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AN ILLUSORY “CONSENSUS” (Part II)

Good intentions don't always translate into good policy

By Julius (Jay) Wachtel. This series compares use of force guidelines promulgated by PERF and the National Consensus to police regulations in Los Angeles, Chicago and New York City. Part I covered two key concepts: proportionality and de-escalation. In Part II we analyze specific rules that govern the use of lethal force, including shooting at vehicles and at fleeing suspects, and discuss agency guidelines for dealing with the mentally ill.

Lethal force

[*Graham v. Connor*](#), the Supreme Court's landmark decision on use of force, makes no special distinction as to deadly force. According to Graham, “whether officers' actions are objectively reasonable” must be analyzed “in light of the facts and circumstances confronting them,” using “the perspective of a reasonable officer on the scene.” These “facts and circumstances” include “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.”

[PERF](#): Principle 3 is a commonsensical rule that prohibits using deadly force against persons who only pose a threat to themselves. PERF does not otherwise distinguish as to lethal force. Throughout, its emphasis is on de-escalation and other strategies that can help avert the need to use force against persons not armed with a firearm.

[National Consensus](#): Adopts *Graham*. Allows officers to use deadly force to protect themselves and others from an imminent threat of death or serious bodily injury. (See below for circumstances involving fleeing persons.)

[LAPD](#): Its basic rule does not distinguish between deadly and non-deadly force and sets the threshold for using force as the need to protect oneself or others from “bodily harm.”

While the use of reasonable physical force may be necessary in situations which cannot be otherwise controlled, force may not be resorted to unless other reasonable alternatives have been exhausted or would clearly be ineffective under the particular circumstances. Officers are permitted to use whatever force that is reasonable and necessary to protect others or themselves from bodily harm.

(240.10)

[Chicago \(draft policy\)](#): Similar to LAPD rule but specifically refers to “proportionality” (see Part I of this series):

Consistent with the Department's commitment to the sanctity of life, the Department member's use of deadly force must be objectively reasonable, necessary, and proportional. During all use of force incidents, Department members will apply the force mitigation principles and use the least amount of force required under the circumstances. (sec. II-F-2).

[Chicago's standing policy](#) on the use of deadly force, which apparently remains in effect, stipulates that officers “will not unreasonably endanger themselves or another person to conform to the procedures in this directive” (Order G03-02-03, sec. IV). No such reference appears in the newer, draft policy.

[NYPD](#): https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-01-force-guidelines.pdf Encourages de-escalation but otherwise parallels the language of the National Consensus:

In situations in which [using de-escalation techniques] is not safe and/or appropriate, MOS [member of the service] will use only the reasonable force necessary to gain control or custody of a subject. The use of deadly physical force against a person can only be used to protect MOS and/or the public from imminent serious physical injury or death (pg. 1).

Shooting at vehicles

[PERF](#): Rule#8 prohibits shooting at vehicles unless an occupant is “using or threatening deadly force by means other than the vehicle itself.”

[National Consensus](#): Permissible if an occupant of the vehicle is threatening with deadly force “other than the vehicle” (sec. D-3-c-1) or if the vehicle is being used as a weapon and officers lack other “present or practical” means to avoid being struck (sec. D-3-c-2).

[LAPD](#): Follows the PERF model but opens the possibility of permissible departures with a note that concedes “this policy may not cover every situation that may arise.” In such cases factors such as the level of peril and whether officers had other means to avoid being harmed will be considered, but deviations “shall be examined rigorously” (sec. 556.40).

[Chicago \(draft policy\)](#): Essentially adopts the National Consensus approach. No firing at vehicles if they are the only force being used unless doing so is “reasonably necessary” to

prevent death or great bodily injury to officers or other persons (order G03-02, sec. II-F-6-f).

NYPD: Its highly restrictive rule, apparently a model for PERF, has been in place for years:

Members of the service SHALL NOT (f) Discharge their firearms at or from a moving vehicle unless deadly physical force is being used against the member of the service or another person present, by means other than a moving vehicle (proc. 221-01, page 3, sec. 1-f).

NYPD's [2013](#) firearms discharge report notes that state law is more forgiving, allowing officers "to shoot at the driver of a vehicle who is using the vehicle so that it poses an imminent threat of deadly physical force" (pg. 3). But whether NYPD actually enforces its own, strict rule is open to question. This report - they are issued yearly - lists four ID-AC ("intentional discharge-adversarial conflict") incidents in which officers were assaulted with moving vehicles classified as "blunt instruments" (pg. 22.) None of these events appear on that year's list of unauthorized firearm discharges (pp. 43-44). NYPD's discharge reports for [2012](#), [2014](#) and [2015](#) paint a similar picture.

Shooting at fleeing suspects

PERF: Not mentioned.

National Consensus: Allows it to prevent flight (need not be a felon) "when the officer has probable cause to believe that the person has committed, or intends to commit a felony involving serious bodily injury or death, and the officer reasonably believes that there is an imminent risk of serious bodily injury or death to the officer or another if the subject is not immediately apprehended" (sec. IV-D-1b)

LAPD: More restrictive than National Consensus, requiring both an imminent risk and that the person fleeing is a felon "for a crime involving serious bodily injury or the use of deadly force" (sec. 556.40).

