experts” at the Police Executive Research Forum (PERF) issued a policy guide they have sanctimoniously titled, “Use of Force: Taking Policing to a Higher Standard.” This word salad is apparently based on the popular but completely incorrect perception that American police officers use force, particularly lethal force, at high rates and unlawfully. In reality, American law enforcement rarely uses force of any kind, and kills only three to four percent of those who assault them with potentially lethal force. In this “guide”, PERF sets forth “30 Guiding Principles”, of which we will only address the high (low) points. That should be enough to place a stake through the heart of this legal, ethical and tactical vampire.

PERF Policy 1. The sanctity of human life should be at the heart of everything an agency does.

Agency mission statements, policies, and training curricula should emphasize the sanctity of all human life—the general public, police officers, and criminal suspects—and the importance of treating all persons with dignity and respect.

While praise-worthy on its face, this policy statement does not reflect the reality of the conduct to which officers must respond. Regularly, officers are forced to address the conduct of persons who do not share this polite value set. Those persons can put law enforcement personnel and other non-criminal citizens at risk of death or great bodily harm. While no one should advocate gratuitously harming these offenders, neither should anyone advocate that their well-being ought to be on the same par as that of our police officers, or our friends and families. Neither of the authors would wish to see any of our friends, families, or colleagues harmed because of the foolish idea that the health of an assaultive criminal is as or more important than the safety and lives of the good guys.

PERF Policy 2. Departments should adopt policies that hold themselves to a higher standard than the legal requirements of *Graham v. Connor*.

Agency use-of-force policies should go beyond the legal standard of “objective reasonableness” outlined in the 1989 U.S. Supreme Court decision *Graham v. Connor*. This landmark decision should be seen as “necessary but not sufficient,” because it does not provide police with sufficient guidance on use of force. As a result, prosecutors and grand juries often find that a fatal shooting by an officer is not a crime, even though they may not consider the use of force proportional or necessary. Agencies should adopt policies and training to hold themselves to a higher standard, based on sound tactics, consideration of whether the use of force was proportional to the threat, and the sanctity of human life.

Many police agencies already have policies that go beyond legal requirements. For example, many police agencies have adopted pursuit policies, and rules barring officers from shooting at or from moving vehicles, that go beyond current legal precedents.

Our overarching observation here is policy related. These Supreme Courts decisions, unlike contentious political matters such as those involving abortion or gun control, are usually decided by an 8-1 or 9-0 Court. Despite the obvious lack of real world experience in dealing with dangerous offenders of most of the justices, the Court is not confused about the tactical dynamics of a deadly force encounter, which underpins *Graham v. Connor* and its progeny. In fact, long before the Supreme Court began deciding use of force cases using a Fourth Amendment Analysis, it recognized the foolhardiness of substituting one’s notions of reasonableness from the cool comfort of a courtroom. In 1921, in the case of *Brown v. United States*, Associate Justice Oliver Wendell Holmes wrote, “Detached reflection cannot be expected in the presence of an uplifted knife.” Contrary to the assertions made by PERF, the Constitutional standard, when combined with sound and current training on the recognition and control of violent, threatening behavior, is certainly sufficient. Such clear expressions of fundamental law and policy should not be discarded based upon the critiques of the ignorant no matter how well intentioned.

Additionally, in other Fourth Amendment cases, where the court sets forth the lawful parameters of a search and seizure, or Fifth Amendment rights to counsel, it would be ridiculous to tell law enforcement officers, “The Court says you may do X+3, but for policy reasons, we are only going to allow you to do X+1.” The ridiculousness of such a posture is trebled by the fact that officers are making use of force decisions under situations that are “tense, uncertain and rapidly evolving.”

