# The Bill Blackwood Law Enforcement Management Institute of Texas

Split-Second Syndrome & Officer Created Jeopardy: Implications for Agency Policy

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#### **ABSTRACT**

As a consequence of public safety, officers at times must use deadly force to protect themselves and others. Professional, respectful, effective and accountable policing demands that this use of force be subjected to and withstand not only legal, but ethical scrutiny regarding such a controversial topic. The ability to justify an act does not make it necessary and deadly force by police officers is the rule, not the exception. Police officers are often thrust into unpredictable and stressful situations, where their reactions have grave consequences. Police agencies have an obligation to ensure their officers are trained in best practices regarding force. Police agencies should implement policy that prohibits officer created jeopardy. Policy implementation which communicates a sanctity for life demonstrates that police agencies are sincere in preserving life whenever possible. This is best communicated by clear policy that promotes safety for citizens and officers. The purpose of this paper is to identify the need for policy governing officer behavior, which will promote uniformity, consistency, and best practices. Incorporating such policy will not adversely impact an officer's ability to perform their duties and will enhance safety for all.

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#### INTRODUCTION

The use of deadly force is the most serious action a police officer will ever take. Officers are empowered by law with the authority to use deadly force when that force is necessary to protect their lives or the lives of third parties. Officers are also entrusted by their communities to only use deadly force as a last resort. In the United States (U.S.) it is especially important that officers and their agencies remain cognizant of their role in a democracy based constitutional republic. Law enforcement is a function of policing and many states, as has Texas, empowers public servants with the authority to use deadly force as peace officers. The term peace officer is an honorable designation and serves as a constant reminder that such officers should value life and have a duty to preserve it whenever possible. Most peace officers serve their entire careers without ever using deadly force, but for the few that do, that force must be necessary.

Controversial police shootings have called into question the legitimacy of police force on the grounds of necessity. Officer worn body cameras and citizen videos have captured officers using deadly force when they have faced no apparent threat. The 2015 Walter Scott and 2016 Philando Castile shootings are two examples. Less commonly discussed is deadly force used by officers when the threat to their safety is apparent, but which would not have occurred if not for the officers' action (Garrison, 2017).

In these instances, officers place themselves in a compromising position where deadly force is then justified. Some examples include officers stepping in the path of moving vehicles, jumping on or in vehicles, and reaching inside running vehicles. These types of behavior are collectively known as officer created jeopardy, which follows split-

second syndrome and at best is reckless (Miller, 2015; Garrett & Stoughton, 2017). White (2016) interprets split-second syndrome, which was originally coined by Fyfe in 1989 as "the shortsighted, tunnel-vision standard for viewing the justifiability of officer actions" (p. 226). Miller (2015) describes it as a misperception and overreaction on the officer's part. Officer created jeopardy does not honor the pledge to "safeguard lives" nor does it reflect the promise of "never employing unnecessary force or violence" displayed in the police code of ethics (see Appendix).

Police agencies have an opportunity to communicate their commitment to the sanctity of life internally and externally. Police agencies should implement policy that prohibits officer created jeopardy. Relationships between police agencies and the communities they serve are greatly influenced by transparency, accountability and a commitment to service. Officer conduct involving deadly force must be held to the highest standard of scrutiny because nothing is more important than human life. No police action has further reaching consequences than the use of deadly force. Even when necessary, deadly police force profoundly impacts the officer, recipient, families of both, the agency, and greater community (Miller, 2015). The purpose of this paper is to communicate that police agencies should enact policies that prohibit officer created jeopardy. Having a policy that promotes best practices regarding deadly force simultaneously reduces the likelihood of an officer having to use deadly force and embodies the ethos of professional public service.

#### **POSITION**

Police officers fulfill a unique role in society. The power they wield daily is unappalled even by members of occupations deemed more prestigious. According to

Alpert and McDonald (2001), state granted coercive and control power through the use of force is the characteristic that most separates police from other members of society. It is necessary that the exercise of this power be guided within the administrative framework of the police employer.

Force is generally described as necessary, which is that force an officer uses to protect the officer or a third party, and excessive, which is defined as force that exceeds the principles of safety and control. Occasional miscalculations in force are expected due to human error. There is no legal requirement that officers use the minimum amount of force in every encounter because this is understandably infeasible. This paper also does not imply that an officer should ever compromise their safety or the public's by waiting until deadly force is used against them. It suggests however, that when deadly force is used, it meets the criteria as a response to a deadly threat, which is necessitated by suspects, not officers.

