



August 25, 2012

After Bullets Hit Bystanders, Protocol Questions

By **MICHAEL WILSON**

The encounter was breathtakingly brief: a [surveillance video](#) showed a gunman outside the Empire State Building on Friday pulling a pistol, pointing it at two police officers, their firing at him and his falling to the sidewalk.

All the yelling and cries of pain occurred out of camera view, just north of where the gunman, [Jeffrey T. Johnson](#), collapsed and died: nine bystanders were struck, cradling bloody arms or lying on the sidewalks and curbs.

The police commissioner, [Raymond W. Kelly](#), [confirmed](#) on Saturday that all nine were wounded by police bullets, bullet fragments or shrapnel from ricochets. Mr. Kelly also confirmed that the shooter, Mr. Johnson, never fired another shot after killing a former co-worker, Steven Ercolino, moments earlier.

“We had a witness that said that Johnson fired at the police,” Mr. Kelly said Saturday. “But the final count of the shells, it appears that that is not the case.”

It was the second time in two weeks that police officers fired fusillades on the crowded streets of Midtown — 28 shots fired between the two episodes — and with it, there were once again questions of police protocol in urban settings. In the first shooting, no bystanders were struck when [officers fired 12 shots at a man](#) with a knife just south of Times Square.

The nanosecond speed at which a shooting plays out is followed by hours of analysis, second-guessing and [study](#).

There is no national data on how often bystanders are struck by police bullets; Geoffrey P. Alpert, a criminologist at the [University](#) of South Carolina and an expert on the police use of force, said that hitting innocent civilians “doesn’t happen very often, but it happens.”

He added: “The rule of thumb is that you do not put civilians in the line of fire, but the rule of thumb is also that you don’t let a murderer get away.”

In many police shootings, stray shots are almost inevitable; a study based on New York’s annual firearms discharge reports indicated that officers hit their targets [34 percent of the time](#).

“It’s a tense situation, people are scared and moving,” Professor Alpert said. “It’s not like the movies, where you can shoot [the gun](#) out of his hand.”

The [New York Police Department](#) does include such episodes in its firearms discharge report. In 2010, for example, the police hit three bystanders in a shootout with a gunman; the year before, one bystander was struck when an officer struggled with a suspect who was trying to take his gun, and the gun fired.

Those encounters are some of the more trying for officers.

“One of the grim realities of police work,” reads a recent annual report, “is the terrible contradiction that can arise when it becomes necessary to protect life by using deadly physical force.”

The patrol guide, the department’s manual, states that officers should not fire their weapons when, “in their professional judgment, doing so will unnecessarily endanger innocent persons.”

In the shooting in Midtown, Mr. Kelly said on Friday that the two officers “had absolutely no choice.” In Mr. Johnson’s bag, officers found a clip loaded with six rounds, the police said.

The courts tend to come down on the side of officers in lawsuits brought from bystanders injured by police bullets.

A variety of outcomes after having been struck by a police bullet — physical, psychological, legal — can be found in a gun battle in Harlem in 2005 outside the restaurant Sylvia’s, another New York City landmark.

A suspect opened fire on officers, and five of them fired back 25 times, killing him. When it was over, a woman was kneeling in the street over her baby and bleeding from a gunshot wound to the elbow, and a 78-year-old man carrying [groceries](#) was stooped to help them.

“I got up,” the man, Garnold M. King, recalled in an interview, “and put my hand on my back and said, ‘Oh my God, I was shot too!’ ”

The Police Department was sued. One lawsuit, filed by the wounded woman, Tammy Johnson, went all the way to the Court of Appeals before [being thrown out](#) in 2010 in a 4-to-3 decision; the majority opinion stated that the officers “clearly had probable cause to fire their weapons at the suspect: they were in pursuit of an armed individual who opened fire on them on a public street, endangering the lives of the officers and the public.” New York City officials say they believe that finding strengthens their position in cases like these.

Ms. Johnson, then 39, had been playing with her 17-month-old daughter when she was struck. That moment changed her. She quickly moved to Atlanta.

“I didn’t feel safe in New York City anymore,” she said in an interview Friday.

Ms. Johnson remained angry at the outcome. “It’s going to take someone to die for them to recognize that it’s not right,” she said. “It made me feel like I’m not important, and neither was my daughter.”

There have been times when the city Law Department has chosen to settle cases where the police have shot bystanders. In 2009, according to reports, Wilson Ramos received a \$6 million settlement after he was accidentally shot in the head and paralyzed as the police engaged in a gunfight with a robbery suspect. A bystander wounded by an off-duty police officer during a bank robbery in 1978 received a \$1.5 million settlement, paid by the city and the bank.

Michael A. Cardozo, the city’s corporation counsel, said his office was sympathetic to the injured bystanders but added, “Officers put their lives on the line every day and these officers certainly did that.” He said that he could not discuss how the city would respond if any of those wounded on Friday sued because such cases turn on very specific facts that would have to be analyzed thoroughly.

Mr. King, now 85, also sued the police, although he never questioned the action of the officers — perhaps because he was a retired police officer. “If someone’s firing at you, what are you going to do?” he said.

Asked why he sued, given his allegiance with the officers, Mr. King said, “I can’t answer you. It’s just one of those things, O.K.? That’s the nature of society today.” He received a \$250,000 settlement. “Rich?” he said. “Hell, no.”

He thought of the nine people wounded Friday.

“Thank God that you’re alive. There’s no way you could have avoided you being where you were at a particular time,” he said. “Whatever religion you are, go to your church and get on your knees and say, ‘Thank you, Jesus. I’m alive.’ ”

Of the nine bystanders wounded, at least two remained hospitalized in stable condition on Saturday, Mr. Kelly said. Those who have spoken to reporters expressed relief and, at times, criticism. A sister-in-law of Madia Rosario, one of the wounded, said Saturday of the police, “They needed to be more careful.”

Mr. King made a prediction.

“Every one of them is going to sue,” he said. “The City of New York has money.”

Reporting was contributed by Russ Buettner, Erik Eckholm, Randy Leonard, Wendy Ruderman and Alex Vadukul.