PERF’s assertion of “As a result, prosecutors and grand juries often find that a fatal shooting by an officer is not a crime, even though they may not consider the use of force proportional or necessary” is wrong on multiple fronts. Valid and effective use of force is ugly, and will produce visceral responses that are not even close to objective in the clear vision of hindsight. What a prosecutor or grand jury finds as disproportionate or unnecessary is mostly based on conjecture, unscientific opinion and Hollywood’s version of reality. The media and most citizens are even more ignorant. An officer’s use of force in response to an imminent threat of death or grievous bodily injury should *never* be proportional to the threat presented. One need not and ought not bring a knife to a knife fight. To gain insight into this reality, we strongly urge PERF – and more importantly those police leaders whom may be tempted to heed PERF’s advice – to read *In Defense of Self and Others: Issues, Facts & Fallacies – The Realities of Law Enforcement’s Use of Deadly Force*. This book alone, more than anything PERF might say on the issue, is dispositive of the current state of the Constitutional use of force in policing.

And what possible purpose is served by PERF militating police agencies away from this Constitutional base? What is the incentive? The Constitution is our founding and guiding principle on the governance of free men. Police leadership would be far wiser to follow its sound guidance as set forth by the Supreme Court rather than the constantly changing whims and vicissitudes of politically driven groups of narcissistic anarchists like Black Lives Matter and the “militia” group who have unlawfully occupied the Malheur Wildlife Refuge, one of whom died as a result of violently resisting arrest. Ironically, his apologists are using the same false description of events that resulted in the destruction of the life of Officer Wilson in Ferguson.

PERF Policy 3. Police use of force must meet the test of proportionality.

In assessing whether a response is proportional, officers must ask themselves, “How would the general public view the action we took? Would they think it was appropriate to the entire situation and to the severity of the threat posed to me or to the public?”

Again, PERF appears to be substituting the mistaken and sometimes willful ignorance of certain segments of the public for valid analysis of what constitutes a reasonable use of force. The failure of our profession to contribute to the education of the citizens we protect so that we are able to have an enlightened discussion is a shame, but not a reason upon which we should change policy. It is a reason to improve our communication about the legal and factual underpinnings of what we do. And it is important to recognize that the word is *reasonable* not *proportional*. The guiding principle of centuries of common law is the notion of reasonableness. For example, in 1891, the Supreme Court recognized in *New Orleans and N.E.R. Co. v. Jopes* that “the law of self-defense justifies an act done in honest and reasonable belief of immediate danger.”

Proportionality is a military term used in the Law of Armed Conflict. It concerns weighing the amount of damage caused to noncombatants against the military necessity of bombing a particular target. It is *bad* practice to conflate or mix military targeting terms with the amount of force police should use in the United States. And, if PERF means proportional in the sense of making it a fair fight, shame on them. No citizen has the right to punch, cut or otherwise attack an armed police officer. Anyone who expects anything else than a bullet in response is a fool. This is because of the fact that 20% of the officers killed in the line-of-duty are killed with their own weapon taken from them by an assailants who were treated *proportionally*.

POLICY 4. Adopt de-escalation as formal agency policy.

Agencies should adopt General Orders and/or policy statements making it clear that de-escalation is the preferred, tactically sound approach in many critical incidents. General Orders should require officers to receive training on key de-escalation principles. Many agencies already provide crisis intervention

training as a key element of de-escalation, but crisis intervention policies and training must be merged with a new focus on tactics that officers can use to de-escalate situations. De-escalation policy should also include discussion of proportionality, using distance and cover, tactical repositioning, “slowing down” situations that do not pose an immediate threat, calling for supervisory and other resources, etc. Officers must be trained in these principles, and their supervisors should hold them accountable for adhering to them.

There is nothing in law or ethics that makes this a sound policy direction. The only person responsible for the escalation or de-escalation of an incident is the offender. Despite this, American law enforcement uses force of any type in very few incidents. The vast majority of potentially violent law enforcement contacts are controlled without force because of using good tactics and other options. Sometimes, officers place themselves at increased risk, which they should never do, in an effort to avoid using force that they could and probably should for political reasons or fear of public perception, such as the detective disarmed and beaten (and lucky to be alive) in Birmingham, Alabama this past August.

