

Response to PERF's "30 Guiding Principles" document

by Missy O'Linn

The Police Executive Research Forum (PERF), a Washington, D.C. think tank, recently made the news for promoting its creation of "30 Guiding Principles" for police use of force policy and training.

As an attendee at the PERF "Re-Engineering Police Use of Force" conference in Washington D.C. in May 2015, I left with some serious concerns about the dialogue and the concepts that were being considered. It appeared that the stage had already been set and a course charted and that we were being steered to an outcome that I believed was problematic and placed law enforcement officers and agencies at risk. I wrote to PERF Executive Director Chuck Wexler following the close of the conference about those concerns but never received a response. The following month I wrote an article that was published in PoliceOne ("Cops are Not Ninjas") that summarized my concerns.

Initially I would like to say that I was very disappointed that the overall theme of the PERF meeting seemed to be that American policing is bad: bad cops; bad tactics; and bad training - that Wexler and PERF attributed to Calibre Press and the "21-foot rule" and a theme that included our officers adopting a plan to step up and take on knife wielding suspects like they do in the UK and Scotland. With the media present in the room we heard zero support for our officers and the overwhelming number of good cops that every day put themselves in harm's way. Given the media's focus on the "bad cop" syndrome and plastering of the airwaves with the "epidemic of police abuse" it appeared that PERF was validating that campaign by the presentation in that meeting confirming the "epidemic".

That position of course ignores the fact that nationwide officers are doing a great job - and the stats support that proposition. The fact is also that the anomalies -- the bad cops and questionable incidents that *should* be headlines because they are anomalies -- do not mean we should be telling officers that to improve public relations we now expect that they are going to wrestle knives away from suspects. Make no mistake, trained ninjas with Wyatt Earp gun fighting skills that can talk their way out of anything and perform surgery in the streets would be great, but we all know that is not the reality for American law enforcement.

First we have to remember that armed police officers trying to wrestle with violent individuals, (especially someone with a knife) opens an officer up to being disarmed. Also, just because someone has a knife does not mean that they do not also have a firearm as well. Finally on this particular issue, as someone trained in the British law enforcement spontaneous knife defense system as an instructor, I can tell you that their officers expect to get cut when they are left in a position of no choice but to engage the knife wielding assailant.

The facts are that officers in the United States do not typically receive training on edged weapon defense and disarming that would make them even reasonably safe in attempting such maneuvers. Nationwide, officers on average receive limited or no hands on physical skills training on an annual basis. POST directors from across the country can attest to the challenges facing our agencies with providing mandated training and the core critical skills that have been set in place. Combine that already abysmal reality with the pressure to address other high profile areas of concern (such as communications skills, dealing with the mentally ill, and homeland security, for just a few examples), and you have simply run out of funding and time to create the perfect cop.

As an experienced law enforcement defensive tactics trainer, use of force expert and trial lawyer with 29 years of experience representing law enforcement, I am very familiar with the issues at hand. I work closely with numerous agencies on such issues on a daily basis and train thousands of officers on use of force issues. What I know is that officers typically do a great job of doing their job. But often, officers have a difficult time explaining things about what went into their tactical decision making, policy and the law. We will not make that any easier for them by creating 117 page use of force policies that officers are somehow expected to comply with and articulate. We will not improve the public confidence in our officers by creating expectations that contradict the laws that our officers have been told apply to their actions.

Yes, officers should have a reverence for human life -- the lives of all humans including the lives of the community members they serve, the suspects that they deal with and their own lives as well. Telling officers that we expect them to take unnecessary risks -- risks that the law does not require them to take, and risks that we have in no way trained them to overcome -- is irresponsible and inappropriate. Suggesting that we have failed in American law enforcement because we teach officers that a firearm is the appropriate response to an edged weapon assault seems to be the message of the day. Understand that the law throughout this country is that officers are permitted to use objectively reasonable force under the totality of the circumstances. That means that they should not use deadly force only if nothing else would work. Officers do *not* have to risk getting stabbed or beaten to death while trying to control a suspect. They are allowed to use reasonable force to stop that from potentially happening.

Certainly I am an advocate for distance and cover and slowing things down when we can. Additional officers and resources are wonderful options as well. However, we need to keep in mind that the policies, practices and rules that we advocate and suggest be put in place are applied across the board to agencies of various sizes and resources and to officers of various and wide ranging fitness and skill levels. That is why the Supreme Court and the other courts across this country issue guidelines and rules that encompass the totality of the circumstances and not absolutes.

I suggest not only do we need to remind the community and the media that American law enforcement officers are overwhelmingly doing a great job and that they want to protect and serve with honor and integrity, but that those officers need the members of the communities that they serve to help them. That help comes in the form of better understanding of the limitations that they face and what the public has a right to expect. That expectation, however, does not and should not be that they will be wrestling knives away from the bad guys anytime soon.

As for the latest PERF publication, "Use of Force: Taking Police to a Higher Standard," the document is a continuation of the politically motivated, irrational and unrealistic approach to use of force that was presented at the conference in May 2015. Perhaps this lack of understanding is based on isolation in academia, or perhaps it has to do with a pure political agenda. It certainly is not premised on any concern for the safety of law enforcement personnel or even for the law abiding citizens that are in need of the assistance of law enforcement protection. Law enforcement officers must be confident in their actions as they respond to situations which require split-second decisions in life threatening circumstances. Hesitation and doubt, coupled with fear of potential consequences, are seriously problematic in such circumstances. The decision-making process and the choices officers face are tough enough without adding the ridiculous and impossible criteria proposed by PERF.

