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Amnesty International Report on Police Use of Force

Wesley M. Oliver

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Amnesty International last week harshly criticized the US for not providing standards strictly limiting the use of lethal force by police to those occasions when no other options are available and such force is essential to save lives.

The organization observed that the UN has promulgated standards for the use of deadly force by officers that, on their face, seem not only reasonable, but superior to the laws of many states. As the June 19 Amnesty report (PDF) described the UN standard, "Intentional lethal use of firearms may only be made when strictly necessary and appropriate to achieve the objective," and any kind of force may be used "only when there are no other means available that are likely to achieve the same legitimate objectives." The Amnesty report quite correctly observed that many states, by contrast, are far less restrictive of the use of lethal force by police officers.

Amnesty's statutory comparison is certainly valid, but it is not clear that adoption of that standard by American states would change the way police officers use deadly force.

The real problem with American law on police force is not the legal standard for its justifiable use, it is the vantage point courts take when they consider the actions of officers. Courts for perfectly understandable reasons are deferential to the instantaneous decisions officers must make when confronted with life-threatening situations. Even if every American jurisdiction embraced the UN standard for deadly force, an officer faced with a split-second choice between using a taser and a revolver to save his own life would hardly be responsible if he made the more lethal choice, even if the taser would have sufficed in hindsight.

Deadly encounters with police, however, do not usually begin at the moment when the officer has but a second to make such decisions, though courts typically consider only the last seconds before a trigger is pulled in determining whether the officer's action was reasonable. Courts do not generally consider whether the officer failed to take steps to de-escalate the situation prior to the firing of the fatal shot.

But there is a bigger problem with the Amnesty report. The frame of reference American courts take when looking at police killings is far more problematic than the legal standards. As the June 19 Amnesty report quite correctly observed that many states, by contrast, are far less restrictive of the use of lethal force by police officers.

Amnesty International Report on Police Use of Force

JURIST Guest Columnist Wesley Oliver of Duquesne University School of Law discusses the Amnesty International Report condemning US for police use of force...

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For good or ill as Stoughton describes, police academies typically teach officers using judicial opinions. Courts essentially announce the standards police follow on the streets. As courts evaluate the reasonableness of an officer's actions by looking only at the moments before the citizen was killed, they do nothing to assess the job the officer did to prevent the situation from turning into a life and death struggle. Officers are then left with little guidance as to when lethal force is permitted — or when and how to prevent encounters from requiring such force. Even with the standards that exist in American law today, if courts considered the reasonableness of the officer's actions from the moment the citizen was first encountered, a body of law might develop — and hence programs to train officers — on how to keep police encounters from turning deadly.

In other contexts the law certainly has contributed to the way police are trained and conduct themselves on the street. Consider searches and seizures. Officers are taught from the moment the citizen was first encountered, a body of law might develop — and hence programs to train officers — on how to keep police encounters from turning deadly.

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With reasonable clarity an officer knows when he can search a trunk but is largely left to decide for himself when it is appropriate to take a life. The answer lies in the remedy for each violation. When a trunk is improperly searched any incriminating evidence is excluded in a defendant’s criminal trial. A conviction is potentially lost especially in a drug case, and future officers may or may not be more leery of searching trunks. Their behavior may be unchanged because if the evidence is suppressed, the officer has only lost evidence he would not have had without the search.

If an officer is sanctioned civilly for improperly using force, a jury will get to assign damages, which could be substantial, or if the defendant is criminally convicted, he faces substantial jail time and the collateral consequences of a conviction. Each of these sanctions could make officers substantially less willing to place themselves in positions where they may find lethal force essential. Not surprisingly then courts have made it difficult to find officers civilly or criminally liable for the use of lethal force.

The suppression remedy is, of course, not available for claims of excessive force unless somehow the excessive force produced incriminating evidence, a possibility difficult to construct even for a law school hypothetical. How did American law come to construct a remedy that does a better job protecting our trunks from prying eyes than our bodies from shooting officers?

The answer lies in history—the Era of Prohibition. During the Roaring ’20s, the fear of police was focused on lawful and particularly unlawful searches for alcohol in businesses and private homes. The exclusionary rule, mere glimpses of which had been seen prior to Prohibition, became the rule of law in nearly half of American jurisdictions. With the Supreme Court’s decision in Mapp v. Ohio in 1961, the exclusionary rule—the rule that came into its own because of Prohibition—became the primary mechanism of regulating police, even though by the 1950s, police brutality, not police searches were the public’s primary concern.

For a variety of reasons, many recognized in the Mapp decision itself, an ordinary scheme of civil damages had proven inadequate to deter police misconduct. But in adopting a remedy that only excluded evidence connected to illegal practices, the court did nothing to address excessive force, or even simple harassment by police, something the court would acknowledge in Terry v. Ohio.

The Prohibition Era remedy for deterring police misconduct—one that was well suited to address illegal seizures of alcohol—was not one that was well suited to address society’s concerns about police in 1961, when the Supreme Court imposed the rule on all state courts. The Court’s choice of remedy provided no mechanism to sanction, or even address, police misconduct unrelated to seizures of evidence. Allowing judges to enjoin Fourth Amendment violations, for instance, would have permitted judicial sanctions based on the seriousness of the infraction and regardless of the connection between the illegality and incriminating evidence. Mapp, however, took a very different path. The court’s choice allowed a body of law to develop that thoroughly regulated the seizure of reliable evidence, but gave officers little or no more guidance on the appropriateness of deadly force than they had at the dawn of the Republic.

Amnesty International is correct to observe that the UN standards for the use of deadly force appear to be preferable to those contained in the statutes of most American jurisdictions. Far more important, though, is whether a court will look at the entire context of the police-citizen encounter in applying the standard, whatever it is, and the remedy for a violation of the standard. As with all laws it will be the application of the standard that matters more than the standard itself.

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Prohibition's Legacy: Judicial Regulation of Searches Not Use of Force
Wesley Oliver
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Many have noted the role of America’s original sin of slavery, and the sad legacy of racism that survived Appomattox, in explaining what appears to be the uniquely abusive treatment of black men by police. Another part of our history though – Prohibition – explains why the law has failed to adequately address our recurring [...] READ MORE

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Wesley Oliver
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**Featured News**

**Dean April Barton welcomes 110th entering class**

Dean April Barton welcomed the 110th entering class to our School of Law on Tuesday, August 17, 2021. She introduced the class to the leadership team and gave advice in navigating the educational journey of law school.

**Alumnus, namesake of Judicial Center named top lawyer in Pennsylvania**

Tom Kline L'78 has been named a *Pennsylvania Super Lawyer* for the eighteenth consecutive year and received the distinction as being named the number one lawyer in the state of Pennsylvania.

**Oranburg to explore virtual worlds with Hayek Fund for Scholars Award**
Seth Oranburg, assistant professor of law, received the Hayek Fund for Scholars Award from George Mason University's Institute for Humane Studies (IHS). The funds he received from the award were used to purchase virtual reality equipment and to hire a research assistant, second-year law student Tom Schierberl. Together, the two are going to explore virtual reality worlds in context of the law.

**School of Law welcomes new director of law library services**

Duquesne University's School of Law is pleased to welcome Dana Neacsu as the new director of law library services and associate professor of legal research skills. She will lead the School of Law's Center for Legal Information and the Allegheny County Law Library.

**COVID-19 Update**

We are proud of how our community has worked together to provide a safe learning environment for everyone during the COVID-19 pandemic. We remain committed to the well-being of our students, faculty, and staff while also embracing our University's return to normal operations.

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