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THESIS

**A RACE TO FORCE THE ISSUE: A USE-OF-FORCE
DOCTRINE IN POLICING**

by

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March 2017

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POLICING**

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ABSTRACT

In response to public outrage over police use of force, Police Executive Research Forum (PERF) dedicated its Critical Issues Seminars to discussing use-of-force reform. From the seminars, PERF produced 30 guiding principles, which included best-practice policy recommendations that called for agencies to adopt standards that went higher than the *Graham v. Connor* standard of reasonableness in the eyes of the officer involved. The focus of this thesis was to study what the effect of going beyond current legal standards might have on use-of-force incidents in practice and in the public perception. It also looked to find whether the policy principles put forward could make policing safer for officers and the public they serve. The research showed there was serious debate over the applicability and understanding of PERF's policies. Experts felt the PERF policies should not be adopted as stand-alone policies and further context was required. PERF failed to define the problem it was attempting to solve and only created more confusion with its policy recommendations; no change to law or policy will make policing safer. This thesis recommends that law enforcement, anti-police advocates, and politicians work together to bridge the gap that is felt at every angle of the debate.

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LIST OF ACRONYMS AND ABBREVIATIONS

CDM	Critical Decision-Making Model
BLM	Black Lives Matter
MPC	Model Penal Code
PERF	Police Executive Research Forum
SFPD	San Francisco Police Department

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EXECUTIVE SUMMARY

The narrative of police brutality by racist cops and the immediate call for use-of-force reform began in 2014 in Ferguson, Missouri, and continued after a series of other high-profile fatal police shootings. Public and political sentiment ranged from frustration to hatred toward law enforcement. Constant media attention validated the public's anger with a barrage of stories highlighting the racial differences between the police officers and the individuals shot. The anger and frustration felt by communities around the nation boiled over in protests, riots, and the call for violence toward police from select groups. Activists organized and political leaders issued statements contributing to the narrative that police killings have been racially motivated. Politicians around the nation, from local city council members to the President of the United States, commented on the fact that they felt race was a factor in the recent shootings and within the entire criminal justice system. Contempt for police came from every faction of society.

Comments on social media posts and articles have echoed these narratives with charges of racial discrimination and calls to disarm police forces. Many use social media to call for violence against police. In 2016, police ambush killings increased by 163 percent from 2015.¹ The year ended with 64 officers killed in ambush attacks.²

In response to the public outcry after the events in Ferguson, the Police Executive Research Forum (PERF) refocused a series of already scheduled “Defining Moments” seminars to address law enforcement’s role in the increasing conflict with community members. The seminars produced three separate reports: *Defining Moments for Police Chiefs*, *Re-engineering Training on Police Use of Force*, and *30 Guiding Principles on the Use of Force*.³ The *30 Guiding Principles* report provided best-practice policy

¹ “Preliminary 2016 Law Enforcement Officer Fatalities Report,” National Law Enforcement Officers Memorial Fund, accessed February 15, 2017, <http://www.nleomf.org/assets/pdfs/reports/Preliminary-2016-EOY-Officer-Fatalities-Report.pdf>.

² Ibid.

³ Police Executive Research Forum (PERF), *Defining Moments for Police Chiefs* (Washington, DC: PERF, 2016); PERF, *Re-engineering Training on Police Use of Force* (Washington, DC: PERF, 2016); PERF, *PERF’s 30 Guiding Principles on Use of Force* (Washington, DC: PERF, 2016).

recommendations on use of force that were immediately controversial, garnering attention from major police groups and police attorneys.

My thesis dissects and analyzes PERF's proposals regarding use-of-force reform and its guiding principles, specifically the recommendation to "go beyond the minimum requirements" of *Graham v. Connor*.⁴ It examines what effect going beyond current legal standards might have on use-of-force incidents in practice and in the public perception? It also seeks to determine if the policy principles put forward by PERF in its recommendations could make policing safer for officers and the public they serve. I use the current laws governing use of force and the history of how those laws came to be in order to understand how they relate to use of force. I also determine how the current laws relate to the discretion and authority afforded to law enforcement.

Over the years, the Supreme Court has diligently created and refined a balancing test for analyzing excessive-force claims. The framework allows for the fact that police are often placed in situations in which force is necessary based on the officer's immediate perceptions. These standards matter because, as long as a police officer is found to be acting lawfully within the range of official duties, then he or she enjoys immunity from prosecution, even if the officer's actions result in the injury or death of a suspect.

PERF's *30 Guiding Principles* included thirteen recommended policies with central themes such as: law enforcement should value the sanctity of human life, use force that is proportionate, and de-escalate whenever possible. Many police executives and police attorneys have weighed in on PERF's guiding principles and the context in which they were created. The actual recommended principles, as pointed out by Michael Ranalli, were "so intertwined" that while they could, and should, be applied to all training; they should not be considered "stand alone" or "complete concepts."⁵

PERF's high profile and the political charge of the issue of police use of force attach great weight to statements condemning officers and calling for increased standards.

⁴ PERF, *PERF's 30 Guiding Principles*, 17.

⁵ Michael D. Ranalli, "Adding Perspective to the PERF Guiding Principles on use of Force: What Police Administrators Should Consider," *New York State Chief's Chronicle* (June 2016): 7–11, https://www.nychiefs.org/images/chronicle/June_16.pdf.

At the same time, the PERF recommendations may not do much to help the situation on the ground. In fact, they may confuse both law enforcement officials trying to keep the peace and the public observing police actions as to just what the standards are.

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I. INTRODUCTION

Shortly after the Ferguson, Missouri, protests and riots following the officer-involved shooting of Michael Brown in August 2014, the Police Executive Research Forum (PERF) held three conferences and drafted three documents. The first document, entitled *Defining Moments for Police Chiefs*, was published in February of 2015.¹ The second document, *Re-engineering Training on Use of Force*, was said to explain the third document.² The third document was *30 Guiding Principles on Use of Force*.³ The *30 Guiding Principles* and *Re-Engineering Training* reports called for significant changes in how use-of-force incidents should be judged. PERF is said to create best practices, but its policy recommendations on other topics have been cited in case law as creating precedence.⁴ Specifically, the PERF reports call for agencies to develop policies that go beyond standards under the current threshold of “objective reasonableness,” articulated in the U.S. Supreme Court decision in *Graham v. Connor*.⁵

At issue are the constitutional rights of criminal suspects, or any other citizens interacting with law enforcement—specifically Fourth Amendment protections against unreasonable searches and seizures. Excessive force in the course of an arrest, if it is proven, certainly counts as unreasonable. But what is the threshold? And who gets to decide? During one of the three PERF conferences, Deputy Assistant Attorney General Vanita Gupta stated, “I think it is revolutionary and transformative to be talking about going beyond current understanding of what is ‘objectively reasonable’ per *Graham v. Connor*. There is a real mismatch between what community standards are, what the community expects, and what they think the law should be, as opposed to what the law

¹ Police Executive Research Forum (PERF), *Defining Moments for Police Chiefs* (Washington, DC: PERF, 2016).

² PERF, *Re-engineering Training on Police Use of Force* (Washington, DC: PERF, 2016).

³ PERF, *PERF’s 30 Guiding Principles on Use of Force* (Washington, DC: PERF, 2016).

⁴ PERF, *2011 Electronic Control Weapon Guidelines* (Washington, DC: Police Executive Research Forum, 2011).

⁵ *Graham v. Connor*, 490 U.S. 386 (1989).

allows for.”⁶ This “mismatch” has played out in the days of unrest, some of them violent, as in the cases of Michael Brown in Ferguson, Missouri, in August of 2014, Eric Garner in July 2014, and Freddie Gray in Baltimore in April 2015. Riots broke out in response to each of these incidents. Citizens and police officers were injured and there was major property damage. Additionally, in the wake of these events, there was a significant increase in deaths of officers by gunfire.

The PERF’s high profile and the political charge of the issue of police use of force attach great weight to such statements. At the same time, the PERF recommendations may not do much to help the situation on the ground. In fact, they may confuse both law enforcement officials trying to keep the peace and the public observing police actions as to just what the standards are. An unworkable standard and confusing policy are not standard at all and may even make everyone—officers, suspects, and civilian by-standers—less safe.

A. PROBLEM STATEMENT-BACKGROUND

The current and long-standing basis for evaluating use of force by police officers in subduing a suspect or securing evidence at a scene is “objective reasonableness.”⁷ This standard comes from the Supreme Court decision in *Graham v. Connor*, which explicitly states: “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.”⁸ The reasonableness and, therefore, legality of the use of force depends on “the severity of the crime at issue ... whether the suspect poses an immediate threat to the safety of the officers or others ... and whether the suspect is actively resisting arrest or attempting to evade arrest by

⁶ PERF, “*PERF’s 30 Guiding Principles*, 36.

⁷ Tom Jackson, “Protocol for Reducing Police Shootings Draws Backlash from Unions, Chiefs Group,” *Washington Post*, March 30, 2016, https://www.washingtonpost.com/local/public-safety/move-to-reduce-police-shootings-draws-sharp-backlash-from-unions-chiefs-group/2016/03/30/03c81e6a-ec55-11e5-bc08-3e03a5b41910_story.html.

⁸ *Graham v. Connor*, 490 U.S. 386 (1989), 396–397.

flight.”⁹ This three-pronged test is purposefully imprecise; it uses what PERF describes as “broad principles on how police use-of-force is to be considered and judged” because each individual situation has so many variables that contribute to the decisions made by officers in the field and ultimately comes down to the judgment of the officer on the scene.¹⁰

The court specifically writes that reasonableness must not be adjudged through the lens of “20/20 hindsight.”¹¹ To be sure, the so-called *Graham* factors are objective in the sense that the officer’s intent does not figure into the equation. The court in *Graham* writes, “An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.”¹² Rather, one must look to the “totality of the circumstances,” as in any Fourth Amendment analysis, the court writes.¹³

Policy No. 2 in PERF’s *30 Guiding Principles* recommends, “Agencies should continue to develop best policies, practices, and training on use of force issues that go beyond the minimum requirements of *Graham V. Connor*.”¹⁴ PERF “recommends a number of policies that should be considered ... to take steps that help prevent officers from being placed in situations where they have no choice but to make split-second decisions.”¹⁵ The document does not specify just how these higher standards might shape up, but it does recommend the implementation of such measures as “requiring a duty to intervene if officers witness colleagues using excessive or unnecessary force, requiring officers to render first aid to subjects who have been injured as a result of police actions,

⁹ *Graham v. Connor*, 490 U.S. 386 (1989), 396.

¹⁰ PERF, “*PERF’s 30 Guiding Principles*, 36.

¹¹ 490 U.S. at 396.

¹² *Ibid.*, 397, citing *Scott v. United States*, 436 U. S. 128 (1978), 138, which in turn cites *United States v. Robinson*, 414 U. S. 218 (1973).

¹³ *Graham v. Connor*, 490 U.S. 386 (1989), 396, citing *Tennessee v. Garner*, 471 U.S. 1 (1985), 8–9.

¹⁴ PERF, *PERF’s 30 Guiding Principles*, 35.

¹⁵ *Ibid.*, 17.

prohibiting use of deadly force against persons who pose a danger only to themselves, and prohibiting officers from shooting at vehicles.”¹⁶

B. RESEARCH QUESTION

What effect might going beyond current legal standards have on police use-of-force incidents in practice and in the public perception? Can the policy principles put forward by PERF in its recommendations make policing safer for officers and the public they serve?

C. BACKGROUND

The legal requirements of *Graham v. Connor* regarding the use of force by law enforcement articulate the factors that are taken into consideration to analyze an officer’s decision to use force. In addition to the *Graham* factors, “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.”¹⁷ This case came just four years after *Tennessee v. Garner*, which provides the requirements to determine when deadly force can be used to prevent the escape of a fleeing felon.¹⁸ The court articulated that the officer must have “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”¹⁹ These two Supreme Court decisions form the current precedence on use of force.

