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A NOT-SO-MAGNIFICENT OBSESSION

Lapses in policing lead to chronic rulemaking. Does it hit the mark?

For Police Issues by Julius (Jay) Wachtel. How to make police chiefs shudder? Until recently all that was necessary was to utter “pattern or practice.” That dreaded phase is at the heart of a [1994 Federal statute](#) that authorizes the U.S. Justice Department to sue law enforcement agencies in Federal court when it reasonably believes that they have engaged in a pattern or practice “that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”

These investigations were conducted by the [DOJ’s Civil Rights Division](#). And going to court they did. A January 2017 report tallied seventy pattern or practice cases since the dreaded statute’s inception, with a full forty leading to judge-monitored consent decrees (for a list of the more recent cases, click [here](#).)

Spurred by the April 2015 in-custody death of [Freddie Gray](#), DOJ’s investigation of Baltimore PD is perhaps the most notable recent example. Filed in August 2016, [the comprehensive, 150-plus page assessment](#) (summary [here](#)) blamed “systemic deficiencies in BPD’s policies, training, supervision, and accountability structures” for the litany of illegal arrests, excessive force and other unconstitutional measures that were directed mostly at African Americans. In January 2017 Baltimore and the Feds signed off on a [200-plus page consent decree](#) that specifies precisely what’s required for the department to reclaim its good standing. Alas, [an October 2018 news article](#) reported that the judge overseeing the process felt that Baltimore was falling short and that attaining compliance was very much a work in progress.

DOJ’s assessment touched on a number of factors that can drive misconduct. Among them is [a preoccupation with productivity](#):

Many supervisors who were inculcated in the era of zero tolerance continue to focus on the raw number of officers’ stops and arrests, rather than more nuanced measures of performance...The continued emphasis on these types of “stats” drives BPD’s tendency to stop, search, and arrest significant numbers of individuals on Baltimore streets—often without requisite legal justification and in situations that put officers in adversarial encounters that have little connection to public safety....[According to the Fraternal Order of Police] numbers drive everything in the BPD, which has led to misplaced priorities. As a result, officers

in the BPD feel pressure to achieve numbers for perception's sake...(p. 17. Also see pp. 41 and 65)

Despite their agency's avowed intention to "move away from zero tolerance policing", officers remained convinced that making numbers remained very much in fashion:

Many officers believe that the path to promotions and favorable treatment, as well as the best way to avoid discipline, is to increase their number of stops and make arrests for [gun and drug] offenses. By frequently stopping and searching people they believe might possess contraband, with or without requisite reasonable suspicion, officers aim to improve their statistical output, which will in turn reflect favorably in their performance reviews. (p. 42)

Detailed accounts of citizen-officer interactions gone horribly wrong form the core of the review (for a truly mind-boggling example see the 2014 incident discussed on p. 94.) Clearly, repeat violators were a serious problem. Yet identifying them seemed hit-and-miss:

...in the past five years, 25 BPD officers were separately sued four or more times for Fourth Amendment violations. BPD has likewise failed to identify officers in need of support through its EIS [early intervention system]. For example, one of the officer-involved shooting files we reviewed revealed that the involved officer—who unloaded his entire magazine at a car driving toward him—had been previously involved in two other officer-involved shootings in the past five years, in addition to a long history of complaints for harassment and excessive force. (p. 136)

However one might feel about the Civil Rights Division's take-no-prisoners approach, its recognition of the underlying factors that drive officer misconduct lends a weight and authority to its conclusions that a less organic examination couldn't begin to match.

Pattern and practice inquiries placed the Feds at odds with local police. Expensive and highly intrusive, they were by their nature a last resort. In 2012 the Obama administration broadened DOJ's reach with an ostensibly voluntary program entitled "[collaborative reform](#)." Run from the COPS (community policing) office, it offered multi-year clinical partnerships to troubled agencies that feared becoming fodder for the pattern and practices mill. Within five years sixteen departments took up the offer (the sixteenth was St. Anthony, Minnesota, whose officer shot and killed [Philando Castile](#)).

Baltimore joined in 2014 but got kicked out when Freddie Gray happened and the Civil Rights baddies took over.)

Collaborative reform assessments focused on several areas, including the use of force, officer accountability, disparities in enforcement, and community “engagement.” To find out if minority groups were more harshly treated, data was also often collected on stops, field interviews and uses of force (click for [Spokane](#); [Philadelphia](#); [Fayetteville](#); [San Francisco](#).)

Here, for example, were the objectives for Spokane’s review:

- Examine departmental use of force policies and procedures in comparison to national best practices and existing research, identify areas for improvement, and provide recommendations
- Analyze a sample of use of force investigation files from 2009-2012 and identify trends, strengths, and weaknesses
- Examine the role of the ombudsman in use of force investigations in comparison to national best practices and existing research
- Improve SPD organizational culture as it relates to use of force to build trust with the community

However, unlike Baltimore’s pattern and practices investigation, the collaborative reports we examined didn’t drill down to individual factors such as officer impulsivity, or organizational forces such as pressures to produce arrests. About as close as the Spokane report came was in the appendix. Its “culture” section proposed asking, among other things, “what gets measured in this organization?” and “what measures are the most important?” As one might have expected, the answers were nowhere to be found.

