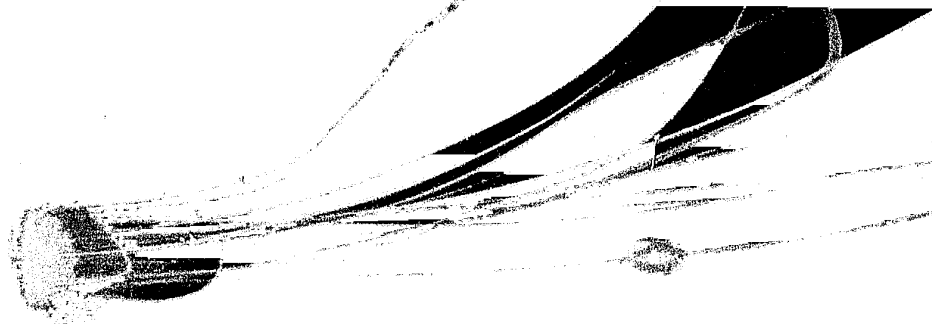




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Deadly Force in Defense of Life

By
JOHN C. HALL, J.D.



"Whoever makes the regulations doesn't row a boat."

—Sixteenth-century English boatman's response when asked why the fees were the same whether rowing up or downstream.

This article addresses the use of deadly force by law enforcement officers to protect themselves and others from "immediate" threats of death or serious physical injury. The purpose in focusing on the immediate defense of life is two-fold. First, Federal and State jurisdictions permit the use of deadly force when "immediate" threats to life exist; but, second, universal recognition of the legal principle has not led to universal attention to the practical realities that are essential to realistic and uniform application. The resulting inconsistencies and confusion only serve to

increase the dangers that already attend law enforcement.

The number of officers slain or seriously injured while performing their duties graphically illustrates the inherent risks associated with law enforcement. For example, during the period 1981-1990, 762 State and local law enforcement officers were slain as the result of adversarial action; an additional 617,969 officers were assaulted, of whom 210,109 (34%) suffered significant injury. The activities in which the officers were engaged at the time they were killed ranged from investigating disturbances

(130) or suspicious persons (109) to making arrests for various serious and nonserious offenses (307), from enforcing traffic laws (96) to handling prisoners (35) or mentally deranged persons (12). One officer was killed during a civil disturbance, and 72 officers were ambushed.²

Society recognizes these risks and grants law enforcement officers the authority to protect themselves as they perform their duties. Obviously, the exercise of that authority must be constantly and carefully monitored to discourage abuse, and officers know that any use of force, particularly deadly force, will certainly be subjected to administrative, and probably judicial, review.

Balancing these two values—protecting the lives of law enforcement officers and deterring the abuse of authority—is critical to a society committed to the rule of law. Unchecked power leads to tyranny, but unenforced law leads to anarchy. To avoid either extreme, the

review of a law enforcement officer's use of deadly force must be informed and realistic. Accordingly, the legal rules must be seen in the context of the practical circumstances confronting those who must apply them.

LEGAL RULES & PRACTICAL CIRCUMSTANCES

As a general principle, the use of deadly force by law enforcement officers in the United States is limited to circumstances where such force is reasonably believed to be necessary to protect life—whether to counter immediate threats of serious physical injury or to prevent the flight of a dangerous person whose escape would presumably pose continuing threats to the safety of the community.³ The fourth amendment to the U.S. Constitution sets the outer limits for the use of force by American law enforcement officers engaged in effecting arrests or other seizures of persons.

In *Graham v. Connor*,⁴ the Supreme Court described the appropriate standard as “objective reasonableness” and explained its application in these terms:

“[T]he question is whether the officers’ actions are ‘objectively reasonable’ in light of *the facts and circumstances confronting them*...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...*the ‘reasonableness’ inquiry...is an objective one*...”⁵ (emphasis added)

The highlighted words in the three phrases provide a rational scheme for analyzing the reasonableness of an officer's use of force. They define the scope of relevant information, the perspective from which that information should be viewed, and the standard against which an officer's action is to be measured. The components of this rational scheme, which are discussed below, are also relevant and useful for formulating department policy.