Since Eric Garner died while being arrested by New York police in July of 2014 and Michael Brown was fatally shot by police in August of 2014, there has been consistent public debate about police use of force. Both incidents resulted in riots, unrest, and protests across the nation.²⁰ Some protests were peaceful and some resulted in

¹⁶ Ibid., 36.

¹⁷ *Graham v. Connor*, 490 U.S. 386 (1989).

¹⁸ *Tennessee v. Garner*, 471 U.S. 1 (1985).

¹⁹ Ibid.

²⁰ John Eligon and Manny Fernandes, “In Protests from Midwest to Both Coasts, Fury Boils Over,” *New York Times*, November 24, 2014, <http://nyti.ms/1yaaMFm>.

arrests, injured officers, and chants of, “From Ferguson to LA, these cops have to pay.”²¹ Scrutiny of police use of force, especially police killing of mentally ill people, unarmed people, and minority people, increased.²²

Another major focus is on the lack of data collection about people killed by the police.²³ The *New York Times* did a Sunday review titled, “Are the Police Bigoted?”²⁴ This article questioned the lack of data relating to lethal force and if there was, in fact, a racial component. The *Washington Post* created its own database through open sources in an effort to track people who were shot and killed by police.²⁵ *Post* managing editor Cameron Barr said, “We needed to do this because it wasn’t being done well. People in a democratic society have a right to know the results of the state’s use of force in the enforcement of law.”²⁶ Reporter Wesley Lowery stated the database started because they had “activists telling us that this happens all the time, that black men are being executed in the street, especially unarmed black men.”²⁷ Many activists who call for demonstrations over police killings across the nation often cite racism as the catalyst.²⁸

Much of the discussion in the public domain is based on race. Pew Research Center conducted a poll of 1,000 people in August of 2014 and found, “Blacks and whites have sharply different reactions to the police shooting of an unarmed teen and the

²¹ *Ibid.*, 2.

²² Michael Wines, “Are the Police Bigoted?” *New York Times*, August 30, 2014, <http://nyti.ms/1uarfp4>.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ “Fatal Force,” *Washington Post*, accessed February 27, 2017, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/>.

²⁶ Allison Michaels, “Inside the Washington Post’s Police Shootings Database,” A Medium Corporation, December 16, 2015, <https://medium.com/thewashingtonpost/inside-the-washington-post-s-police-shootings-database-an-oral-history-413121889529#.8hgkljpre>.

²⁷ Allison Michaels, “Inside the Washington Post’s Police Shootings Database,” Medium, December 16, 2015, 3, <https://medium.com/thewashingtonpost/inside-the-washington-post-s-police-shootings-database-an-oral-history-413121889529#.8hgkljpre>.

²⁸ Sheryl Gay Stolberg and Stephen Babcock, “Scenes of Chaos in Baltimore as Thousands Protest Freddie Gray’s Death,” *New York Times*, April 25, 2015, <http://nyti.ms/1JpmxOV>.

protests and violence that followed.”²⁹ The poll found that 80 percent of blacks (as respondents self-identified) thought the shooting of Michael Brown “raises important issues about race,” while 37 percent of whites felt the same way. As far as the response to the shooting, 65 percent of black respondents said the police response went too far, 20 percent said the response was about right, and 15 percent did not know. About one-third of whites felt the police response went too far, one-third felt it was about right, and one-third did not know. Research and surveys of minority groups have shown that numerous communities lack trust in police, doubt that officers are being held accountable, and believe that “police are likely to use excessive force.”³⁰

Black Lives Matter (BLM) has been one of the most active and critical groups. Born out of protests from the Ferguson riots, this small activist group grew in such volume and tenacity that *Time* magazine named BLM as fourth runner up for Person of the Year.³¹ *Time* described the movement as “a political force” and that it was “rooted in the rejection of police violence.”³² BLM has been involved in the protests that resulted in the resignation of police leaders and educational leaders.³³ BLM has also been involved in struggles with police supporters.³⁴

Although most of the debate and criticism revolves around race, there are other consistently voiced concerns. A couple leading concerns are the lack of prompt release of an officer’s name after an incident and the lack of officer training to deal with mentally ill persons.³⁵ The largest debate centers on the killing of people described as “unarmed,” especially if they are black.³⁶ Of the 60 unarmed people killed in 2015, 24 of them were

²⁹ Paul Hitlin, “Stark Racial Divisions in Reactions to Ferguson Police Shooting,” Pew Research Center, August 18, 2014, <http://www.people-press.org/2014/08/18/stark-racial-divisions-in-reactions-to-ferguson-police-shooting/>.

³⁰ John Wihbey and Leighton Walter Kille, “Excessive or Reasonable Force by Police? Research on Law Enforcement and Racial Conflict,” *Journalist’s Resource*, October 29, 2015, 2.

³¹ *Ibid.*, 1.

³² *Ibid.*, 4–5.

³³ *Ibid.*, 7–9.

³⁴ *Ibid.*

³⁵ *Ibid.*, 1–7.

³⁶ Sandhya Somashekhar et al., “Black and Unarmed,” *Washington Post*, August 8, 2015, 1–14.

black men, which represented 40 percent of the killings—a much higher percentage than the population of black men.³⁷ Although unarmed deaths by police are frequently debated, an article in the *Washington Post* by Abby Phillip pointed out that the killing of an “unarmed white teen” in South Carolina prompted “almost no national outrage.”³⁸

Political attention to the Ferguson shooting and riots was swift. PERF immediately used the “Defining Moments” conference to start discussions on the Ferguson incident.³⁹ During the conference, up to 300 police executives discussed the Ferguson incident and other events that have created concern for them as police leaders. PERF ultimately created three use-of-force reform documents.⁴⁰ Some politicians and scholars agree with PERF that there is a need to change the way policing is done in America.⁴¹

Two days after the shooting in Ferguson, the attorney general announced a federal investigation into the matter, and President Obama sent condolences to the Brown family.⁴² The President commented on the attorney general investigation and officially stated, about Michael Brown, “I urge everyone in Ferguson, Missouri, and across the country, to remember this young man through reflection and understanding.”⁴³ After the verdict not to indict Officer Darren Wilson for the shooting of Michael Brown, President Obama issued a statement from the White House. He said, “The fact is, in too many parts of this country, a deep distrust exists between law enforcement and communities of color...I don’t think that’s the norm. I don’t think that’s true for the majority of

³⁷ *Ibid.*, 2.

³⁸ Abby Phillip, “An Unarmed White Teen Was Shot Dead by Police. His Family Asks: Where Is the Outrage?” *Washington Post*, August 7, 2015, 1–6.

³⁹ PERF, *Defining Moments*.

⁴⁰ PERF, *PERF’s 30 Guiding Principles*.

⁴¹ Wihbey and Kille, “Excessive or Reasonable Force,” 2.

⁴² David Hudson, “President Obama Issues a Statement on the Death of Michael Brown,” The White House, August 12, 2014, <https://obamawhitehouse.archives.gov/blog/2014/08/12/president-obama-issues-statement-death-michael-brown>.

⁴³ *Ibid.*

communities or the vast majority of law enforcement officials. But these are real issues.”⁴⁴

A lack of support from political leaders and police leaders added to the growing anti-cop narrative. Peter Chiaramonte wrote that police felt a “growing anti-cop sentiment as a result of the Ferguson incident and other high-profile incidents.”⁴⁵ Police felt there was a “war on police” when FBI data showed 51 officers were killed in the line of duty in 2014.⁴⁶ Most of the police discourse has been in response to the PERF *Guiding Principles on Use of Force* document and its recommendation that officers should be held to standards higher than those set forth in *Graham v. Connor*.⁴⁷ International Association of Chiefs of Police and Fraternal Order of Police issued a joint statement stating they “reject any call to require law enforcement agencies to unilaterally, and haphazardly, establish use-of-force guidelines that exceed the ‘objectively reasonable’ standard set forth by the U.S. Supreme Court nearly 30 years ago.”⁴⁸

D. RESEARCH DESIGN

In my 15-year experience as a police officer, I would argue that most, if not all, of the policy recommendations in PERF’s guiding principles are already held and practiced by most police officers and agencies. At the same time, while the PERF documents seem ready to jettison the standards of *Graham v. Connor*, I must question what the new standards might look like, how they might work, who might enforce them on the officers, and who must implement them.

PERF’s website describes the organization as “an independent research organization that focuses on critical issues in policing.” The members are chiefs of police

⁴⁴ “Remarks by the President after Announcement of the Decision by Grand Jury in Ferguson, Missouri,” The White House, November 24, 2014, <https://www.whitehouse.gov/the-press-office/2014/11/24/remarks-president-after-announcement-decision-grand-jury-ferguson-missou>.

⁴⁵ Peter Chiaramonte, “War on Police: Line of Duty Deaths Rise Amid Racially Charged Rhetoric, Anti Cop Climate,” Fox News, May 17, 2015, <http://www.foxnews.com/us/2015/05/17/war-on-police-line-duty-deaths-rise-amid-racially-charged-rhetoric-anti-cop.html>.

⁴⁶ Ibid.

⁴⁷ PERF, *PERF’s 30 Guiding Principles*.

⁴⁸ Chuck Canterbury, “Statement of the IACP and FOP on Use of Force Standards,” IACP, accessed June 16, 2016, <http://www.iacp.org/ViewResult?SearchID=2652>.

of larger agencies, sheriffs, and heads of state agencies. Chuck Wexler, the executive director of PERF, was also the co-chair of the politically driven President’s Task Force on 21st Century Policing.⁴⁹ PERF’s *Guiding Principles on Use of Force* was completed between the summer of 2014 and March of 2016. The final report of The President’s Task Force on 21st Century Policing was completed between January and May of 2015.⁵⁰ The concurrency, results, and recommendations of both documents raise a question of whether they are more political than practical. This distinction is important in large part because real-world law enforcement officers must still affect real-world arrests within a workable legal framework.

My thesis dissects and analyzes PERF’s proposals regarding use-of-force reform and its guiding principles, specifically the recommendation to “go beyond the minimum requirements” of *Graham v. Connor*.⁵¹ In this thesis, I use the current laws governing use of force and the history of how those laws came to be in order to understand how those laws relate to use of force. I also determine how the current laws relate to the discretion and authority afforded to law enforcement.

I detail the Ferguson incident as a tipping point for anti-police protests and outline the public discourse, police discourse, and the political discourse for an understanding of each group’s positions. I focus on the political response, from the president to local policy makers, to include the creation of PERF’s *30 Guiding Principles*, in an effort to reform police use of force. I detail key policy recommendations from PERF as they relate to use of force, but my analysis specifically focuses on the first eight policy recommendations.

Using my experience as a law enforcement professional and the data from my research, I evaluate the vastly varying opinions to determine what the disconnect is and if a higher standard would bridge the gap and make a difference in practice and/or in public perception.

⁴⁹ President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing* (Washington, DC: Office of Community Oriented Policing Services, 2015).

⁵⁰ Ibid.

⁵¹ PERF, *PERF’s 30 Guiding Principles*, 17.

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II. LEGAL STANDARDS

In response to the public protest of the events in Ferguson, PERF put out recommended policies that suggested police agencies “should develop policies, practices, and training on use of force issues that go beyond the minimum requirements of *Graham v. Connor*.”⁵² Although there have been several milestone federal and state legal changes that have affected use of force in the United States, *Graham v. Connor* provided a framework with which to evaluate the reasonableness of force used by police.