Still, the agencies that went through the process got nailed with all manners of criticism. For the new, more police-friendly Administration, that was perhaps a bit much. In fact, shortly after his appointment, [the new A.G. tried to pull](#) the Baltimore pattern-and-practice consent decree from Federal court, arguing that it contained “clear departures from many proven principles of good policing that we fear will result in more crime.” Ultimately [he didn’t succeed](#) (new pattern-and-practice casework, though, seems clearly out.)

Collaborative reform, though, is fully within the A.G.’s control. In September 2017, as existing collaborative projects came to their conclusion, [he ordered a kinder and gentler approach](#). According to [the program’s fact sheet](#) and the A.G.’s [official announcement](#), the adjustments reflect a determination to help rather than hinder police:

Changes to this program will fulfill my commitment to respect local control and accountability, while still delivering important tailored resources to local law enforcement to fight violent crime. This is a course correction to ensure that resources go to agencies that require assistance rather than expensive wide-ranging investigative assessments that go beyond the scope of technical assistance and support.

About the same time, [DOJ released a review](#) of the collaborative reform approach. While the self-evaluation was in large part complementary, concerns were expressed that the Feds were insufficiently attentive to local needs. Did “collaboration” fade away? Had it become “pattern and practices” without a judge?

...a number of people also noted that the meaning of collaboration has shifted since the Initiative’s formal launch in early 2012. The extent of collaboration between the TA team and the site representatives was generally deemed strong at the earlier sites, but some felt it has been decreasing at the later sites.

DOJ’s IG would in time release [a massive critique](#) of the agency’s police reform work. We’ll let our brave readers sort through that one.

On March 18, 2018, six months after DOJ’s retrenchment, tragedy struck California’s capital city. After chasing and cornering a black man who was reportedly trying to break into cars, two Sacramento PD officers (one black, one white) apparently mistook a cellphone for a gun. Their gunfire killed [Stephon Clark](#), 22.

This tragic event, which spawned massive protests, would have normally led the Feds to open a “pattern and practices” investigation. But these were no more. Ostensibly at the request of local authorities, [the State stepped in](#). California’s Department of Justice announced it would monitor the city’s criminal inquiry into the shooting. It also committed to examining Sacramento PD policies, practices and training methods “to help identify possible ways to achieve safer outcomes for community members and officers alike.”

Crafted by a team of consultants, lawyers and academics, the [massive, highly detailed report](#) was released earlier this year. Its structure closely resembles the Fed’s collaborative approach. Based on eighteen officer-involved shootings between April 2013 and March 2018 (excluding, for legal reasons, Stephon Clark) the near-100 page missive advances forty-nine recommendations in six areas: use of force policies, use of

force reporting and investigation, use of force training, officer-involved shootings, community engagement, and transparency.

We'll concentrate on shootings. That section produced three recommendations as to tactics (pp. 65-67):

- SPD should ensure its officers are effectively employing cover, distance, and time tactics to minimize the need for deadly force.
- SPD should assess its practices and provide officers with guidance on the discharge of firearms in situations that may endanger bystanders and other officers.
- SPD should ensure its training prepares officers to encounter and detain individuals in a manner that decreases the need for deadly force applications.

The first suggestion was inspired by a brief account of an unspecified shooting in which a late-arriving officer intruded into what seemed to be a contained situation and, instead of taking cover, promptly used lethal force. The second was based on “several” otherwise unspecified prior incidents in which “the backdrop to the discharge of firearms by officers was extremely high risk, including instances of crossfire.” And the third reflected a “significant number” of otherwise unspecified incidents in which “the individual upon whom lethal force was used was perceived (by the officer) as suffering from mental illness.”

This approach was characteristic of the report. Where prior incidents are mentioned – and the accounts are either summaries or otherwise exceedingly brief – they are used to propose rules that reflect practices in use elsewhere or endorsed by recognized sources such as [PERF's “Guiding Principles on Use of Force.”](#) For example, Sacramento's [Discharge of Firearm policy](#) is criticized for making no mention of time, cover and distance and for not warning officers that opening fire carries risks to innocents:

No officer can control the environment in which he or she is forced to discharge a firearm. However, officers can be provided with clear guidance on how to determine whether or not a discharge is reasonable, given the potential risks to bystanders that may exist... (p. 66)

To be sure, keeping one's distance, fire discipline and so on are commonplace in everyday policing. Considering the often chaotic nature of street encounters, if cops didn't typically exercise restraint poor outcomes would be far more frequent. [As we've often emphasized](#) and as Cal DOJ's report concedes, the wide variety of circumstances and personalities officers routinely face makes “controlling the environment”

exceedingly difficult. So providing “clear guidance” is at best an encyclopedic task. That’s why major police departments [have resisted adopting](#) PERF’s guidance. They prefer to deal with this complex and thorny area in other ways, as they fear that going substantially beyond the legal minimum – that lethal force be used only in defense of life – might confuse officers and create a nightmare of civil liability.