Our police do great work in addressing those with mental health problems, in spite of the fact that they are stuck with responding to these people because our legislators have completely failed at providing for the needs of this population for decades. The righteous indignation of patrol and corrections personnel is driven by this reality. It is tremendously difficult to deal with the mentally ill in uncontrolled circumstances as law enforcement often must, and those who are most pathetic are sometimes the most dangerous through no fault of their own. This is because their inability to form specific hostile intent makes them no less dangerous: as John Hall is fond of saying, “Very little mentation is required for deadly action. A rattlesnake is deadly but could not form the mental state required for conviction of murder.”

PERF Policy 5. The Critical Decision-Making Model provides a new way to approach critical incidents.

Policy on use of force should be based on the concept of officers using a decision- making framework during critical

incidents and other tactical situations. Departments should consider adopting the Critical Decision-Making Model (CDM), which PERF has adapted from the United Kingdom's National Decision Model. The CDM provides officers with a logical, easy-to-use thought process for quickly analyzing and responding appropriately to a range of incidents. The CDM guides officers through a process of:

- Collecting information,
- Assessing the situation, threats, and risks,
- Considering police powers and agency policy,
- Identifying options and determining the best course of action, and
- Acting, reviewing, and re-assessing the situation. The CDM is a constructive process that provides a framework for going beyond the minimum legal standard of objective reasonableness.

This is policing version of the military's ill reasoned Escalation of Force (EOF) cards. Not coincidentally, EOF cards were also an offshoot of the legal reasoning of Great Britain. In Britain, as well as most European Union countries, all use of force rights emanate from the sovereign. We fought a Revolution to sever ourselves from such government-centric thinking. We recognized that the right of self-defense – for police and the public alike – emanates from our Creator. It is a God-given, inherent right. Accordingly, efforts by any sovereign to diminish this right must be resisted. Secondly, and more important to the officer on the street, adding such burdensome and confusing constructs to what must be a fast and effective response can be deadly. Officers already endure enough intrusive thoughts as to what might happen should they pull the trigger. Adding this nice sounding, but tactically silly, language will only further delay their response under stress. But, perhaps that is exactly what PERF is: cowardly “leaders” who would rather have a state funeral for a fallen officer than deal with the repercussions of a politically controversial shooting.

For brevity's sake, the remaining 25 PERF Policy Recommendations will be skipped over. Should one really want to become dumber and more

angry at the same time, please feel free to go to PERF's website, where you will find this nonsense in its totality. But, their Policy 8 deserves special consideration for its being completely out of touch with the realities of a deadly assault on police or innocent citizens. It states, "Agencies should adopt a strict prohibition against shooting at or from a moving vehicle unless someone in the vehicle is using or threatening deadly force by means other than the vehicle itself." This ignores what should be a blinding flash of the obvious: a 4,000-pound vehicle used as an instrumentality or weapon possesses many times more "knockdown" power than any handgun or rifle. So, why should an officer be precluded from shooting a suspect who is trying to run down the officer or innocent other?

Likewise Policy 9, prohibiting the use of deadly force on those who present only a danger to themselves. This is insulting. If in fact one only presents a danger to themselves, no one could assert that there is any basis in law or ethics for using deadly force. To claim that our police are doing so is insane. However, sad as it may be, some who are suicidal may become homicidal, or at least appear to do so to force the police to do that which they will not do themselves. This is a common enough occurrence that it has earned this moniker of "suicide by cop."

In conclusion, PERF's policy advice ignores another inconvenient truth: police officers are assaulted at least 66,000 times a year: 15,500 times with a deadly weapon, and many more with personal weapons (hands, feet, etc.) that can result in death or great bodily harm; yet, police only kill approximately 800 suspects a year nationwide. So, this notion that police are indiscriminately killing innocent citizens is sheer fantasy. Perhaps, it is the result of repetitive playing on YouTube and television of police encounters. Shamefully, there is no indication in PERF's policy that the well being of officers and the innocent citizens whom they are sworn to protect is considered, let alone valued.

One could conclude this is an effort to cater to the squeaky wheels and rabble rousing by ill-informed or malicious groups bent on violence, instead of displaying the integrity and intellectual courage to confront their falsehoods head-on. Baltimore and Ferguson-like rioting must be quickly quelled by reasonable but overwhelming force else we surrender our peaceful realm to those who place all decent people and great expectations at risk.