Throughout the years there have also been several lower court decisions that have highlighted and refined the reasonableness standard, to include balancing tests on governmental interest and tests for the amount of force used. While there has not always been complete agreement on court decisions, the courts have established precedents for law enforcement to follow and use in training. Adhering to the letter and the spirit of these tenets of reasonable use of force also underlies the qualified immunity that protects police officers from lawsuits or prosecution if they are discharging their duties lawfully.

This chapter provides a history on how the law, as it relates to use of force, has progressed through the years and where it is today. It also discusses qualified immunity and demonstrates how these doctrines work in practice in several California cases.

A. REASONABLENESS AND USE OF FORCE

The Supreme Court provides well-defined standards in analyzing use of force cases through two cases decided 30 years ago. *Tennessee v. Garner* in 1985 provided boundaries for using deadly force on a fleeing felon, and *Graham v. Connor* in 1989 provided an “objective reasonableness” standard that allows for review of alleged excessive force claims to be determined based on the “totality of the circumstances” as perceived by the officer without the benefit of “20/20” hindsight.” The reasonableness test is incredibly important for law enforcement to be able to effectively perform their duties without fear of second-guessing or Monday-morning quarterbacking. The courts

⁵² PERF, *PERF's 30 Guiding Principles*, 35.

have recognized the need to evaluate reasonableness based on the officer's perspective in many decisions.

Graham v. Connor owes much to the earlier *Tennessee v. Garner* case, which helped to define and restrict the use of deadly force to apprehend a "fleeing felon," including its constitutionality.⁵³ Prior to the court's decision in *Tennessee v. Garner*, use of deadly force to apprehend a person thought to have committed a felony fell to the states. States were generally split on what their use of deadly force laws allowed. Most states fell into three categories of law that was followed: common law, model penal code, and a variation of the two.⁵⁴ Tennessee law, under common law principles, still allowed for use of deadly force on any fleeing felon.

Garner was an unarmed 15-year-old boy who was fleeing from the scene of a burglary. In an effort to stop the fleeing burglar from jumping the fence and getting away, the police officer fired his gun at Garner, striking and killing him. The officer testified that he was not in fear, but that he knew he would not be able to apprehend Garner. Garner's father sued the officer and a whole host of other people in district court for violating his son's civil rights. The court found that the officer did not violate Tennessee statutes or his department's policy and therefore did not violate the suspect's civil rights. The case was dismissed and the plaintiff appealed the decision. The appellate court reversed the decision using the Fourth Amendment as the test and found Tennessee's statute did not restrict the use of force and therefore was unconstitutional. Tennessee attempted to defend the statute and brought it to the Supreme Court.

Tennessee argued that because the statute "was the prevailing rule at the time of the adoption of the Fourth Amendment and for some time thereafter, and is still in force in some States, use of deadly force against a fleeing felon must be reasonable."⁵⁵ The Court admitted that it had "often looked to the common law in evaluating the

⁵³ *Tennessee v. Garner*, 471 U.S. 1 (1985).

⁵⁴ Chad Flanders and Joseph C. Welling, "Police Use of Deadly Force: State Statutes 30 Years after Garner," *Saint Louis University Law Journal*, January 24, 2017, <http://www.slu.edu/colleges/law/journal/police-use-of-deadly-force-state-statutes-30-years-after-garner/>.

⁵⁵ "Tennessee v. Garner," Justia, footnote 21, accessed March 1, 2017, <https://supreme.justia.com/cases/federal/us/471/1/case.html#F21>.

reasonableness, for Fourth Amendment purposes, of police activity.”⁵⁶ The Court refused to rule the statute reasonable just because it had been in existence since the adoption of the Fourth Amendment. The Court instead cited the more restrictive Model Penal Code (MPC) as reference for the case, “Though effected without the protections and formalities of an orderly trial and conviction, the killing of a resisting or fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspect.”⁵⁷

The Court also took the opportunity of its decision to review the laws in each of the 50 states. The justices found that almost half the states had codified common law and half had adopted some version of the MPC. Four states still had pure common law, two states adopted MPC verbatim, and the remaining states had no documentation defining their laws. California and Indiana were two of the states that had adopted common law, but had taken extra steps to restrict the use of deadly force.⁵⁸

Common law allowed for use of deadly force against any felon. The Court of Appeals of California heard a number of cases over the years, including *Kortum v. Alkire*, and decided that deadly force was only authorized if the felony was a “forcible and atrocious one, which threatens death or serious bodily harm.”⁵⁹ The *Tennessee v. Garner* case made clear to the other states that common-law rule on use of deadly force to seize any felon was not restrictive enough and was “lacking in humanity” because deadly force could be considered even if no weapons were involved and it was not a dangerous felony.⁶⁰ Although some states have changed their laws to be more in line with *Tennessee v. Garner*, some states to this day have made no change to their common law to require that the felony be a violent felony or involve threats of any bodily harm.⁶¹

⁵⁶ Ibid.

⁵⁷ Ibid., footnote 14.

⁵⁸ Flanders and Welling, “Police Use of Deadly Force.”

⁵⁹ *Kortum v. Alkire*, Court of Appeals of California, Civ. No. 38947 (1977); *People v. Martin*, Court of Appeals of California, Crim. No. F004497 (1985).

⁶⁰ *Tennessee v. Garner*, 471 U.S. 1 (1985).

⁶¹ Flanders and Welling, “Police Use of Deadly Force.”

Four years later, in 1989, the Supreme Court decided *Graham v. Connor*, changing the way excessive force claims were analyzed. First, the prevailing “shock the conscience” test was changed to an “objective reasonableness” test.⁶² The “shock the conscience” test came out of *Rochin v. California* in 1952. It involved forced retrieval of evidence when the suspect, Rochin, was taken to the hospital and forced to vomit pills he had swallowed.⁶³ The court alleged Rochin’s due process was violated when evidence was forced from his body. In Justice Frankfurter’s decision, he said, “This conduct shocks the conscience.”⁶⁴ Conduct that shocks the conscience would be further clarified with a four-part test that came from the 1973 case *Johnson v. Glick*. Although this case came from a corrections facility, it was used as the standard for excessive force claims. The four factors provided by the court were: “1) the need for the use of force; 2) the relationship between the need and the amount of force used; 3) the severity of the injuries sustained by the subject; and 4) whether force was applied in good faith or maliciously and sadistically for the very purpose of causing harm.”⁶⁵ The courts often had differing application of the test so the injuries sustained were often the central deciding factor.⁶⁶

The *Glick* case was decided under the Fourteenth Amendment and stood as the standard for excessive force cases for many years. Under the Fourteenth Amendment, the due process standard protects any person from government deprivation of “life, liberty, or property, without due process of law.”⁶⁷ The *Graham v. Connor* decision examined excessive force claims through the Fourth Amendment “objective reasonableness” standard. Justice Rehnquist’s opinion to use the Fourth Amendment was based on the specific facts of the *Graham v. Connor* case. Because the allegation of excessive force

⁶² Darrell L. Ross, “An Assessment of *Graham v. Connor*, Ten Years Later,” *Policing: An International Journal of Police Strategies & Management* 25, no. 2 (June 2002): 297.

⁶³ *Rochin v. California*, 342 U.S. 165 (1952).

⁶⁴ *Ibid.*

⁶⁵ *Johnson v. Glick*, 352 F.Supp. 577 (1972), 1033.

⁶⁶ Ross, “An Assessment of *Graham v. Connor*,” 297.

⁶⁷ “U.S. Constitution—Amendment 4,” U.S. Constitution Online, accessed February 13, 2017, http://www.usconstitution.net/xconst_Am4.html.

centered on an arrest or seizure of Graham's person, the court used the Fourth Amendment's freedom from unreasonable search and seizure in its decision.

This alleged Fourth Amendment violation created the need to make clear "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application" and 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."⁶⁸ The court also made clear 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."⁶⁹ Chief Justice Rehnquist explained in the decision:

This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other "seizure" of his person. We hold that such claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard.⁷⁰

Although federal law delivers a decision and creates opportunity for civil rights violations, it does not change state law. So an officer could be cleared of any criminal acts by the state if he or she was found to have acted properly within the confines of state law and still be found to have violated a citizen's right under federal law. In addition to possible civil rights violations created by *Tennessee v. Garner* and *Graham v. Connor*, *Monell v Department of Social Services of the City of New York* created civil liability to agencies that violated those civil rights, if the government worker was following department policies and practices.⁷¹ Although this court case probably was the cause of police agencies taking a much more restrictive approach to their policies and practices,

⁶⁸ *Graham v. Connor*, 490 U.S. 386 (1989).

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, 386.

⁷¹ Samuel Walker and Lorie Fridell, "Forces of Change in Police Policy: The Impact of *Tennessee v. Garner*," *American Journal of Police* 11 (1992): 106.

Tennessee v. Garner pointed out that more than 85 percent of police departments already had more restrictive policies than allowed in common law.⁷²

The Supreme Court over the years has diligently created and refined a balancing test for analyzing excessive-force claims. The framework allows for the fact that police are often placed in situations in which force is necessary based on the officer's perception at the time.

B. QUALIFIED IMMUNITY

These standards matter because as long as a police officer is found to be acting lawfully within the range of official duties, then he or she enjoys immunity from prosecution, even if the officer's actions result in the injury or death of a suspect. (This immunity is "qualified" by the provision that the officer acted lawfully.) The qualified immunity doctrine is protection from a civil lawsuit for performance of duties as a government official. The courts have recognized the inherent danger of civil lawsuits that government workers face. In the 1982 Supreme Court case *Harlow v. Fitzgerald*, the court wrote, "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁷³

The process has changed over the years from involving both a subjective and objective test. The current test is solely an objective test that can be decided without the need for the "costly process of discovery and trial."⁷⁴ The "subjective determination typically would require discovery and testimony to establish whether malicious intention was present."⁷⁵ The courts saw the conflict this created and went to the objective test. "This shield of immunity is an objective test designed to protect all but 'the plainly

⁷² *Tennessee v. Garner*, 471 U.S. 1 (1985), 18.

⁷³ Richard G. Schott, "Qualified Immunity: How it Protects Law Enforcement Officers," *FBI Law Enforcement Bulletin*, September 2012, <https://leb.fbi.gov/2012/september/qualified-immunity-how-it-protects-law-enforcement-officers>.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

incompetent or those who knowingly violate the law.”⁷⁶ Qualified immunity “is not appropriate if a law enforcement officer violates a clearly established constitutional right.”⁷⁷

Overly restrictive policies that are adopted by agencies can have a direct impact on whether or not an officer receives qualified immunity, as they can make the rules unclear. The diminishment of what constitutes justifiable use of force and therefore qualified immunity has already started to occur, as evidenced by the spike in officers being charged with murder for on-duty shootings.⁷⁸

C. CASES

The framework provided in *Graham v. Connor* and refined by other lower court cases already require what PERF has indicated would be increased standards such as de-escalation, time and distance, and proportionality. *Graham* also acknowledged the fact that police officers are often forced to make split-second decisions. The following Ninth Circuit court cases highlight how difficult it is to determine the reasonableness of use-of-force incidents, but also highlight how effective the courts have been in determining when an officer has used excessive force.

In *Deorle v. Rutherford*, the Ninth Circuit examined the shooting of an emotionally disturbed man on his own property with a less-than-lethal beanbag gun.⁷⁹ The beanbag struck Deorle in the eye, leaving him with serious and permanent damage. The court used the *Graham* standard of objective reasonableness to determine if officer Rutherford’s use of force was reasonable. Rutherford was on a perimeter around Deorle’s property. The court essentially found that Deorle was contained and obeying commands. They determined that Rutherford did not issue any commands to stop and, in addition, “Rutherford was stationed in a secure position behind a tree, his line of retreat was clear,

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Matt Ferner and Nick Wing, “Here’s How Many Cops Got Convicted of Murder Last Year for on-Duty Shootings,” *Huffington Post*, January 13, 2016, http://www.huffingtonpost.com/entry/police-shooting-convictions_us_5695968ce4b086bc1cd5d0da.