Several days ago, on February 12, seven NYPD officers unleashed a barrage of gunfire – forty-two rounds in eleven seconds – at an armed robber. [Two veteran officers were caught in crossfire](#): one, Brian Simonsen, 42, died; the other, Matthew Gorman, 34, was wounded. The 27-year old suspect, a chronic offender, was also wounded. His gun turned out to be a hyper-realistic toy.

As we mentioned in “[Speed Kills](#),” lapses in the use of lethal force keep happening with regrettable frequency. And it’s not just suspects who are being hurt. What’s to be done? What *can* be done? We’ve frequently [cautioned against campaigns](#) to get tough on crime, which can drive officer decisions in the wrong direction. Most recently, “[Cops Aren’t Free Agents](#)” argued against measuring policing with numbers. Yet other than Baltimore’s, which was done by the Feds under the apparently extinct “pattern or practice” banner, the assessments we reviewed ignored pressures to produce. Could it be that cops (outside Baltimore) are immune to the powerful force that affects every other craft and profession? (For your blogger’s paper on point, click [here](#).)

Yet the NYPD officers weren’t victimized by pressures to produce. They fell prey to decisions other cops made while under stress. A man robbing an occupied store after dark who walks towards officers, gun raised, can definitely provoke a lot of anxiety. But while there is a retinue of prescriptions for dealing with fraught situations (see, for example, “[Routinely Chaotic](#)” and “[Speed Kills](#)”) far less attention has been directed to differences in how officers respond to stressful events.

Like other humans, cops differ. Some are less risk-tolerant, others more impulsive or aggressive (see, for example, “[Three \[In?\]explicable Shootings](#)”). Perhaps if someone hadn’t fired that first shot, one cop might still be alive. Are there ways to improve how officers react under stress? “[A training method to improve police use of force decision making: a randomized controlled trial](#)” (J. Andersen, H. Gustafsberg, 2016) probed the psychological and physiological factors that affect officer response. It identified three effects of stress: perceptual distortions (e.g. tunnel vision), motor deficits (e.g., loss of fine motor skills) and cognitive deficits (e.g., loss of memory and stored knowledge.) These were addressed through an elaborately devised training program. Results seemed

promising: at post-test, trained officers performed significantly better and made significantly better use-of-force decisions than non-trained officers. However, there was no significant post-test difference in physiological arousal.

A key limitation of Andersen & Gustafsborg was that everything happened in a lab. In contrast, [“Can You Build a Better Cop? Experimental Evidence on Supervision, Training, and Policing in the Community”](#) (E. Owens, D. Weisburd, K. Amendola, G. Alpert, 2018) compared post-treatment outcomes in the field. Their intervention was a “supervisory meeting” in which officers working relatively “high-risk” geographical areas were probed in depth, in a “non-authoritarian manner,” about a recent officer-citizen interaction. According to the findings, these cops remained as active as comparable cops who didn’t receive the treatment. However, they became “less likely to resolve incidents with an arrest and less likely to be involved in use-of-force incidents.” That effect was most noticeable in less-troubled locations, where the “probability of being in a risky circumstance” was only moderate.

It’s an interesting finding. However, arrests that don’t happen because cops become less inquisitive are not necessarily a good thing. While the authors insist that officers “appeared generally indifferent to the meetings,” our personal, practitioner experience suggests that at least a few of the experimental subjects may have formed a not-necessarily-complementary opinion of the get-together and shared it with their peers. What’s more, precisely how “cause” translated into an “effect” was only vaguely specified. Officers were advised that the meeting’s purpose “was to discuss how the officer used procedural justice during the incident in question.” This approach, which seems a tad loosey-goosey, supposedly encouraged cops to slow down so they would “incorporate new information about [an] event as it unfolded” instead of going on “autopilot.

Well, maybe it did. A previous meta-analysis, though, wasn’t optimistic. [“Stress management interventions for police officers and recruits: a meta-analysis”](#) (G. Patterson, I. Chung, P. Swan, 2014) evaluated twelve programs that used techniques ranging from weight training to psychotherapy to improve officer coping skills. While specific goals varied, each study measured physiologic (e.g. heart rate) and/or psychological (e.g. anxiety) and/or behavioral (e.g. drinking alcohol) outcomes. Unfortunately, none of the categories, once aggregated, yielded statistically significant results. However, the physiological and behavioral interventions did demonstrate “clinically meaningful” improvements. So there is some hope.

Which finally (mercifully!) brings us to our parting shot. Changing a production-driven culture is no easy task. Neither is moderating the sympathetic nervous system,

which controls the “fight or flight” response. That doesn’t mean that we need be endlessly stuck devising rules for police behavior. After all, we know just how far rulemaking takes us in everyday life. Perhaps we can begin by acknowledging the salience of workplace pressures and individual physiological and psychological factors. By making them an accepted topic of discussion and inquiry in law enforcement and academic circles. And by sharing these insights with the greater community, with whom they are certain to resonate.