Officer created jeopardy, also known as tactical violations, normally results from split-second syndrome when police officers unnecessarily place themselves in tactically disadvantageous situations (Miller, 2015; Garrison, 2017; Garrett & Stoughton, 2017). Police agencies should ensure they implement clear cut policies designed to keep the officers they employ and the public they are sworn to protect safe, establish community trust through accountability and conscientious policy, reduce officer stress, and mitigate civil liability.

Police agencies have generally gone through great lengths to ensure the safety and well-being of their officers. Such practices have ranged from establishing peer-counseling services, regulating the number of hours an officer can work, incentivizing or

requiring officers to meet physical fitness standards and providing access to employee assistance programs (Fiedler, 2011; Mumford, Taylor & Kubu, 2015). Regarding officer use of force however, police agencies have historically failed to provide adequate guidelines and were forced by the courts to improve and reform policy and practices. Court ordered policing sets a standard, but one in which police take a backseat in protecting officers and the public (Garrett & Stoughton, 2017).

In *Tennessee v. Garner*, the Supreme Court prohibited police deadly force against fleeing suspects based on their felony status alone. Prior to this 1985 ruling, 32 states authorized officers to use deadly force against fleeing felony suspects who did not pose an immediate threat to officers or third parties (Fyfe, 1981; Nowacki, 2015). Most police departments nationwide did not establish more restrictive policies despite scholars urging police to do so before being mandated by the courts (Fyfe, 1981; Rosenthal, 2016).

Loose or non-existent use of force policies endanger officers and citizens (Prenzler, Porter & Alpert, 2013). Fyfe (1981) questioned the degree to which police accurately report citizen deaths at the hands of police. By contrast, countless police officers have fallen victim to tactical violations, but the details surrounding such deaths are often not made available to the public. Agencies may not wish to tarnish the officer's legacy by assigning any personal blame, further traumatize the officer's family or subject the agency to liability. Administrators may later enact policy without ever acknowledging the precipitating event.

Meyers (2002) explained how tactical violations resulted in injuries and deaths of officers in 21 incidents during training or enforcement operations. In the Meyers study,

officers killed fellow officers 17 times, one officer died by his own hand, and three suffered non-life-threatening injuries from gunshot wounds. These tragedies are indicative of the need for increased operational and tactical safety and have relevance for policies prohibiting officer created jeopardy involving citizens. The preventable loss of life in training should be conceptualized and projected to encompass officers and citizens in the field.

Bravery and initiative are praised in policing with rookie and veteran officers being susceptible to taking shortcuts. Newer officers may want to shed their rookie status or impress their peers while veterans may become complacent by overcalculating their experience. When officer created jeopardy results in a favorable outcome, the agency may ignore or be reluctant to take corrective action. Pinizzotto, Davis & Miller, (2007) make this point by stating, "the community and the media often consider these as acts of heroism and applaud an officer for taking needless and, perhaps, irresponsible risks. This kind of reaction can send a harmful message to other officers" (p.4).

Bohrer, Kern, and Davis (2008) praise officer restraint and acknowledge that officers frequently only use deadly force when they have no other choice but to protect themselves or others from violence. Furthermore, police force is relatively rare, occurs in approximately one sixth of custodial arrests, and is likely to be minor (Garner, Maxwell & Heraux, 2002; Miller, 2015). However, the use of deadly force remains one of the most traumatic events a law enforcement officer will ever experience and is as comparatively stressful as the death of a fellow officer (Violanti, 2016). Policing is a demanding field where organizational ambiguity along the lines of structure, practices,

and policy contribute to officer stress beyond what is experienced in the street (Bishopp, Worrall & Piquero, 2016). Policing is highly unpredictable, but police agencies must take necessary precautions to reduce the likelihood an officer will inflict or suffer from trauma associated with the use of deadly force.

Vague or overly broad use of force policies also damages police legitimacy and are counterintuitive when one considers the core purpose of policing is to fundamentally protect life (see Appendix). Police often encounter people in crisis experiencing a broad range of emotional, psychological, and physical ailments. Such individuals will not always behave rationally, and police should deescalate, not be a contributor to their distress (Miller, 2015).

Currently, officers are also receiving mandated training in greater detail in preparation for responding to mentally ill persons. The expectation is that officers will utilize their training to defuse potentially violent encounters. Some mentally ill or emotionally distraught people intentionally provoke police to use deadly force against them by exhibiting behavior designed to force an officer's decision making. Within the literature, this performance is known as suicide by cop (Patton & Fremouw, 2016). Miller (2015) asserts that approximately 10% of police shootings are caused by suicidal individuals that provoke officers to shoot them. Officers will at times be required to use deadly force in suicide by cop situations, but Lord (2014) identifies the importance of police tactics in limiting coerced police force.