Scope of Inquiry: Facts & Circumstances

Only those facts and circumstances known to officers “at the moment” the decision to use force was made are relevant.⁶ This relatively narrow focus precludes reference to matters that could not have been known to officers until later and avoids the temptation to judge the correctness of an action by its outcome. It is also consistent with the Supreme Court's admonition in *Graham v. Connor* that review of an officer's judgment should not rely



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”

upon "the 20/20 vision of hindsight."⁷

In *Reese v. Anderson*, during a traffic stop, an officer shot and killed a suspect who repeatedly lowered his hands in defiance of the officer's command to keep them raised. The court considered the officer's action to be reasonable in light of the following facts:

"[T]he vehicle had just come to an abrupt stop after a high speed chase during which apparently stolen objects had been tossed from the car. [The officer] had his gun drawn...and ordered the vehicle's occupants to raise their hands...the vehicle occupants clearly understood [the officer's] commands and initially complied. [The suspect] repeatedly reached down in defiance of [the officer's] orders....Under these circumstances, a reasonable officer could well fear for his safety and that of others nearby. The fact that the vehicle was 'totally surrounded' by police does not change matters...also irrelevant is the fact that [the suspect] was actually unarmed."⁸ (emphasis added)

Just as facts unknown to officers at the time are irrelevant to the legality of their decision to use deadly force, so are allegations that the officers violated departmental policies or "standard police procedures." In *Greenridge v. Ruffin*,⁹ a police officer approached a vehicle at night, based on the belief that an illegal act of prostitution was occurring. Displaying her badge, the officer opened the car door, identified

herself as a police officer, and ordered the two passengers to place their hands in view. When neither complied, the officer pointed her drawn handgun into the car and repeated the command. When she saw the male suspect reach for what she believed to be a shotgun, she fired one shot that struck him in the

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jaw. The bullet lodged near the spinal cord and caused permanent injury. The officer subsequently discovered that the object was, in fact, a wooden nightstick.

In a civil suit against the officer, the trial court excluded evidence that the officer violated police procedures by not using a flashlight during a nighttime prostitution arrest and by not employing proper backup. The U.S. Court of Appeals for the Fourth Circuit upheld that ruling, observing that the Supreme Court in *Graham v. Connor* "relied upon the 'split-second judgments' that were required to be made and focused on the reasonableness of the conduct 'at the moment' when the decision to use certain force was made." Applying that principle to the facts of the case, the court stated:

**"...the *Graham* decision
contradicts [the] argument**

that, in determining reasonableness, the chain of events ought to be traced backwards to the officer's misconduct of failing to comply with the standard police procedures... we are persuaded that events which occurred before [the officer] opened the car door and identified herself to the passengers are not probative of the reasonableness of [her] decision to fire the shot. Thus, the events are not relevant, and are inadmissible."¹⁰

A contrary position by the courts would permit plaintiffs to shift the focus of the inquiry from a suspect's actions that prompted an officer's belief that a threat existed to factors that have no bearing on that issue. In *Smith v. Freland*,¹¹ the U.S. Court of Appeals for the Sixth Circuit addressed this point squarely when an officer's use of deadly force was alleged to be in violation of the department's policy:

"[T]he issue is whether [the officer] violated the Constitution, not whether he should be disciplined by the local police force."

The Supreme Court's definition of the relevant scope of the inquiry as the facts and circumstances confronting officers "at the moment" the decision to use force was made is further qualified by the Court's observation that an officer's judgment must often be made in circumstances that are "tense, uncertain, and rapidly-evolving."¹² In other words, an officer's capacity to acquire and evaluate the available "facts" is directly affected by the "circumstances" that must be taken into account, even though they

cannot be adequately re-created in the courtroom.

Perspective of the Inquiry: Reasonable Officer on the Scene

The Supreme Court in *Graham* ruled that "the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene...." In that regard, the Court has long recognized that law enforcement training and experience provide a unique perspective:

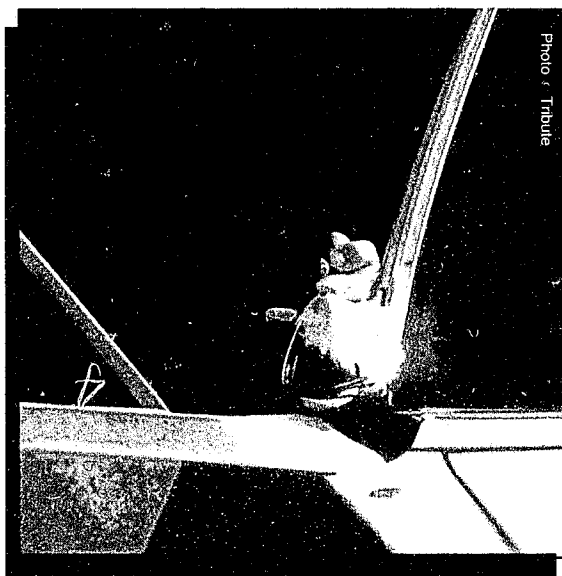
"...when used by trained law enforcement officers, objective facts, meaningless to the untrained... [may permit] inferences and deductions that might well elude an untrained person."¹³

*Smith v. Freland*¹⁴ serves as an instructive case on the issue of an officer's perspective. A high-speed chase followed an officer's attempt to stop a motorist for speeding and running a stop sign. The officer made several attempts to block the suspect's car but had to swerve out of the way to avoid collision when the suspect tried to ram the police car. The suspect then turned down a dead-end street, turned around, and came to a stop, facing the police car. When the officer got out of the police car, the suspect suddenly sped forward, crashed into the police car, and drove around it to escape. The officer fired one shot, which entered the passenger window, passed through the seat, and struck the suspect, killing him.