Given the various and numerous proposals contained in the document, let me focus my response here on the first half:

"Sanctity of Human Life" -- This concept is offered as if it is something new when in fact this is a concept that is foundational to all peace officers. What is absent here is the understanding that *all* life is sacred -- the lives of the citizens and victims that officers are sworn to protect, the lives of officers and yes, the lives of suspects as well. The problem is when you use this phrase in judgment of an officer's actions (typically in civil litigation) to argue that an officer faced with potential life threatening circumstances should only have used force as an absolute last resort. That issue blends in fact into the problem with the very next PERF proposal.

"A Higher Standard than Graham" -- The standard for judging an officer's use of any force with regard to arrestees or pre-trial detainees is whether that force is objectively reasonable under the totality of the circumstances. That standard was established in 1989 and has been refined and illuminated by the United States Supreme Court and lower court decisions in subsequent cases over the course of the last 25+ years. Of particular note is the fact that the USSC decisions do not support the judgment and the opinions being promoted by PERF or in many respects being forced on local law enforcement by collaborative reform consultants and/or DOJ

consent decrees. Thus, the provisions of law set forth by the legislative and judicial branches of government are being circumvented by consultants, political factions and the media.

“The Test of Proportionality (i.e., what would the public think?)” -- This proposal is offensive and preposterous. First, the "public's opinion" needs to be identified - In other words, who is PERF referring to that law enforcement should consult with in the split-seconds that they have to make such decisions? Is PERF referring to the opinions of the majority of Americans who still rank law enforcement among the most trusted institutions in this country (see Gallup poll), or the opinions of the media and politicians who are among the least trusted institutions in the land? PERF is making an assertion based on a false premise -- that the majority of Americans believe that law enforcement is failing. Take a survey, or read those that have been done. Just because protesters march and rioters burn does not mean that lawlessness should be condoned. A man beats a police officer and is ultimately shot, and the officer is cleared. A knife wielding assailant is shot, and the officer's actions are criticized, but the law says that officers do not have to risk serious bodily injury to eliminate that threat. If you could put these things to a vote by the public, it is very likely an officer would have been found to have acted properly -- but because of the irrational and frequently lawless and violent actions of some, PERF wants to turn the law on its head.

“Adopt de-escalation as policy” -- By implying that law enforcement is failing to do exactly this very thing now, this is another example of the political motivation of the PERF proposals. De-escalation *is* the goal of law enforcement officers dealing with confrontations and violent encounters. However, when officers try to de-escalate (using such options as talking, team work, time, tactics, tools, etc.), there must also be cooperation on the part of the suspect/subject. If the suspect/subject is holding a knife, if he allows officers to contain the situation (i.e., he stands still or drops the knife), then officers can successfully de-escalate. However, if distance and cover are an issue, the immediate threat may not allow time to "de-escalate" a given situation.

“Use of the Critical Decision-Model” (described as "a logical, easy to use thought process for quickly analyzing and responding appropriately to a range of incidents") -- Once again, PERF's implication is that American law enforcement is not making well-thought-out, logical decisions on a daily basis in dealing with complex, rapidly evolving and frequently unpredictable and dangerous scenarios they encounter. Even more ridiculous is that a complex decision-making model from the U.K. is the answer to the hypothetical assertion and that such a model can be applied in such scenarios. In fact, law enforcement officers in the United States *are* taught various ways to evaluate and respond to problems that they encounter. There is no evidence or research that establishes a failure to effectively perform such functions; and there are serious questions about whether the U.K.'s CDM works in rapidly evolving situations such as those encountered by street level law enforcement personnel.

“Shooting at vehicles should be prohibited” -- Once again PERF suggests that the judicial system and the law as thought out and established over the course of our history is flawed and insufficient. That perspective is presumably based on PERF’s assumptions based on the media’s spotlight on certain events and political posturing. Over the course of the past eight years in particular, the current administration (and particularly the DOJ through consent decrees and collaborative reform efforts) have tried to impose extra-judicial standards on law enforcement agencies across the country. In particular they have insisted that agencies adopt this particular standard which in fact is not supported by the law. Make no mistake, shooting at or from a moving vehicle is strongly discouraged by all law enforcement agencies. However, an absolute prohibition does not have a basis in the realities of this world. In fact, the United States Supreme Court decided two cases recently -- Plumhoff (2014) and Mullenix (2015) -- confirming that this tactic is objectively reasonable under certain circumstances. Additionally, logic and reality shine in the face of such a proposition: a vehicle itself is a weapon that poses a threat and, if used as such, justifies the use of deadly force to stop the threat. Officers always have to evaluate the threat and the options available, balance the risks and select a reasonable option to put into action. Emphatic prohibitions of options for officers to consider and use illustrates the short-sightedness of such proposals -- especially in light of well-thought out and reasoned decisions by the highest court in the land.

As I reflect on the remainder of the proposals in the PERF document I will likely be motivated to continue in my dissection of same. However, for now let me just say that it is apparent that the safety of law enforcement personnel is obviously not a concern to PERF. There is no sign of respect for the legislative or judicial branches of our constitutional system because these proposals disregard and disrespect both the laws as written and the decisions issued.

Finally, the media does not represent the public's opinion nor does PERF appear to want to be a voice of reason in this time of stress. Law enforcement officers are being ambushed and assaulted; we are facing the greatest threats to our citizens ever with the homeland security issues that are well known; yet PERF suggests that we make it more difficult for officers to protect and serve by raising the standard above acting reasonably and by requiring officers to hesitate and ask if their actions will be popular. Even more disturbing is that PERF implied in their press releases that such proposals have the support of law enforcement executives on a nationwide basis. Shame on you! Thank you to the IACP for the public rebuke and to the FOP and others that have spoken out against PERF’s specious proposal.