⁷⁹ *Deorle v. Rutherford*, 9th Cir. 272 F.3d 1272 (2001).

and Officer Nichols was stationed almost immediately behind him. Rutherford could easily have avoided a confrontation, and awaited the arrival of the negotiating team by retreating to his original position behind the roadblock.”⁸⁰ The court also found, “A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. There must be other significant circumstances that warrant the use of such a degree of force at the time it is used.”⁸¹

The interesting part of this case was that the court did more than just apply *Graham*; the court analyzed if “the officer made a reasonable mistake as to the legality of his actions.”⁸² The court assumed that Rutherford believed his actions were reasonable, but questioned if his belief was reasonable. The court explained, “Qualified immunity operates...to protect officers from the sometimes hazy border between excessive and acceptable force.”⁸³ Ultimately, the court wrote in its decision, “Every police officer should know that it is objectively unreasonable to shoot—even with lead shot wrapped in a cloth case—an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals.”⁸⁴ The decision by the court based on the facts presented was that Rutherford used unreasonable force against Deorle and was therefore denied qualified immunity. *Deorle* also created a measurement to determine the gravity a use-of-force case imposes by analyzing “the type and amount of force inflicted.”⁸⁵

A second Ninth Circuit case, *Bryan v. MacPherson*, applying the *Graham v. Connor* standards also concluded that an officer used excessive force when “he deployed

⁸⁰ Ibid .

⁸¹ Ibid.

⁸²Ibid.

⁸³Ibid.

⁸⁴Ibid.

⁸⁵ *Bryan v. MacPherson*, 630 F. 3d 805 (2009).

his X26 Taser in dart mode to apprehend Carl Bryan for a seatbelt infraction, where Bryan was obviously and noticeably unarmed, made no threatening statements or gestures, did not resist arrest or attempt to flee, but was standing inert twenty to twenty-five feet away from the officer.”⁸⁶ The officer was initially denied qualified immunity. There were two other Taser cases pending in the Ninth Circuit and MacPherson requested the court to reconsider based on the two other cases. The court did reconsider the case and determined that MacPherson would be entitled to qualified immunity. “It explained that the constitutionality of using the Taser in dart mode was not clearly established when MacPherson Tasered Bryan.”⁸⁷

As with many other court decisions, Judges Richard Tallman, Maria Consuelo Callahan, and N. Randy Smith dissented. Judge Tallman wrote, “Police officers are allowed to act in reasonable self defense...yet, in *Brian v MacPherson*, we deem unconstitutional the actions of a police officer who did just that.”⁸⁸ He continued, MacPherson “was confronted by a mostly naked man who reacted with irrational rage to being directed to stop his car for a simple seatbelt violation. He shouted ‘f***’ over and over, repeatedly punched his steering wheel, ignored the officer’s commands to remain in his car, shouted gibberish, pummeled his own thighs, and did not retreat when the officer yelled at him to get back in his car.”⁸⁹ Most interestingly was Tallman’s opinion that, nine years earlier, the court in *Deorle* “rewrote the standard.”⁹⁰ Tallman wrote:

Despite this clear, consistent, and controlling Supreme Court precedent, a single judge of our court, joined only by a senior judge of a different circuit sitting by designation, charted a new path in 2001. Without citing a single case, the court in *Deorle* rewrote the standard: “The degree of force used by [law enforcement] is permissible only when a strong governmental interest compels the employment of such force.” 272 F.3d at 1280. To justify this conclusion, the *Deorle* panel quotes *Graham* out of context. Specifically, the *Deorle* majority wrote that the *Graham* factors

⁸⁶ Ibid.

⁸⁷ Tim Hull, “9th Circuit Won’t Revisit Officer’s Use of Taser,” Courthouse news Service, November 30, 2010, <https://www.courthousenews.com/9th-circuit-wont-revisitofficers-use-of-taser/>.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ *Bryan v. MacPherson*, 630 F. 3d 805 (2009).

“are simply a means by which to determine objectively ‘the amount of force that is necessary in a particular situation.’” *Id.* (quoting *Graham*, 490 U.S. at 396–97, 109 S.Ct. 1865). The full sentence from *Graham* actually reads: “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.” *Graham*, 490 U.S. at 396–97, 109 S.Ct. 1865. It is clear that *Graham* envisions a flexible standard, appropriate to “reasonableness”; *Deorle* nonetheless requires the police to use only the minimum force necessary. That is not the law the Supreme Court has articulated as the standard applicable to police officers as they make these time-pressured and difficult decisions.⁹¹

In a third case from the Ninth Circuit, *Young v. County of Los Angeles*, the court once again found that excessive force was used when Deputy Wells pepper sprayed Mark Young for not obeying his order to return to his vehicle. This resulted from a traffic stop of Young for not wearing his seatbelt. While Deputy Wells was writing Young a traffic citation, Young exited the vehicle to provide Wells with his registration. Wells told Young to wait in his vehicle. Young did not reenter his vehicle and instead told Wells he preferred to sit on the curb in front of his vehicle. Wells continuously told Young to get back in his vehicle. When Young did not comply, Wells came up from behind him and pepper sprayed him with no warning. Young stood up and Wells continued to pepper spray him and strike him with a baton. Wells never alleged that he felt threatened by Young before pepper spraying him.

The court used the standards in *Graham* to determine “whether...officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.”⁹² The court also balanced “the nature and quality of the intrusion on the individual’s Fourth Amendment interest against the countervailing governmental interests at stake” as quoted in *Tennessee v. Garner*.⁹³ The court also used the decision in *Deorle* to determine, “The gravity of the particular intrusion that a given use of force imposes upon an individual’s liberty interest is measured with reference to ‘the type and amount of force inflicted.’”⁹⁴

⁹¹ *Ibid.*

⁹² *Young v. County of Los Angeles et al.*, 9th Cir., Case No. 09-56372 (2011).

⁹³ *Ibid.*, 8.

⁹⁴ *Ibid.*, 8.

The court mentions, also from *Deorle*, “Warnings should be given, when feasible, if the use of force may result in serious injury, and...the giving of a warning or the failure to do so is a factor to be considered in applying the *Graham* balancing test.”⁹⁵

The Supreme Court and lower courts, as described in the previous cases, have analyzed many excessive-force claims and attempted to apply logic to situations that often were anything but logical. There are many factors that go into decisions made by the courts in determining if excessive force was used. One factor that is typically left out is the resistance or force used against a police officer in the performance of his or her duties. This factor was almost silent in the PERF reports and recommendations.

⁹⁵ *Ibid.*, 17.

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III. POLICE AS THE BAD GUYS: THE NARRATIVE

The current narrative about police brutality by racist cops and the immediate call for use-of-force reform began in Ferguson and continued after a series of high-profile fatal police shootings. Public and political sentiment ranged from frustration to hatred toward law enforcement. Constant media attention validated the public's anger with a barrage of stories highlighting the racial differences between the police officers and the individuals shot. The anger and frustration felt by communities around the nation boiled over in protests, riots, and call for violence toward police from select groups. Activists organized and political leaders issued statements contributing to the narrative that police killings have been racially motivated. Politicians around the nation, from local city council members to the President of the United States, commented on the fact that they felt race was a factor in the recent shootings and within the entire criminal justice system. Contempt for police came from every aspect of society. Social media was abuzz with constant stories of police abuse.

This chapter outlines the narrative that came from different groups and contributed to the growing conflict between police and the community. The frequently divisive nature of the narrative and the resulting conflict provides insight into why there would be such a push to provide the public with use-of-force reform.

A. FERGUSON

The use of force debate immediately centered on race and out-of-control cops. The headlines after the Ferguson incident frequently invoked the “unarmed black teen” and the refrain of “hands up don’t shoot.” Articles highlighted the fact that the police officer was white and he killed an unarmed black teenager, Michael Brown. Facts presented by witnesses within days of the shooting allege that Brown was either running away or attempting to surrender, but that he had his hands up.⁹⁶ Protests and riots

⁹⁶ “The Killing of Michael Brown: Missouri Police Shooting of Unarmed Black Teen Sparks Days of Protests,” Democracy Now!, August 12, 2014, http://www.democracynow.org/2014/8/12/the_killing_of_michael_brown_missouri.

included signs that said, “Stop Police Brutality & Murder,” “Black Lives Matter,” “Jail Killer Cops,” and “Stop Racist Police Brutality” (see Figure 1).



Figure 1. Protest Signs⁹⁷

⁹⁷ Source: (Top Left) Sophie J. Evans and Kieran Corcoran, “Michael Brown and Eric Garner Relatives are Joined by More than 50,000 Protestors Coast to Coast in Marches Against ‘Police Brutality,’” *Daily Mail*, December 13, 2014, <http://www.dailymail.co.uk/news/article-2872825/Michael-Brown-s-mother-Eric-Garner-s-widow-join-10-000-protesters-marching-Washington-DC-end-police-violence.html>; (Top Right) Jessie Daniels, “Research Suggests Why Grand Juries Fail to Indict,” *Racism Review*, December 29, 2015, <http://www.racismreview.com/blog/tag/police-brutality/>; (Bottom) “Police Brutality Is a Blue-State Problem,” *The Black Conservative*, January 29, 2016, <http://blackconservative360.blogspot.com/2016/01/police-brutality-is-blue-state-problem.html>.

B. ACTIVISTS AND BLACK LIVES MATTER

BLM started in response to Trayvon Martin's death at the hands of George Zimmerman. Many felt that Zimmerman had followed Martin simply because Martin was black. BLM did not gain national attention until the group's involvement in organizing protests of the Michael Brown killing in Ferguson. BLM's website claims the group fights state violence against black people and anti-black racism.⁹⁸ BLM believes black lives are "systematically and intentionally targeted for demise."⁹⁹ The group alleges that black people are "unfairly targeted," stopped more often, and arrested more often, as well as have force used against them more often than it is used against white people.¹⁰⁰

Members are fairly absolute in their rejection of law enforcement as a practice and an idea. BLM activist Jessica Disu spoke out on the show "The Kelly File" in favor of disarming the police and/or abolishing police departments.¹⁰¹ When questioned about how the public would keep their communities safe, she stated that one life lost was too much and that they would come up with "community solutions."¹⁰² She is not alone in her idea that police should be unarmed; for example, Paul Krane argues that gun control should start with the police.¹⁰³ And former Green Party presidential candidate Jill Stein feels the same way.¹⁰⁴ During one of the protests in Ferguson, Al Sharpton gave a speech outside the courthouse. He said, "St. Louis is in fact bearing witness for America. The Band-Aid has been ripped off, and all of America is seeing the open wound of racism

⁹⁸ "About #Black Lives Matter," Black Lives Matter, accessed October 10, 2016, <http://blacklivesmatter.com/about/>.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ian Hanchett, "Jessica Disu: 'We Need to Abolish the Police,'" Breitbart, July 11, 2016, <http://www.breitbart.com/video/2016/07/11/jessica-disu-we-need-to-abolish-the-police/>.

¹⁰² Derek Hunter, "Black Lives Matter Activist: Disarm, Abolish all Police [VIDEO]," *Daily Caller*, July 12, 2016, <http://dailycaller.com/2016/07/12/black-lives-matter-activist-disarm-abolish-all-police-video/>.

¹⁰³ Paul Krane, "Where Gun Control Ought to Start: Disarming the Police," Counterpunch, April 29, 2016, <http://www.counterpunch.org/2016/04/29/where-gun-control-ought-to-start-disarming-the-police/>.