Chicago (draft policy): More permissive than the National Consensus or LAPD. Requires only that "the sworn member reasonably believes that the person to be arrested poses an immediate threat of death or great bodily harm to a sworn member or another person unless arrested without delay" (order G03-02, sec. II-F-4-b).

NYPD: Similar to LAPD – fleeing suspect must be a felon (offense not specified) and present an imminent threat of "death or serious physical injury to the MOS [member of

the service] or another person present” (proc. 221-01, page 3, sec. 1-c). A foreword notes that this and other rules are more restrictive than what the law requires:

Uniformed members of the service are authorized under New York State law to discharge a firearm to prevent or terminate the unlawful use of force that may cause death or serious physical injury, taking into account the below prohibitions imposed by the Department...(proc. 221-01, page 2, sec. 1)

Dealing with the mentally ill

[PERF](#): Extensive discussion of the need for officer training and specialized responders. Officers are encouraged to dialog with mentally ill, take the time to call in specialists, and to avoid deploying Tasers against mentally ill persons armed only with a knife unless the instrument is being wielded “in an aggressive, offensive manner” (p. 19).

[National Consensus](#): Not mentioned.

[LAPD](#): Rules mention a commitment to fair, compassionate treatment (sec. 240.30). LAPD deploys [mental illness response teams](#) staffed by officers and clinicians.

[Chicago \(draft policy\)](#): Officers are required to communicate calmly, de-escalate, establish a “zone of safety” and call for a supervisor. When mentally ill persons are armed “Department members will not attempt to take the subject into custody without the specific direction of a supervisor unless there is an immediate threat of physical harm to the subject, Department members, or others” (order S04-20-01, sec. II-B-1). As in L.A. and New York, specialized mental health response units are on call.

[NYPD](#): Extensive stand-alone policy similar to Chicago’s. Stipulates that deadly force can only be used “as a last resort to protect the life of the uniformed member of the service assigned or any other person present.” Extensive tactical advice with emphasis on slowing things down, establishing a “zone of safety” and, when persons are uncooperative or armed, waiting for a supervisor unless there is an imminent threat of serious physical injury or death (proc. 221-13, sec. 1, pg. 1).

As we mentioned in Part I, PERF’s well-articulated intentions to restrict the use of force well beyond Graham’s “objectively reasonable” standard [dismayed the IACP](#). Indeed, honorable intentions don’t always translate into good policy. Consider PERF’s criticism of officers who used a Taser to dislodge a schizophrenic clinging to a signpost ([Guiding Principles, pg. 18](#)). The man died, likely from the effects of being shocked five

times in quick succession. In prior posts (click [here](#) and [here](#)) we cited warnings about the possibly lethal effects of administering repeated ECW doses in close succession. [PERF's 2011 report on electronic control weapons](#) carries a similar warning. What's interesting here is that [a Federal appeals court ruled](#) in a lawsuit filed by the schizophrenic man's survivors that the officers violated *Graham* for too hastily deploying the device in the first place. In its full-page spread on the matter, PERF prominently agreed. (The cops were nonetheless granted qualified immunity.)

Yet one must wonder. In "[Is it Always About Race?](#)" we suggested that delaying a Taser's deployment could lead to something far worse:

Incidentally, our vision of Tasers and bean-bags as preventive tools probably clashes with some agency guidelines. Bringing down an uncooperative someone with a less-than-lethal weapon is best done the instant it's possible. Waiting for additional justification can turn into a death warrant. So reworking the rules governing the use of less-than-lethal force may be called for.

Had the officers dealing with the mentally ill man succeeded after administering a single dose, their actions would have been applauded. Yet who catalogs successful outcomes?

The "real world" is sloppy in other ways. Point in case: shooting at vehicles. Imagine being a cop on foot as an uncooperative bad guy sits in a car nearby with the engine idling. Always avoid placing oneself in a vulnerable position? Then by all means avoid law enforcement. Agencies write in endless "imminent risk" exceptions so that use of force rules can bend to the exigencies of the real world. Or, as may be the case in New York City, they look the other way when cops fire at vehicles.

Of course, rules have value. Yet the ultimate cure is prevention. In "[A Stitch in Time](#)" we urged that officers be kept informed about persons in mental distress. [PERF Principle number 29](#) deems well trained, informed call-takers and dispatchers indispensable (pg. 68):

A number of controversial uses of force by police have stemmed from failures of call-takers and dispatchers to obtain, or relay to responding officers, critically important information about the nature of the incident.

[The Center for Problem-Oriented policing](#) recommends that police departments make information about mentally disabled persons available to dispatchers so it can be passed on to patrol. Of course, doing so is potentially intrusive, but as we've said, so is shooting someone, or getting shot.

We should also be far more curious about successes. Every day cops peacefully resolve countless incidents that could have ended very poorly. Systematically collecting data about these events could prove highly enlightening. How do differences in policy, resources, tactics and officer characteristics influence outcomes? In “[Is it Always About Race?](#)” we suggested that policing requires that officers accept some risk. How much is too much, and how much is not enough? Figuring out why cops succeed seems like a far better approach to improving the practice of policing than simply tweaking the rulebooks.