In a civil suit against the officer, the trial court granted summary

judgment to the defendant officer. The appellate court affirmed with this explanation:

"...we must avoid substituting our personal notions of proper police procedures for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world or our imagination to replace the dangerous and complex world that policemen face every day."¹⁵



achieve a timely halt to a deadly threat that may not be known to those outside of law enforcement. When taken into account, these limitations give appropriate meaning to the Supreme Court's observation.

"Reactive role" of law enforcement

The law does not permit officers to make "pre-emptive strikes" on the possibility that a person will prove dangerous, for that potential exists in every case. Instead, they must await facts that justify a reasonable belief in the probability of a threat.

Some relevant facts, such as a suspect's prior actions, may already be known to an officer. However, because the critical information must be gleaned from a person's actions on the scene, the initiative rests with the potential assailant, and the officer must assume the role of one reacting to an action that is well underway before it can be detected.

Modern law enforcement training programs advise trainees of the edge that "action" has over "reaction." The resulting disadvantage to the officer may sometimes be partially offset through vigilance, planning, tactics, and the use of protective equipment, but it cannot be completely canceled. The effect is to reduce the time in which an officer can safely wait before initiating a response.

Limited means available to terminate a threat

When deadly force is deemed necessary to terminate an immediate threat to life, a reasonable officer

Among the practical aspects that make up "the dangerous and complex world" of the law enforcement officer, the most significant is captured in the Supreme Court's observation that the circumstances in which life-and-death judgments must be made are often "tense, uncertain, and rapidly-evolving." To comprehend fully the impact of time constraints on the deadly force issue, it is necessary to understand that "the perspective of a reasonable officer" incorporates knowledge of specific limitations on the ability to

could be expected to recognize the limited means available to accomplish that purpose and to understand that the limitations directly impact on time constraints. Even firearms, the most likely instruments to be used, offer no guarantee of a timely result. The evidence of medical science, confirmed by the experience of law enforcement, attests to the ability of the human body to continue deliberate actions even after sustaining grievous—even fatal—injury.

The reality is that most gunshot wounds are not fatal, and even fatal wounds do not necessarily cause instantaneous physiological incapacitation. A random review of the shooting deaths of 56 police officers during 1990 disclosed that 16 of those officers continued to perform some deliberate function *after* sustaining fatal wounds. Two of the officers called for assistance and 15 officers returned fire, killing 5 assailants and wounding 5 others. Four officers received fatal wounds to the head.

To reliably deprive an assailant of the ability to carry out voluntary actions requires neutralization of the central nervous system, either directly by injury to the brain or upper spinal column or indirectly by depriving the brain of oxygen through massive blood loss. The time necessary to achieve the result may be seconds or minutes—depending on the location, number, and severity of the wounds—but it may suffice for the assailant to carry out life-threatening actions.

Taken together, the effects of these practical factors on the time available to an officer to counter a deadly threat place appropriate emphasis on the Supreme Court's ref-

erence to the need for "split-second judgments." The cases already discussed illustrate the need to act quickly and reject the notion that officers can wait until they are certain before using deadly force. In *Greenridge v. Ruffin*,¹⁶ the officer mistakenly believed the suspect was reaching for a shotgun, when he was

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reaching for a wooden nightstick; in *Reese v. Anderson*,¹⁷ the officer believed the suspect was reaching for a gun, when there was no weapon at all.

The following brief scenarios illustrate other typical circumstances where "the perspective of a reasonable officer" may detect the presence of immediate threats unseen by those operating from a different vantage point:

Facts

Shortly after receiving a report of a nearby armed robbery, an officer sees a suspect running from the direction of the crime and carrying a pistol in his hand. The officer draws his own handgun, confronts the suspect at a range of about 10 yards, and orders him to drop his pistol and raise his hands.

The suspect raises his hands but does not drop the pistol.

Analysis

Although the suspect is not pointing his pistol at the officer at that moment, he nevertheless poses an immediate, deadly threat to the officer. If the suspect decides to fire at the officer, it is highly unlikely that the officer can respond quickly enough to prevent it.