¹⁰⁴ Michael E. Hayden, "Jill Stein on Exploring 'what it Means to Disarm our Police Force,'" ABC News, August 21, 2016, <http://abcnews.go.com/Politics/jill-stein-exploring-means-disarm-police-force/story?id=41555794>.

exists.”¹⁰⁵ BLM and many other activists tell a story of rampant racism and police brutality by police.

C. POLITICAL LEADERS

Politicians were quick to jump on the anti-police bandwagon. The U.S. President himself offered support to the Brown family three days after the shooting. His statement said:

The death of Michael Brown is heartbreaking, and Michelle and I send our deepest condolences to his family and his community at this very difficult time. As Attorney General Holder has indicated, the Department of Justice is investigating the situation along with local officials, and they will continue to direct resources to the case as needed. I know the events of the past few days have prompted strong passions, but as details unfold, I urge everyone in Ferguson, Missouri, and across the country, to remember this young man through reflection and understanding. We should comfort each other and talk with one another in a way that heals, not in a way that wounds. Along with our prayers, that’s what Michael and his family, and our broader American community, deserve.

His support for Brown and others bolstered the anti-police narrative. President Obama went on supporting the narrative of racist police in many other statements. In July of 2016, President Obama spoke out regarding the killings of Alton Sterling and Philando Castile. He stated that he could not comment on specific facts, but felt all “Americans should be troubled by the shootings.”¹⁰⁶

Obama also cited statistics he felt proved that racial disparities “exist in our criminal justice system.”¹⁰⁷ He also commented frequently on how dangerous and challenging police work can be, but made no calls for citizens to comply with police orders. He also has acknowledged the failure of society in a larger problem that police are now expected to address. The President was quoted by NPR as saying, “Too often we’re

¹⁰⁵ Bill Hoffman, “Ferguson Mayor: Black Leaders Don’t Want Sharpton Here,” Newsmax, August 13, 2014, <http://www.newsmax.com/newsfront/black-teen-killed-police/2014/08/13/id/588617/>.

¹⁰⁶ Bill Rehkopf, “TRANSCRIPT: Obama Comments on Police Involved Shootings,” *The Hill*, July 7, 2016, <http://thehill.com/blogs/pundits-blog/civil-rights/286941-transcript-obama-comments-on-police-involved-shootings>.

¹⁰⁷ *Ibid.*

asking police to man the barricades in communities that have been forgotten by all of us for way too long.”¹⁰⁸ While this statement seems to be in support of police, it reinforces the feeling that the police are an occupying force that have taken over neighborhoods.

Other political comments have centered around the initial facts that were presented in Ferguson, the “hands up don’t shoot” narrative, and the response to the protests and riots. On August 14, 2014, Senator Rand Paul wrote an opinion piece for *TIME* entitled “We Must Demilitarize the Police.”¹⁰⁹ In the article, Paul writes, “If I had been told to get out of the street as a teenager, there would have been a distinct possibility that I might have smarted off. But, I wouldn’t have expected to be shot.”¹¹⁰ This kind of opinion piece did very little for police relations and actually seemed to reinforce the public outrage.

D. PUBLIC PROTEST AND RIOTS

In response to a call for justice for Michael Brown, protests and rioting occurred in Ferguson, Missouri, and all around the nation. The protests ranged in size and temperament, but the call for justice was the consistent theme. The police handling of the protests in Ferguson came under scrutiny from many, even those in law enforcement. The police used armored vehicles, weapons, and tear gas in attempt to control the situation. Many critics of Ferguson’s response would say the protests were peaceful and the police felt like an occupying force.¹¹¹

The St. Louis County grand jury’s decision not to indict Darrin Wilson in the shooting of Michael Brown once again brought protests from around the nation. With the protests and riots came chants of, “From Ferguson to L. A. these killer cops have got to

¹⁰⁸ Scott Horsley, “Obama Walks Fine Line on Race and Policing,” NPR, July 13, 2016, <http://www.npr.org/2016/07/13/485855670/obama-talks-about-race-and-police-again>.

¹⁰⁹ Rand Paul, “Rand Paul: We Must Demilitarize the Police,” *Time*, August 14, 2014, <http://time.com/3111474/rand-paul-ferguson-police/>.

¹¹⁰ *Ibid.*

¹¹¹ Jamelle Bouie, “The Militarization of the Police,” *Slate*, August 13, 2014, http://www.slate.com/articles/news_and_politics/politics/2014/08/police_in_ferguson_military_weapons_threaten_protesters.html.

pay.”¹¹² One protest march in December of 2014 included BLM and the Million Man March. Another group of protestors claiming association with Trayvon Martin Organizing Committee, which advocates against “racist police practices,” separated from the larger protesting groups and began chanting for violence.¹¹³ The chant was, “What do we want? Dead cops! When do we want them? Now!”¹¹⁴

E. SOCIAL MEDIA

Comments on social media posts and articles have echoed these narratives—the charges of racial discrimination and the calls to disarm the police forces. Many also have called for violence against police. Some postings from July 2016 were captured through social media and documented in an article by James Barrett.¹¹⁵ The screen capture shown in Figure 2 speaks volumes of the anger felt by some in black communities. Ben Baller, a jeweler to many famous artists, has more than 400,000 followers and posted the tweet in Figure 2 the day of the Dallas shootings.

¹¹² Eligon and Fernandez, “In Protests from Midwest.”

¹¹³ Nicolas Medina Mora, “Protester Who Chanted for ‘Dead Cops’ Says They Didn’t Mean it,” BuzzFeed, January 3, 2015, <http://www.buzzfeed.com/nicolamedinamora/protester-who-chanted-for-dead-cops-says-they-didnt-mean-it>.

¹¹⁴ Ibid.

¹¹⁵ James Barrett, “Black Lives Matter Sympathizers Respond to Dallas Attack by TRASHING COPS,” *Daily Wire*, July, 8, 2016, <http://www.dailywire.com/news/7303/black-lives-matter-activists-respond-dallas-attack-james-barrett>.

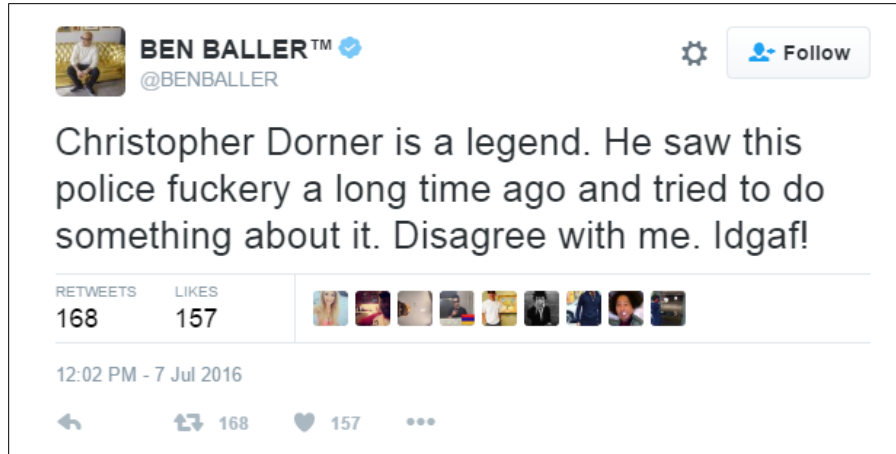


Figure 2. Twitter Post from Ben Baller before Killings of Dallas Police¹¹⁶

At the time of the screenshot capture in Figure 2, @BenBaller’s tweet had been retweeted 168 times. Two days before the Dallas killings, @BenBaller tweeted, “I want to kill 100 cops every time I hear ‘stop resisting’ RIP #AltonSterling.” At the time of the screenshot capture in Figure 3, his tweet had been retweeted 255 times.

¹¹⁶ Source: Ibid.



Figure 3. Twitter Posts from Ben Baller and Others Days before Killings of Dallas Police¹¹⁷

One of the most provocative statements did not actually call for violence but encouraged it: “Soon the tables will turn” was tweeted hours before the ambush killings of Dallas police officers and retweeted 108 times at the time of screenshot shown in Figure 4.

¹¹⁷ Source: Ibid.



Figure 4. Twitter Post from @BlackNefertiti Hours before Killings of Dallas Police¹¹⁸

The sentiment to kill cops is an example of how incendiary the relationship is between police and some members of the public.

F. TRADITIONAL MEDIA

The news media and conventional entertainment programs have actively participated in the divisive anti-police narrative, frequently listing the race of both the officer and the person shot as if it were the main factor in the use of force. When Michael Brown was killed, headlines persistently described him as an unarmed black teen. However, the reality was that he was a 6'5," 289-pound adult male.¹¹⁹ The St. Louis

¹¹⁸ Source: Ibid.

¹¹⁹ Peter Eisler, "Ferguson Case: By the Numbers," *USA Today*, November 25, 2014, <http://www.usatoday.com/story/news/nation/2014/11/25/ferguson-case-by-the-numbers/70110614/>.

Grand Jury investigation also found evidence that Brown had attempted to grab Wilson's gun while Wilson was seated in his vehicle.¹²⁰

In October of 2016, St. Louis police attempted to contact a 14-year-old boy walking with another man. The boy ran and pulled a gun on the police officer chasing him. The boy fired the gun at the police and they returned fire. The article that reported the incident mentioned, "The two officers involved are white; the teen is black."¹²¹ In an unfortunate reality, that statement had more to do with the case than the actual facts; as the article described, citizens immediately gathered at the scene and challenged the facts presented by the police. St. Louis Alderman Chris Carter was quoted in the article saying, "People are just tired of the police shootings."¹²²

The *New York Times Sunday Review* featured an article by Michael Wines, "Are Police Bigoted?" In it, Wines wrote, "The death of the black teenager shined a spotlight on the plague of shootings of black men by white police officers."¹²³ Although Wines was admittedly unable to find any research that pointed to race being part of the decision for police officers to use deadly force, he wrote, "But most interesting, perhaps, was the race of the officers who fired their weapons. About two-thirds were white, and one-third black-effectively identical to the racial composition of the St. Louis Police Department as a whole. In this study, at least, firing at a black suspect was an equal-opportunity decision."¹²⁴ Using "equal-opportunity" when referring to shooting people suggests Mines believes it is something police look forward to doing.

¹²⁰ "Department of Justice Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson," March 4, 2015, 6, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown.pdf.

¹²¹ Joel Currier and Jacob Barker, "St. Louis Officers Shoot and Critically Injure Boy, 14, after He First Fired at Them, Police Say," *St. Louis Post Dispatch*, October 3, 2016, http://www.stltoday.com/news/local/crime-and-courts/st-louis-officers-shoot-and-critically-injure-boy-after-he/article_4b8cc6af-24e2-5caf-9f61-1df7a5c23cc5.html.

¹²² Ibid.

¹²³ Michael Wines, "Race and Police Shootings: Are Blacks Targeted More?" *New York Times*, August 30, 2014, <https://www.nytimes.com/2014/08/31/sunday-review/race-and-police-shootings-are-blacks-targeted-more.html>.

¹²⁴ Ibid.