The potential for civil liability exists and agencies that do not have policies against officer created jeopardy expose their controlling governments, themselves and their officers to unnecessary litigation (Rosenthal, 2016). Wrongful damage and death

lawsuits brought against officers and agencies generally claim that there was a failure by the agency to train, supervise, or that officers were retained despite demonstrating unsuitability for police work (Lee & Vaughn, 2010). Regardless of the success of such suits, a cost occurs in monetary and reputational terms (Garrett & Stoughton, 2017). Schwartz (2016) found that many governments settle out of court and the annual cost of such settlements exceed \$100 million on average. Agencies that are reluctant to implement policy and training because of the perceived cost soon find corrective action is often grossly more expensive (Meyers, 2002).

#### COUNTER ARGUMENTS

Research has proven that attempts to impose rigid agency standards across the board without consideration for the elasticity required in street level encounters has proven unsuccessful. Officer discretion has long been a hallmark of good and effective policing. It is inevitable because no officer can enforce every law (Bronitt & Stenning, 2011). Discretion is also important internally because no agency can hope to administratively cover every eventuality (Tummers & Bekkers, 2014). Police officers must make sudden judgments based on real-time information, and citizens rely on people, not policies (Shane, 2010). Without the flexibility to navigate the law and dynamic situations, police officers would render a disservice to citizens as their choices would be robotlike and predetermined by policy (Nowacki, 2015).

The policy recommendation for force does not take into account that an officer's safety may be compromised if the officer hesitates while weighing split second decisions against policy and the perceived threat of discipline for potential violations (Rosenthal, 2016). Blanket policy rarely has the anticipated effect and unintended

consequences may arise from an overzealous desire to curtail officer discretion. Police officers experience a great deal of stress and much of this stress is compounded by organizational administrators (Shane, 2010).

Officers are accustomed to adjusting to the unpredictability of their public interaction but expect support and stability from their supervisors and managers. Although police work can present physical dangers and be emotionally taxing, officers experience greater levels of distress and dissatisfaction from rigid and misapplied policies than from the public (Moon & Jonson, 2012). When officers feel under siege by the public and their police administrators, they may adapt attitudes of de-policing, which hinder law enforcement and public safety. De-policing occurs when officers take a hands-off approach to crime because they feel their leaders will sacrifice them in favor of political correctness (Nix, Wolfe, & Campbell, 2018).

Police officers often experience volatile and unpredictable encounters. Many of these encounters stem from emergency calls for assistance from the public (Hine, Porter, Westera & Alpert, 2018). The public expects its police officers to act and not shy away from conflict. Bedi (2016) states, "officers have no duty to retreat and, in some jurisdictions, can kill even if there is no imminent threat of deadly harm" (p.25). Officers have an obligation to address crime and citizen concerns, which often place them in direct conflict with some members of the public (Nowacki, 2015). Overly restrictive policy handcuffs officers and may cause the public to lose confidence in its police if the public perceives officers as not engaging its concerns.

Proponents of the officer created jeopardy doctrine incorrectly assumes that civil liability attaches when officers must use force that may be considered controversial, but

this assumption is inaccurate. Rather than rely on emotion and speculation, it is more appropriate to utilize case law, which provides a guiding principle for action. The objective reasonableness standard was established in *Graham v. Connor* (1989), in which the Court found "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" (p. 396). The Court reaffirmed in *Los Angeles v. Mendez* that although law enforcement officers' actions may have provoked a shooting, they nor their agency were liable for damages to the plaintiff (Macfarlane, 2018). To impose a higher standard through administration than required by the highest court of the land is to usurp both police discretion and judicial oversight.

Police discretion is a vital tool of law enforcement and one that must be tempered through a respect of life and an ethos of service. Without such temperance, discretion is reduced to individual passion with scant regard for the consequences that attach. An officer's decision to use or not use deadly force endures long after the perceived urgency in the moment of that decision. It is erroneous to contend that administrative oversight of officer behavior concerning potential deadly force tactics is unwarranted. To the contrary, the guiding principle of such policy is to safeguard both the officer and community from preventable harm.

The necessity of addressing officer created jeopardy is not an indictment of an officer's decision-making ability and absent policy, it is just as likely to result from the failure of an agency to provide direction (White, 2016). Rather, a concentrated effort must be made to provide all officers with a set of demonstrated and proven best practices. No policy can completely indemnify nor insulate, but it can help clarify

expectations in otherwise uncertain and ambiguous situations. While officers have no legal duty to retreat, such retreat may be the prudent action to take if it preserves lives (Pinizzotto et al., 2007). Individual officers are usually not held directly financially liable in civil suits regarding force. Schwartz (2016) reported that officers are required to pay in less than .02 percent of use of force cases, but that costs to the employing agency and government may be crippling, which negatively impacts salaries, benefits, operations, and other resources.

