

March 2, 2016

Chuck Wexler
Executive Director
Police Executive Research Forum
1120 Connecticut Ave., NW Suite 930
Washington, DC 20036

Re: Use of Force: Taking Policing to a Higher Standard; 30 Guiding Principles

Dear Mr. Wexler:

The California Peace Officers' Association ("CPOA"), the California Police Chiefs Association ("CPCA") and the California State Sheriffs' Association ("CSSA") write to you to express some of their concerns regarding PERF's recent publication entitled "Use of Force: Taking Policing to a Higher Standard; 30 Guiding Principles" (the "30 Guiding Principles").

As you may be aware, CPOA represents more than 2,000 peace officers, of all ranks, throughout the State of California. CPCA represents virtually all of the more than 332 municipal chiefs of police in California. CSSA is a non-profit professional organization that represents each of the 58 California Sheriffs. These three professional associations collectively represent the interests of law enforcement throughout the State of California.

It is important to note that the Associations acknowledge that several recommendations by PERF set forth in the 30 Guiding Principles are constructive and likely already endorsed in law enforcement agency policies throughout California. These guiding principles include the importance of de-escalation, immediately rendering first aid to injured suspects, response to critical incidents involving the mentally ill by properly trained officers and multi-jurisdictional crisis teams, the duty to intervene by officers to prevent excessive use of force by other officers, the importance of documenting use of force, and the review of critical incidents by those with specialized training.

However, the Associations have significant concerns regarding several other PERF recommendations articulated in the 30 Guiding Principles that we believe will potentially adversely affect officer safety, will lead to a number of differing and

potentially conflicting standards governing use of force throughout California and the rest of the country, thus decreasing guidance to and consistency in the application of force by law enforcement officers, and will lead to significant liability exposure to law enforcement agencies following PERF's recommendations.

For example, the second policy principle set forth by PERF in the 30 Guiding Principles is extremely problematic. This principle advocates that "Departments should adopt policies that hold themselves to a higher standard than the legal requirements of *Graham v. Connor*." PERF further states that "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 you are undoubtedly aware, *Graham v. Connor*, 490 U.S. 386 (1989), is the United States Supreme Court decision establishing the standard by which use of force is judged under the Fourth Amendment. *Graham v. Connor* provides that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question 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 *Graham* Court held that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."

The "objectively reasonable" standard articulated by the Supreme Court has been relied upon by law enforcement agencies and their officers in decision making for nearly 30 years. Since the Supreme Court decided *Graham v. Connor*, it has been cited in subsequent case law interpreting the "objectively reasonable" standard in a multitude of factual contexts over 20,000 times. Law enforcement agencies have relied upon the guidance provided by this case law to craft policies regarding the use of force consistent with the law and prevailing law enforcement standards.

Accordingly, it is difficult for the Associations to accept PERF's conclusion that this standard "does not provide police with sufficient guidance on use of force." In addition, instead of relying upon this long-established standard, PERF is recommending that individual agencies adopt individual policies setting forth when their officers can use force that may not necessarily be consistent with *Graham v. Connor*. If followed by agencies, this approach would lead to a number of differing and potentially conflicting

standards governing use of force throughout the country. As such, it is hard to conceive how this approach would increase “guidance” to law enforcement officers regarding the use of force. Moreover, PERF fails to explain how it believes its approach would foster the goal of providing additional guidance to law enforcement officers in the 30 Guiding Principles.

The third guiding principle also creates great concern for the Associations. In this principle, PERF states that “Police use of force must meet the test of proportionality.” (Emphasis in original) “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?’” (Emphasis added.)

In other words, PERF is endorsing a concept that a law enforcement officer must consider whether his or her actions would pass scrutiny in the court of public opinion, rather than under standards imposed by the Constitution and courts of law.

That principle would also appear to contradict instructive language set forth in *Graham v. Connor* that the “‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight” and that the “calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.”

PERF’s recommendation also begs the question of safety implications for officers who pause in their actions, while coping with a combative suspect, to consider how the public may later perceive their actions. In the Associations’ perspective, officer safety in hostile situations supersedes subsequent public opinion regarding the incident, which is, unfortunately, many times skewed by unbalanced media coverage.

Another PERF recommendation would also appear to conflict with officer safety and fostering the safety of the public at large. Specifically, PERF recommends that law enforcement agencies adopt policies that strictly prohibit “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.”

While most agencies have policies governing firing at moving vehicles, PERF makes its recommendation to strictly prohibit such action despite the recent United States Supreme Court decision of *Mullenix v. Luna*, 136 S. Ct. 305 (2015). In that case, the

Supreme Court held that a police officer was entitled to qualified immunity for his conduct in shooting and killing a reportedly intoxicated fugitive who was fleeing in a vehicle at high speed. The Supreme Court analyzed the use of force based on the facts confronting the officer at that time.

PERF's recommendation also ignores another recent United States Supreme Court case entitled *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), in which the Court held that an officer acted reasonably when he fatally shot a fugitive driving a car who was intent on resuming a car chase that posed a deadly threat for members of the public based upon the manner in which the fugitive drove the fleeing vehicle.

In sum, the law on this issue provides that it is legally permissible, in some circumstances, to shoot at a moving vehicle to eliminate the immediate threat of serious bodily injury or death posed by the driver of that vehicle based upon the manner in which the driver is driving. PERF's recommendation would remove all discretion from law enforcement officers confronting like scenarios.

PERF's recommendation that agencies adopt policies concerning use of force that differ from the "objectively reasonable" standard articulated by the United States Supreme also poses serious civil liability issues for law enforcement agencies in California. Pursuant to the California Supreme Court decision of *Lugtu v. California Highway Patrol*, 26 Cal. 4th 703 (2001), a law enforcement agency's policy does not establish the standard of care for negligence claims against that agency in California. However, this same opinion holds that the agency's policy may nevertheless be considered as evidence by a jury in determining whether or not an officer was negligent in a particular case.

Accordingly, if a California law enforcement agency adopts a policy that imposes a higher legal standard than that imposed by the United States Supreme Court, that higher standard may be used to determine that its officers acted negligently in a particular situation. This has obvious negative civil liability implications for agencies following PERF's recommendation.

The Associations would like to take this opportunity to thank PERF for its work on behalf of law enforcement throughout the country. However, we would also recommend that PERF reconsider several of its recommendations set forth in the 30 Guiding Principles in light of the points raised herein on behalf of California law enforcement agencies.

Very truly yours,

Chuck Wexler
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Sheriff Scott Jones
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