G. POLICE KILLINGS

Although the Trayvon Martin Organizing Committee later claimed it did not mean what it said, there would be two dead cops a week later and many more killed in ambush-style killings after that. Between 2015 and 2016, police ambush killings increased by almost 70 percent; the year ended with 64 officers killed in ambush attacks.¹²⁵ The first two police officers to be ambushed in an unprecedented spree of police ambush-style killings were Officers Wenjian Liu and Rafael Ramos of the New York Police Department. The officers were sitting in their vehicle when Ismaaiyl Brinsley approached the passenger window of their patrol car and shot both men dead. Neither officer had time to pull their weapons.¹²⁶

Several other high-profile police ambush killings took place, the largest occurring when five officers were killed and six wounded in Dallas on July 7, 2016, at a previously scheduled BLM rally. The shooter in this incident, Micah Johnson, was killed during the exchange but told “authorities that he wanted to kill white people, especially white officers.”¹²⁷ Ten days later, on July 17, 2016, Gavin Long would ambush police officers in Baton Rouge, killing three and injuring another three. The shooters in both of those attacks were killed. Chief David Brown said Johnson told police in negotiations that “he was upset about Black Lives Matter...and about recent police shootings.”¹²⁸ He said Johnson “was upset at white people...he wanted to kill white people, especially white officers.”¹²⁹ Long created many podcasts under the name “Cosmo Setepenra.”¹³⁰ He

¹²⁵ Jason Hanna, Ralph Ellis, and Steve Visser, “Fallen Officers: 64 Shot Dead this Year,” CNN, December 13, 2016, <http://www.cnn.com/2016/08/14/us/police-officers-fatal-shooting-line-duty-nationwide/index.html>.

¹²⁶ Benjamin Mueller and Al Baker, “2 N.Y.P.D. Officers Killed in Brooklyn Ambush; Suspect Commits Suicide,” *New York Times*, December 20, 2014, <https://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html>.

¹²⁷ “What we Know about the Attack on Police in Dallas,” *Washington Post*, July 12, 2016, <https://www.washingtonpost.com/graphics/national/dallas-protest-shooting/>.

¹²⁸ Manny Fernandez, Richard Pérez-Peña, and Jonah Engel Bromwich, “Five Dallas Officers Were Killed as Payback, Police Chief Says,” *New York Times*, July 8, 2015, <https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html>.

¹²⁹ *Ibid.*

ranted “about ‘fighting back’ against ‘bullies’ and discussed the killings of black men at the hands of police.”¹³¹ In one video he referred to Johnson as “one of us.”¹³² This discourse not only divides law enforcement and their communities further, it calls for violence.

¹³⁰ Brian McBride, “Investigators Scour Gunman’s Social Media as Motive Remains Unknown,” ABC News, July 18, 2016, <http://abcnews.go.com/US/investigators-scour-baton-rouge-gunmans-social-media-motive/story?id=40657759>.

¹³¹ Ibid.

¹³² Ibid.

IV. PERF'S 30 GUIDING PRINCIPLES

The road to hell is paved with good intentions.

—Proverb

In response to the public outcry after the events in Ferguson, PERF refocused a series of already scheduled “Defining Moments” seminars to address law enforcement’s role in the increasing conflict with community members. The seminars produced three separate reports: *Defining Moments for Police Chiefs*, *Re-engineering Training on Police Use of Force*, and *30 Guiding Principles on Use of Force*.¹³³ The *30 Guiding Principles* report provided best-practice policy recommendations on use of force that were immediately controversial, garnering attention from major police groups and police attorneys.

This chapter outlines the basis for PERF’s creation of the 30 principles, the themes that came out of the recommendations, expert opinions on adoption of the policy recommendations as written, the implications PERF has created with the publishing of the principles, and finally the weaknesses of the guiding principles in their stated goal of making policing safer.

A. CREATION OF THE 30 GUIDING PRINCIPLES

The background of the creation of the 30 guiding principles was the *Re-engineering Training on Police Use of Force* report.¹³⁴ Chuck Wexler wrote in his summary of the report:

PERF’s Board of Directors was quick to realize that the rioting last summer in Ferguson was not a story that would fade away quickly, and we decided to hold a national conference in Chicago about the implication of Ferguson for policing. As we look back at the most controversial police shooting incidents, we sometimes find that while the shooting may be

¹³³ PERF, *Defining Moments*; PERF, “*Re-engineering Training*”; PERF, “*PERF’s 30 Guiding Principles*”.

¹³⁴ PERF, “*Re-engineering Training*”.

legally justified, there were missed opportunities to ratchet down the encounter, to slow things down, to call in additional resources, in the minutes before the shooting occurred.¹³⁵

The process was led by Chuck Wexler and consisted of “nearly 300 police chiefs and other law enforcement executives, federal government officials, academics, and representatives from policing agencies in the UK,” discussing use-of-force incidents and application.¹³⁶

The group that contributed to PERF’s final recommendations was missing one major component: officers who actually work in the field. Jim Glennon from Calibre Press responded to the PERF recommendations with a suggestion to “get the perspective of those who actually do, not just the theories of those who study and intellectualize what they read about cops.”¹³⁷ Most of the police chiefs and executives who belong to PERF have long since “done” police work in the field, and some never have.

Many police executives and police attorneys have weighed in on PERF’s 30 guiding principles and the context in which they were created. Retired Chief of Police, attorney, police trainer, and program manager for Lexipol Michael D. Ranalli wrote an article for *The New York Chief’s Chronicle* analyzing the “principles and supporting context.”¹³⁸ Ranalli felt the PERF principles were “not suitable for immediate adoption by agencies since further context is required.”¹³⁹ Ranalli wrote, “This report must be viewed with a very critical eye because some of the principles are expansive, conclusory statements that do not provide sufficient basis for complete understanding of the principles’ intended scope, let alone adoption.”¹⁴⁰ Similarly, David Bolgiano and

¹³⁵ Ibid., 3.

¹³⁶ Ibid.

¹³⁷ Jim Glennon, “PERF: Making Headlines, & Headaches for Cops,” Calibre Press, March 4, 2016, <https://www.calibrepress.com/2016/03/perf-making-headlines-headaches-for-cops/>.

¹³⁸ Ranalli, “Adding Perspective.”

¹³⁹ Ibid., 7.

¹⁴⁰ Ibid.

Douglas R. Mitchell wrote a response to PERF's recommended principles, calling them "ill advised."¹⁴¹

Bolgiano and Douglas felt the context in which the report was written was "based on the popular but completely incorrect perception that American police officers use force, particularly lethal force, at high rates and unlawfully."¹⁴² In response to PERF's recommendation to adopt policies that go beyond the current legal precedents, they wrote, "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."¹⁴³

Mildred (Missy) O'Linn, a retired police officer, attorney, technical expert in law enforcement civil liability and peace officer training and tactics instructor, also wrote a response to the principles recommended by PERF.¹⁴⁴ O'Linn was an attendee at the Re-Engineering Police Use of Force conference and "left with some serious concerns about the dialogue and the concepts that were being considered."¹⁴⁵ She, like others, felt "the overall theme of the PERF meeting seemed to be that American policing is bad: bad cops; bad tactics; and bad training."¹⁴⁶ The report documented O'Linn's concern. Wexler wrote that the number-one issue was stated as "training currently provided to new recruits and experienced officers in most police departments is inadequate."¹⁴⁷ PERF also found that cultural changes were needed to reduce use of force.¹⁴⁸ While PERF did not fault police officers for not having better training, the report created an inference that the

¹⁴¹ David G. Bolgiano and Douglas R. Mitchell, "PERF's Ill-Advised Guidance on Use of Force or Obey the Supreme Court: Except When Time to Defend Yourself and Innocent Others," San Francisco Police Officers Association (SFPOA), accessed January 15, 2017, <http://sfpoa.org/policies/BolgianoandMitchellresponsetoPERF.pdf>.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Missy O'Linn, "Response to PERF's '30 Guiding Principles' Document," SFPOA, accessed January 15, 2017, <http://sfpoa.org/policies/OLinnresponsetoPERF.pdf>.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ PERF, *Re-engineering Training*, 4.

¹⁴⁸ Ibid., 9.

public outrage was deservedly at the feet of law enforcement. O’Linn wrote “with the media in the room we heard zero support for our officers...it appeared PERF was validating that campaign by the presentation in that meeting confirming the epidemic.”¹⁴⁹

B. CENTRAL THEMES

The actual recommended principles, as pointed out by Ranalli, were “so intertwined” that while they could, and should, be applied to all training, they should not be considered “stand alone” or “complete concepts.”¹⁵⁰ Still, some central themes emerge, including that law enforcement should value the sanctity of human life, use force that is proportionate, and de-escalate whenever possible.

1. De-escalation/Sanctity of Human Life/Proportionality

Several of the principles were central to the concepts. Ranalli points out the implications of suggesting that law enforcement does not already work based on these core beliefs fails to take into consideration that police officers contact tens of millions of people each year and get it right 99 percent of the time.¹⁵¹ Similarly, O’Linn points out in her response, “De-escalation *is* the goal of law enforcement officers dealing with confrontations and violent encounters.”¹⁵² The danger of de-escalation/sanctity of human life/proportionality as a stand-alone concept is that it infers this “fundamental change,” as PERF refers to it, will change use of force.

The principles provided by PERF as “fundamental changes” also imply that officers’ actions have dictated the amount of force necessary as opposed to the suspect or subject’s actions. PERF found that officers were moving in too quickly and they recommended slowing things down or “tactically disengaging.”¹⁵³ The group wrote that the idea is: “If you can calm the situation down and walk away from a minor

¹⁴⁹ O’Linn, “Response to PERF.”

¹⁵⁰ Ranalli, “Adding Perspective.”

¹⁵¹ Ian Tuttle, “The DOJ’s Policing Statistics Don’t Lie,” *National Review*, December 9, 2014, <http://www.nationalreview.com/article/394249/dojs-policing-statistics-dont-lie-ian-tuttle>.

¹⁵² O’Linn, “Response to PERF.”

¹⁵³ *Ibid.*, 5.

confrontation, and nothing bad happens when you leave, that may be a better outcome than forcing a confrontation over a minor conflict.”¹⁵⁴ This type of conclusion fails to take into consideration that “there must also be cooperation on the part of the suspect/subject.”¹⁵⁵ It also suggests that officers are escalating “minor incidents.”

More important in this connection is the idea of “legitimacy,” as proposed by Ranalli:

The real key here, and what needs to be an essential component of any officer’s decision-making process in relation to enforcement, is the purpose of the initial encounter itself: Is it lawful and for a legitimate (e.g., non-discriminatory) purpose? If the enforcement purpose passes the test of legitimacy, then the resulting scenario will be driven, to a large extent, by the violator.

Legitimacy of purpose can support legitimacy of specific police actions, even though those actions may appear in isolation to be excessive. Officers do sometimes respond in an overly aggressive manner and/ or take no time to try to talk a person down. That must change, but these principles are not comprehensive enough for practical implementation and are not the appropriate way to address the issue. Many of the police videos that have gone viral involve officers who are attempting to enforce a “minor offense” that is legitimate and, if the person cooperated, as the vast majority do, would have resulted in the violator going on his/her way with minimal delay. Yes, officers need to take these situations slowly and not make decisions out of legitimate enforcement actions must be completed and officers need to clearly know what is expected of them.¹⁵⁶

PERF recommended adopting the Critical Decision-Making Model (CDM). This model included a series of questions officers should be asking themselves, such as “What exactly is happening? What is the nature of the risks or threats? What powers do I have legally and within policy to respond? Do I need to take action immediately? Am I the best person to deal with this? If I take a certain action, will my response be proportionate to the seriousness of the threat?”¹⁵⁷

¹⁵⁴ Ibid.

¹⁵⁵ Ibid., 4.

¹⁵⁶ Ranalli, “Adding Perspective.”

¹⁵⁷ PERF, *PERF’s 30 Guiding Principles*.

These questions are basic core questions that police officers are already trained to ask themselves in any field training program. Officers are trained to determine what is happening, what the threats are, how they should respond, and what authority they have to intervene. The minor difference between what police officers already do and the CDM is that PERF has formalized the model and presented it as if it is a brand new idea to consider those questions. The major difference is what PERF is suggesting should be considered in the decision-making process.