Facts

Two officers attempt to arrest an armed suspect. The suspect resists by firing shots at the officers and then running away.

Analysis

The constitutional standards announced by the Supreme Court in *Tennessee v. Garner*¹⁸ permit the use of deadly force *to prevent the escape* of this demonstrably dangerous suspect. But apart from the presumption that the suspect's escape will continue to pose a danger to the community, it must also be recognized that his ability to gain cover, or simply turn and fire, poses an immediate threat to officers who try to chase and catch him.

A "reasonable officer" may be presumed to know of the practical limitations on the ability to respond effectively to immediate threats. Since these factors provide the context in which judgments to use deadly force are made, they also provide the context in which those

judgments need to be assessed. Without them, an officer's "objectively reasonable" use of deadly force may be misjudged as precipitate or excessive.

Goal of the Inquiry: Objective Reasonableness

The fourth amendment does not require that law enforcement officers be "right"; it requires only that they be "reasonable." Although the U.S. Constitution does not preclude the imposition of stricter standards by State courts interpreting State law, the concept of "objective reasonableness" provides a logical means of fairly assessing an officer's actions, whether in the context of the fourth amendment, State law, or department policy.

The Supreme Court has observed that the standard is not capable of "precise definition or mechanical application."¹⁹ Likewise, the issues raised during encounters between law enforcement officers and criminal suspects are not conducive to precise or mechanical solutions. Thus, the fourth amendment is "not violated by an arrest based on probable cause, even though the wrong person is arrested...nor by the mistaken execution of a valid search warrant on the wrong premises....With respect to a claim of excessive force, *the same standard of reasonableness at the moment applies....*"²⁰ (emphasis added)

CONCLUSION

The Supreme Court recognized in *Graham v. Connor* that officers frequently have to make "split-second judgments" concerning the use of force under "circumstances that are tense, uncertain and rapidly evolving...." The constraints thus

imposed on an officer's ability to acquire and evaluate information, the legal obligation to wait and "react" to the actions of suspects, and the limited means available to reliably achieve a timely end to the threat emphasize that point.

The concerns that officers be discouraged from using excessive force are legitimate. But those concerns must be balanced against the equally legitimate interest in permitting law enforcement officers to protect themselves and others during the performance of concededly hazardous duties.

“...the concept of ‘objective reasonableness’ provides a logical means of fairly assessing an officer’s actions....”

Society does not intend that those dedicated to enforcing the law should sacrifice their lives in the process. Unfortunately, the authority granted to officers to protect themselves can be effectually nullified by inadequate attention to the practical context in which life-and-death decisions are necessarily made. To pursue the theme of the English boatman whose words opened this article, even if "whoever makes the regulations doesn't row a boat," perhaps it is not too much to expect that they will make allowances for the difference between rowing upstream and rowing downstream. ♦

Endnotes

¹ Robert Bolt, *A Man For All Seasons*, Vintage Books, 1962, 17.

² Uniform Crime Reports, Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted*, 1990.

³ Prior to the Supreme Court's 1985 decision in *Tennessee v. Garner*, 471 U.S. 1, over 20 States permitted the use of deadly force to prevent the escape of any "fleeing felon." In *Garner*, the Court limited the constitutional authority to use deadly force for prevention of escape to those instances where there is "...probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others...."

⁴ 490 U.S. 386 (1989).

⁵ *Id.* at 396-399.

⁶ *Id.*

⁷ *Id.*

⁸ 926 F.2d 494, 500-501 (5th Cir. 1991); see also, *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988) ("knowledge of facts and circumstances gained after the fact [that the suspect was unarmed] has no place in the trial court's or jury's *post hoc* analysis of the reasonableness of the actor's judgment.")

⁹ 927 F.2d 789 (4th Cir. 1991).

¹⁰ *Id.* at 796.

¹¹ 954 F.2d 343, 347 (6th Cir. 1992).

¹² *Graham v. Connor*, 490 U.S., at 396-397.

¹³ *United States v. Cortez*, 449 U.S. 411, 418 (1980).

¹⁴ 954 F.2d 343 (6th Cir. 1992).

¹⁵ *Id.* at 347.

¹⁶ 927 F.2d 789 (6th Cir. 1991).

¹⁷ 926 F.2d 494 (5th Cir. 1991).

¹⁸ 471 U.S. 1 (1985). The Court offered two criteria to assess whether a fleeing suspect is dangerous: (1) "...if the suspect threatens the officer with a weapon..." or (2) "...there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm...." Satisfying either of these criteria effectively establishes the presumption that the suspect's escape will continue to endanger the community.

¹⁹ *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

²⁰ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.