Policing must evolve as it is presented with increasing challenges. Some required changes are incremental, while others are dynamic and mandate immediate redress. One method to analyze officer created jeopardy along this continuum is to consider the issue of police response from a different angle. The advent of heavily armed and dedicated active shooters has forever changed the way police officers train and respond. The North Hollywood Bank robbery in Los Angeles, California in 1997 and the Columbine, Colorado massacre of 1999 are two relevant examples. The North Hollywood shootout found officers underequipped while Columbine pointed to the need for an immediate and planned police response (Cannon, 2013; Strachota, 2014).

Prior to the above occurrences, there was not much training in the general law enforcement community about being outgunned or addressing active shooter threats that were usually engaged by tactical units such as special weapons and tactics (S.W.A.T). However, law enforcement has made adjustments in policy, training, and response because public safety required an operational change. In each instance above, both time and risk were factors, and this is no less true for officer created jeopardy.

#### RECOMMENDATION

Police departments nationwide should implement policy that prohibits officer created jeopardy. The Police Executive Research Forum (PERF) recommends that police departments consider best practices as identified through research and implemented by peer law enforcement agencies. Suggestions made by PERF include officers reconsidering their approach to persons with weapons that do not possess firearms, relying on cover, distance, time, training for non-lethal takedowns whenever possible, and the involvement of supervision on the scene (Abanonu, 2018).

In addition, agencies should prohibit officers from placing themselves in the path of moving vehicles, jumping in the bed of trucks or on the hood or roof of moving vehicles, reaching inside a vehicle to remove the keys while the engine is running and the driver seat is occupied, and rushing into a dangerous situation where an immediate threat to life does not exist and when backup is available and capable of being summoned. Not every call for service, citizen initiated, or officer driven interaction constitutes an emergency. Case law established in *Graham v. Connor* (1989), provides that police force must be judged using the perspective of a reasonable officer on the scene. Clear policy can provide guidance under specific circumstances which help inform what is acceptable and therefore reasonable.

In any policy implementation at least four broad classifications for the use of deadly force should be considered and are as follows: (1) the individual's possession or attempt to immediately access a weapon; (2) the individual is armed and is attempting to gain a position of advantage; (3) the individual possesses the capability to inflict serious bodily injury with or without a weapon and is attempting to do so; and (4) the

individual is fleeing after inflicting or attempting to inflict death or serious bodily injury and still possesses that capability (Miller, 2016).

The highest concern of law enforcement must be the preservation of human life and not merely liability. Officers have a duty to protect themselves and the public.

Officers should never unnecessarily jeopardize their safety or that of the public through a rash action that places them in an untenable position regarding force. Just because their officers have not used deadly force through actions that are preventable, no chief law enforcement executive can ignore that the potential exists. Policy based on best practices nationwide should be established to guide officers on the use of deadly force.

While it may be uncomfortable to create policy more restrictive than what is allowed by law, agencies and chief executives are encouraged to remember that the law often must catch up to best practices and what is in the best interest of the public. Shooting at unarmed felons suspected of property crimes was never a good practice, but a majority of law enforcement agencies endorsed or allowed it until they were forced to change. Forward thinking and future leaders do not wait to be forced.

The failure of police departments to formulate policies that pertains to their potential to cause avoidable harm remains a point of criticism (Friedman & Pnomarenko, 2015). An overreliance on the judiciary for operational directives is misguided. No judicial body can ever bridge the abyss of departmental expectations with officer actions, which is rightly communicated through policy. Garrison (2017) makes the argument that, "not every moral wrong is a legal wrong and not every legal wrong has a criminal sanction as a remedy. What is lawful is not always just and what is just is not always required by the law" (p. 243).

Establishing policy alone will not eliminate acts of officer created jeopardy but such policy will help reduce the frequency of force by police officers. Given the nature of police work, officers will always deal with stressful situations that require split second decisions. Nevertheless, the recommended policy within this paper and accountability for compliance will incentivize officers to behave appropriately and consider the ramifications of their actions.

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#### **APPENDIX**

### **CODE OF ETHICS**

As a law enforcement officer, my fundamental duty is to serve society, to safeguard lives and property, to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder, and to respect the constitutional rights of all people to liberty, equality, and justice.

I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful to the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or what is confided to me in my official capacity will be kept secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals. I will enforce the law courteously and appropriately without fear of favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and accept it as a public trust to be held so long as I am true to the ethics of the police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession—law enforcement.