Under the model proposed by PERF, officers should take into consideration if the use of force was proportionate. PERF has put forth, under policy 3, the test of proportionality, which includes officers asking 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?”¹⁵⁸ Bolgiano and Mitchell responded: “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.”¹⁵⁹ They go on to write, “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.”¹⁶⁰ Ranalli points out in his response that PERF focuses on “minor offenses” when referring to proportionality.¹⁶¹ He says, “Proportionality, as the term should be considered, already falls within the purview of a Graham objective reasonableness analysis and this is where it should remain.”¹⁶²

San Francisco Police Department (SFPD) police commission modeled use-of-force reform policy after the PERF guiding principles. The San Francisco Police Officers Association (SFPOA) had the policies analyzed by Blake P. Loeb, an attorney and police trainer with extensive experience. The proposed policy required force to be

¹⁵⁸ Ibid., policy 3.

¹⁵⁹ Bolgiano and Mitchell, “PERF’s Ill-Advised Guidance,” 4.

¹⁶⁰ Ibid.

¹⁶¹ Ranalli, “Adding Perspective,” 10.

¹⁶² Ibid.

“proportionate to the severity of the offense committed.”¹⁶³ He compared SFPD’s proposed policy to Seattle Police Department’s General Order, in which “the requirement to use proportional force does not stand on its own.”¹⁶⁴ Loeb’s added that “the concept is not just tied to the severity of the offense, but also to the threat to the officer or the public.”¹⁶⁵ Loeb’s stated, “In every other instance in which I have seen that term used (with one exception, referenced PERF), it is directly tied to the *Graham v. Connor* framework.”¹⁶⁶ Loeb’s primary concern is that “the proposal does not define what is meant by ‘proportional force.’” He felt the “proposal could suggest that ‘proportional’ means that the officers are required to match the degree of force being used by the suspect...if an officer is being threatened by a knife, the maximum force the officer can use in response is a knife.”¹⁶⁷

Loeb’s commented on PERF’s recommendation that officers take into consideration “how the general public might view the action.” He wrote that the suggestion is “essentially requiring officers defer to future YouTube commentary for determining whether the use of force is appropriate at the time.”¹⁶⁸

2. Going above the Legal Standard

Loeb’s was also concerned with the lack of definition of proportionate and questioned whether it would be “consistent with *Graham* or a departure from that legal standard.”¹⁶⁹ In the document, PERF has recommended police departments “develop policies, practices, and training on use of force issues that go beyond the minimum requirements of *Graham v. Connor*.”¹⁷⁰ Ranalli disagrees: “That is the law and we should not create a separate standard in our own policies. My concern is that

¹⁶³ Blake P. Loeb’s, “Review of Proposed SFPD General Orders Related to Use of Force and Use of Lethal Force,” SFPOA, February 29, 2016, <http://sfpoa.org/policies/Loeb’sLetter>.

¹⁶⁴ *Ibid.*, 3.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ PERF, *PERF’s 30 Guiding Principles*, 35.

administrators will fail to recognize that the use of force decision is legally different from tactical decisions made by officers before a use of force incident.”¹⁷¹ He was firm in his caution to administrators and wrote that it was “not just a matter of semantics.”¹⁷² Ranalli agreed that changes involving crisis response and slowing situations down was appropriate, “but that in no way, shape or form should involve creating a higher legal standard on officers who are susceptible to mistakes when under high-stress conditions.”¹⁷³

This clarification was much needed for administrators if they had read comments in the report, such as Principal Deputy Assistant Attorney General Vanita Gupta’s comments, “I think it’s revolutionary and transformative to be talking about going beyond current understanding of what is ‘objectively reasonable’ per *Graham v. Connor*. There is a real mismatch between what community standards are, what the community expects, and what they think the law should be, as opposed to what the law allows for.”¹⁷⁴

The National Association of Police Organizations, which represents more than 1,000 police units and 241,000 officers, also cautioned, “The *Graham v. Connor* decision is not merely an optional ‘legal standard,’ it’s the Supreme Court’s explanation of what the Constitution requires...it instructs courts how to analyze the actions of law enforcement officers after the fact. And these cases are usually civil, not criminal in nature.”¹⁷⁵ National Association of Police Organizations laments, “If PERF wants to change the Constitution, go right ahead, but don’t mislead readers into thinking that Constitutional law has suddenly become optional for police chiefs, prosecutors and jurors.”¹⁷⁶

¹⁷¹ Ranalli, “Adding Perspective,” 9.

¹⁷² Ibid.

¹⁷³ Ibid., 10.

¹⁷⁴ PERF, *PERF’s 30 Guiding Principles*, 36.

¹⁷⁵ “Police Executives Propose Dangerous New use of Force Rules for Line Officers,” National Association of Police Organizations (NAPO), February 5, 2016, http://www.napo.org/files/5614/5504/8432/PERF_use_of_force_guidelines_reply_2016.pdf.

¹⁷⁶ Ibid., 2.

3. Questionable Real-World Application of PERF Principles

Adopting PERF's guiding principle policies has questionable real-world application, a substantial amount of debate, and in some cases is counter to current law and common sense, as in the case of "Policy 8, Shooting at vehicles must be prohibited."¹⁷⁷ This policy recommendation warranted special attention by many that analyzed the policies. Bolgiano and Mitchell called Policy 8 "completely out of touch with the realities of a deadly assault on police officers or innocent citizens."¹⁷⁸ Ranalli felt the same, writing that "language that definitively prohibits an action will inevitably result in a situation where an officer violates the policy under reasonable circumstances, which in turn can create issues that must be dealt with if litigation results."¹⁷⁹

John F. Timone, a member of PERF, commented in the PERF recommendations, "A strict policy does not mean there will never be an exception to the rule."¹⁸⁰ Ranalli responded: "If you know this will reasonably happen, I cannot grasp why any administrator would want to create such a policy."¹⁸¹ O'Linn was just as exasperated when she wrote: "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."¹⁸² Finally, Loeb, in his review of the proposed SFPD policy, wrote, "The ban on officers shooting at the operator of a vehicle who is only using the vehicle as a weapon will endanger the public and officer or require officers to choose between saving a life or their job."¹⁸³

Loeb also commented on how the current SFPD policy addressed concerns of officers unnecessarily shooting at drivers when the officer could have instead gotten out

¹⁷⁷ PERF, *PERF's 30 Guiding Principles*, policy 8.

¹⁷⁸ Bolgiano and Mitchel, "PERF's Ill-Advised Guidance," 7.

¹⁷⁹ Ranalli, "Adding Perspective," 11.

¹⁸⁰ PERF, *PERF's 30 Guiding Principles*, 46.

¹⁸¹ Ranalli, "Adding Perspective," 11.

¹⁸² O'Linn, "Response to PERF," 5.

¹⁸³ Loeb, "Review of Proposed SFPD General Orders," 9.

of the way.”¹⁸⁴ The policy stated, “Officers could only shoot at the driver if there was an imminent threat of serious bodily injury or death *and* the officer had no reasonable or apparent means of retreat.”¹⁸⁵ The SFPD policy wording is common among agency policy. Lexipol has a similar policy. Lexipol’s policy on shooting at or from moving vehicles states:

Shots fired at or from a moving vehicle are rarely effective. Officers should move out of the path of an approaching vehicle instead of discharging their firearm at the vehicle or any of its occupants. An officer should only discharge a firearm at a moving vehicle or its occupants when the officer reasonably believes there are no other reasonable means available to avert the threat of the vehicle, or if deadly force other than the vehicle is directed at the officer or others.¹⁸⁶

Officers should not shoot at any part of a vehicle in an attempt to disable the vehicle.

Lexipol has provided strong policy language that strictly limits shooting unless there are no other reasonable means. It puts the responsibility on the officer to move out of the path of any approaching vehicle. It also allows for the inevitable situation in which an officer would be forced to shoot at the driver to save lives.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Foster City Policy Department, *Policy Manual: Policy 300* (Irvine, CA: Lexipol, 2016).

V. CONCLUSION

#deescalation & #complying citizens is the answer #commonground

—Tweet from Reverend Jarrett Maupin

A. FINDINGS

Many have commended PERF for its intentions with the *30 Guiding Principles* document while others have questioned its motivations. Michael Ranalli points out most of the praise came from the “mainstream media, while criticism came from police circles, including attorneys who defend officers and municipalities.”¹⁸⁷ PERF member Vanita Gupta accurately said, “There is a real mismatch between what the community standards are...and what [the community thinks] the law should be.”¹⁸⁸

Nevertheless, PERF’s solution to increase the standards for police is not the answer, as evidenced by Reverend Maupin’s experience with the Maricopa County Sheriff’s Office. Maupin, who described himself on his Twitter account as a “Progressive Baptist Preacher...Civil Rights Campaigner...[and] Radical Political Activist,” was invited by Maricopa County Sheriff’s Office to participate in use-of-force scenario training.¹⁸⁹ Maupin participated in three different scenarios. In the first scenario, Maupin attempted to contact a suspicious person in a parking lot. The person refused to cooperate or speak with Maupin. The person kept walking behind a vehicle and would not listen to Maupin’s commands to stop. The person then came out from behind the vehicle and shot Maupin.

The second scenario involved two men engaged in an argument. Maupin approached the men and asked, “What’s going on today, gentlemen?”¹⁹⁰ One of the men

¹⁸⁷ Ranalli, “Adding Perspective,” 11.

¹⁸⁸ PERF, *PERF’s 30 Guiding Principles*, 36.

¹⁸⁹ James Beattie, “Anti-cop Activist Pastor Trains with Maricopa County Sheriff’s Office,” *Western Journalism*, January 9, 2015, <http://www.westernjournalism.com/anti-cop-activist-pastor-trains-maricopa-county-sheriffs-office/>.

¹⁹⁰ *Ibid.*

rushed Maupin, who shot the unarmed man. The third scenario ended with Maupin contacting a non-compliant suspect and getting him onto the ground. The suspect refused to give Maupin his hands. In the end the suspect was found to have a knife in his waistband. A reporter then participated in the same scenarios and, according to the article, “the results were the same.”¹⁹¹ After the training, Maupin said, “I didn’t understand how important compliance was, but after going through this, yes my attitude has changed—this happens in 10–15 seconds. People need to comply for their own sake.”¹⁹² Maupin is exactly “the community” to which Gupta was referring when she spoke of the mismatch of expectations. The focus has been placed on law enforcement to change. Maupin’s experience is an indication of a wider problem involving non-compliance.

The common criticism of the seminars that led up to PERF’s recommendations has been PERF’s failure to address support for police officers. Ranalli very eloquently says he wished PERF had “issued a challenge to our elected officials and asked that they make public statements condemning the behavior of persons who clearly refuse to comply with the lawful commands of officers. This has been sorely missing for the last couple of years and our officers are seeing the result: people who feel entitled and emboldened to challenge officers. Such attitudes do nothing but create flash points that perpetuate the problem.”¹⁹³ When law enforcement experts and political leaders condemn police use of force but do not address the actions of the subject, it does not make policing safer for anyone. O’Linn suggests, “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.”¹⁹⁴ Community members often do not understand the danger of resistance. The lack of leadership to call for compliance does more harm than good.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ranalli, “Adding Perspective,” 11.

¹⁹⁴ O’Linn, “Response to PERF,” 1.

Police officers are aware that using force looks ugly. In an effort to bridge the gap that Gupta identified, police departments all over the United States have extended outspoken critics invitations to participate in use-of-force scenario testing. Many of the critics have refused to participate. Those who have participated have learned why lack of compliance is the driving factor in most use-of-force cases. Addressing this problem area must involve law enforcement, politicians, civic leaders, and activists. If protecting human life is really the goal of those protesting in the streets, compliance with lawful orders must be a central discussion, yet it is absent in public discourse.

B. LIMITATIONS

PERF sets unrealistic expectations, unattainable goals, and confusing restrictions with its policy recommendations. J. Michael McGuinness, an attorney with 25 years of experience in defending police officers, has written on why policing requires the retention of the reasonable belief standard. He writes, “The body of reasonable belief law cannot be changed without devastation to effective policing and officer safety. The American police community will aggressively resist purported reforms that will inevitably increase police officer deaths throughout America.”¹⁹⁵ The discrepancy between police use-of-force and the public’s view is the training and experience that a police officer receives. It is also the dangerous environment in which they work, and case law recognizes that over and over again in the courts. PERF’s recommendations came on the heels of the Ferguson incident. The riots and the public protest created an environment wherein political acquiescence formed policy recommendations.

Agencies like the SFPD are currently bearing witness to the International Association of Chiefs of Police’s concern “about calls to require law enforcement agencies to unilaterally, and haphazardly, establish use of force guidelines that exceed the ‘objectively reasonable’ standard.”¹⁹⁶ The SFPD has been forced by the city’s police

¹⁹⁵ J. Michael McGuinness, “Law Enforcement Use of Force: Safe and Effective Policing Requires Retention of the Reasonable Belief Standard,” *The Champion*, May 2015, www.forcescience.org/champion.pdf.

¹⁹⁶ “International Association of Chiefs of Police (I.A.C.P.) February 2016 Statement on Use of Force,” SFPOA, accessed February 28, 2017, <http://sfpoa.org/policies/IACPonUseofForce.pdf>.

commission through a unanimous vote to accept policy changes that closely mirror PERF's policy recommendations.

The police union is battling over wording such as “minimal force” as opposed to “reasonable force.”¹⁹⁷ The commission has threatened to issue “temporary department bulletins to enforce rules such as making sure officers ‘shall’ use de-escalation techniques.”¹⁹⁸ As Ranalli points out, this is not just semantics. He writes, “The manner in which this principle is written may allow for inappropriate changes to policy pertaining to the legal standards for use of force, when the focus really needs to be on tactics and decision making leading up to the need and/or decision to use force.”¹⁹⁹ Ranalli recognizes that PERF's intention may have been to focus on training and opportunities to de-escalate. His concern is, “Agencies may interpret Guiding Principles #2 as encouraging them to change their use of force polices to require a higher legal standard than *Graham*. Such a change is not appropriate and will not solve the real problem,” assuming anyone can define the real problem.²⁰⁰ Some protestors, rioters, and community activists say the problem is that police are racist murderers. PERF says police have too much leeway and are moving too fast. However, neither of those narratives works for the two days of riots, violence, and burning that happened in September 2016 in Charlotte, after a black police officer shot a non-compliant black suspect that was armed with a gun.²⁰¹

When a group such as PERF puts out best-practice policies that, as written, are unclear and too broad, it confuses city leaders and the public into thinking those policies should be adopted. An unintended consequence of PERF's policy recommendations and

¹⁹⁷ Jonah Owen Lamb, “SFPD's use-of-Force Policy Reforms Unanimously Passed by Police Commission,” *SF Examiner*, June 22, 2016, <http://www.sfexaminer.com/sfpds-use-force-policy-reforms-unanimously-passed-police-commission/>.

¹⁹⁸ *Ibid.*

¹⁹⁹ Ranalli, “Adding Perspective.”

²⁰⁰ *Ibid.*

²⁰¹ Tonya Maxwell and Melanie Eversley, “N.C. Gov. Declares State of Emergency Following Violent Charlotte Protests,” *USA Today*, September 21, 2016, <http://www.usatoday.com/story/news/nation/2016/09/21/charlotte-police-man-killed-officers-holding-gun-not-book/90774106/>.

the reports it produced is that it affirmed to the public that police officers were using force inappropriately. By attempting to make policing safer, PERF may have unintentionally made policing much more difficult. According to the Pew Research Center, the calls for reform have “made [police] jobs riskier, aggravated tensions between police and blacks, and left many officers reluctant to fully carry out some of their duties.”²⁰² PERF’s recommendations add to the volume of procedures that police officers are already attempting to navigate.

C. FURTHER RESEARCH

An area of research that had been suggested by Geoffrey Alpert in his testimony to the President’s Task Force on 21st Century Policing is the collection of use-of-force data. He recommends exploring “officer decision making...to look at unsuccessful encounters as well as those that are successful.”²⁰³ He suggests analyzing the data to “help understand these situations.”²⁰⁴ Alpert also suggests a single repository to examine patterns, trends, and even anomalies.²⁰⁵ He raises some interesting points over what the data and analysis might provide:

The media makes sensational headlines about the number of rounds fired in an encounter. What if that number is not sensational but close to the average for a specific type of situation where the suspect has a specific type of weapon? There are media reports of unarmed subjects being shot. What if there were ways to know what the suspect did that prompted the officer to use deadly force? What if the agency could report the reason that each shot was fired? We could answer questions about contagion fire, the comparative frequency of force or deadly force in particular types of places or against particular types of people? We need to move beyond anecdotal to empirical!²⁰⁶

²⁰² Rich Morin et al., “Behind the Badge,” Pew Research Center, January 11, 2017, <http://www.pewsocialtrends.org/2017/01/11/behind-the-badge/>.

²⁰³ Geoffrey P. Alpert, “Testimony to the President’s Task Force on 21st Century Policing,” January 30, 2015, 2, <https://cops.usdoj.gov/pdf/taskforce/submissions/Alpert-Geoffrey-Testimony.pdf>.

²⁰⁴ Ibid.

²⁰⁵ Ibid., 4.

²⁰⁶ Ibid., 5.

Having this type of empirical data could help bridge the gap between law enforcement actions and community expectations.

D. CONCLUSIONS

This research questioned what effect going beyond the legal standards might have on use-of-force incidents and public perception. This research has uncovered serious debate over the applicability and understanding of PERF's policies. Law enforcement experts have expressed concern over adopting the policies as written. They have also questioned if use-of-force reform was even necessary. It is not in dispute that law-enforcement officers have a difficult and dangerous job. Nor is it disputed that, the majority of the time, they get it right.

PERF's policy recommendations have confused city leaders and the public into thinking its policies should be adopted. The number of cities across the nation that have rushed to adopt PERF's policies or are in the process of doing so is evidence that police departments are being strong-armed into adopting them. For example, Chicago, Baltimore, and San Francisco police departments have adopted PERF's policies or versions of them.²⁰⁷ The failure in PERF's attempt to make policing safer is that it assumes the false narrative of police being the problem, and it assumes the recommended ideas were not already being practiced by police officers every day. As Ranalli recommends, police agencies should "use the PERF use of force principles as one part in your agency's continuous quality improvement process, not as the complete answer."²⁰⁸ There must be a combination of compliance by the public and de-escalation by police officers. There is typically no question when a police officer uses force upon a compliant subject. Police agencies would be much more apt to recognize "bad cops" or excessive force if the subject does not fight with the officer.

PERF failed to define the problem before embarking on its solution. Surpassing legal standards to create more opportunity to indict police officers for using force against physically resistant subjects will not solve what Obama has described as "deeply

²⁰⁷ "Police Use of Force Project," accessed February 14, 2017, <http://useofforceproject.org/>.

²⁰⁸ Ranalli, "Adding Perspective."

embedded racism” in our country. These policies limit police officer discretion and lean toward a post hoc evaluation, which is contrary to the ruling in *Graham v. Connor*. Use-of-force reform will not fix the problems we are experiencing in society. In a press conference after the ambush killing of police officers in Dallas, Chief David Brown said,

Every societal failure, we put it on the cops to solve. Not enough mental health funding, let the cop handle it. Not enough drug addiction funding, let’s give it to the cops. Here in Dallas we have a loose dog problem. Let’s have the cops chase loose dogs. Schools fail, give it to the cops. 70 percent of the African-American community is being raised by single women, let’s give it to the cops to solve as well. That’s too much to ask. Policing was never meant to solve all those problems. I just ask other parts of our democracy along with the free press to help us.²⁰⁹

It seems PERF may have attempted to use the law to solve a problem that cannot be fixed by law. In order to make policing safer for everyone, police departments and their communities need to come together to define the problems particular to their jurisdictions. Community activists and political leaders need to discuss the importance of compliance. And, of course, police departments must continually train their personnel in using de-escalation techniques.

E. WHERE WE GO FROM HERE

To Law Enforcement Leaders

1. As a law-enforcement leader, do not rush to judgment. The only rush should be to deliver known facts to the community—when all the facts are in, admit any wrongdoing. If the facts show the officers acted reasonably, we need principled leaders who have the courage to stand up for their officers when warranted.
2. As a law-enforcement leader, adopt solid, defensible policies that allow officers to do their jobs. When considering policy changes, include line level officers in the discussion; after all, they are doing the work.
3. Avoid adopting zero-tolerance policies. They can create an environment in which officers feel they must take action when there may be better solutions.

²⁰⁹ Josh Horwitz, “Every Societal Failure, we Put it on the Cops to Solve,” Quartz, July 12, 2016, <https://qz.com/729378/dallas-police-chief-david-brown-were-asking-cops-to-do-too-much-in-this-country/>.

4. Give your police officers the tools and training they need to succeed. Ensure they are equipped with less lethal options and are trained in their use. We have witnessed tragic events occur when officers had the tools to effectively resolve a situation but lacked the necessary training to use them.

To Law Enforcement Supervisors

1. Go out and supervise! Make sure your staff is using force sparingly and treating the community with respect. Effective supervisors should know if one of their employees is involved in more use-of-force situations than the others. There may be an explanation, but it could be an indication that the officer may be using force inappropriately or too quickly—or is doing the escalating. Watch for these signs, and provide the necessary interventions.
2. Train, train, train. Starting with the police academy, make sure they are training your recruits the way you want them to be trained. Have frequent and realistic training with your teams. Teach your officers to be critical thinkers and ready to react so they are not caught off guard.
3. Provide your officers with support so they know they can go out and do their jobs. If they are fearful of acting, it creates a dangerous environment for everyone involved.
4. Expect nothing less than excellent service. Ultimately, we are public servants. Make sure your officers understand that, and demand nothing less.

To the Line Level

1. Make opportunities to get out of your car and create relationships with your communities. Show the people you swore to protect that you will do just that. Use force sparingly. I heard this at some point in my career: “You get the last act; let them have the last word.” If you build trust in your community, most people will stand by you or at least reserve judgement when the critical incident happens.
2. Invite your local advocates, the media, and community members to experience force-option scenarios so they understand how difficult it becomes when the person fails to cooperate or comply. Better yet, invite your chief and those who may have forgotten what it was like to work the streets to participate. Community members like Reverend Maupin would be excellent advocates for imparting how important compliance is for the safety of everyone involved. Many of the high-profile events of the last several years have centered on non-compliance.

To Politicians and Civic Leaders

1. Your literal silence on the danger of not complying with lawful police orders creates an unnecessary and dangerous condition. This silence has contributed significantly to the tragic outcomes we have witnessed over the years. Your collective failure to urge citizens to comply with lawful orders has emboldened them to challenge and often violently resist police in the performance of their duties. There are avenues and recourse if citizens feel they have been unfairly targeted or treated. The street is not the place to hold court.
2. Slow down your desire to condemn police actions to the media. The practice of being first to comment on the 24-hour news cycle to tell people what they want to hear is inflammatory and negligent. Reserve judgment until you fully understand the circumstances.
3. If you are invited to participate in a police force-option scenario, do it. You cannot make decisions, call for changes to law, or try to preempt the court process if you do not understand the risks and dangers associated with being a police officer. The decision to act or not can mean life or death; you will never fully understand that fact. You can, however, get a taste of how it feels by experiencing use-of-force scenarios.

This thesis has proven to me that the current use-of-force debate is not an “us against them” fight. It cannot be. No change in law or policy will make a difference or make policing safer. The change must come from each of us having a sincere desire to make a difference and improve wherever we can.

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