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Clearing up misconceptions about legal standards for police use of force – Ed Flosi

It has been said many times that a little bit of knowledge can be a dangerous thing. Along that same line of thought; inadequate or insufficient information can lead to misunderstanding, or dangerous misinterpretation. In recent travels, I have heard some "trends" being discussed regarding the legal standards and limitations of a law enforcement officer's use of force. Some were harmless and even somewhat humorous. Others were disturbingly inaccurate that need further discussion with a different viewpoint brought out.

A law enforcement officer's decision to use force in response to a suspect's actions are sometimes made in a split-second with no time to contemplate multiple layers of decision points. The US Supreme Court understood this when they commanded all that choose to lend opinion about an officer's use of force to heed this warning:

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.[1]

Establishing standards that: (1) do not exist, or (2) are so incomplete that they become misleading and will only lead to confusion in the minds of the law enforcement personnel in the field. If only a portion of a legal standard is discussed while leaving an important defining part out, it is an incomplete standard and therefore a false standard. These false standards are not necessarily taught with bad intentions. All the same, these false standards can cause hesitation when time is of the essence.

There are some dangerously incomplete statements regarding use of force standards being floated around. Most of these statements involve some type of sense of absoluteness that does not take into consideration the directions, guidelines and factors as prescribed by the US Supreme Court.

"Officers must use the least amount of force necessary"
While this phrase may be in some agency policies, it is not the standard of law. The "least amount" is a phrase that is open to over-analysis. It also implies a level of exactness as to what is the least amount, and according to whom? Least amount is an overly subjective term. The correct legal standard is force that is objectively reasonable based on the totality of the facts known to the officer at the time of the force application.

There is a fiercely contested debate over the words "necessary" and "reasonable" as well. That is a much larger discussion for another article.

"Officers must be aware of the active versus passive resistance analysis under the Graham standards."
This quote was referenced to a recent 9th Circuit Court of Appeal decision. What was written in *Bryan v. McPherson* is, "Following the Supreme Court's instruction in *Graham*, we have drawn a distinction between passive and active resistance. See Forrester, 25 F.3d at 805." However, in the same decision the court went on to say:

Resistance, however, should not be understood as a binary state, with resistance being either completely passive or active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer. We must eschew ultimately unhelpful blanket labels and evaluate the nature of any resistance in light of the actual facts of the case.[2]

"Officers must consider less intrusive alternatives."
This statement in of itself can be dangerously misinterpreted without further explanation. Remember the overarching commandment given by the U.S. Supreme Court above before taking this statement as a full truth. If the situation allows for consideration based on the pace of the event, officers should consider less intrusive alternatives.

If officers had to consider less intrusive alternatives in every situation, it would require superhuman thought. This absolute statement would violate one of the other force analysis rules as stated by the US Supreme Court:

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.[3]

"Officers need to consider if an event is tense and rapidly evolving."
This statement is part of the overarching direction given by the U.S. Supreme Court. The pace of the event can certainly play a large part in what will be considered in the determination of reasonableness. This language was a direction to be used in a post-event analysis. In other words, those that choose to opine (after the fact) about an officer's use of force "must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." These words can be seen as one reason why so many directions in policy/procedure are qualified with those famous words, "when feasible."

This is a far stretch from the absolute direction as written.

Imagine a situation that is "tense, uncertain and rapidly evolving." How would an officer have time to consider this as part of their force decision making process (before the fact) in such an event? To require an officer to stop and consider if a situation is "tense, uncertain and rapidly evolving" when it already is would waste precious milliseconds and could place that officer in more jeopardy.

Conclusion
Officers have enough factors to process in their reasonable force decision making. These factors include, but are not limited to: (1) the severity of the crime at issue, (2) the threat of the suspect to the officer or others, and (3) the amount of resistance given by the suspect.[4] Until the rules officially change, it is important that trainers do not get so wild with speculation and creative over-interpretation of what the courts may be trying to indicate that officers become tentative in using force when it is objectively reasonable.

In part two of this article we will explore other statements that need a little clarification.

[1]*Graham v. Connor*, 490 U.S. 386 (1989)
[2]*Bryan v. McPherson*, F.3d, 2009 WL 5064477 (9th Cir. 2009)
[3]*Graham v. Connor*, 490 U.S. 386 (1989)
[4]*Graham v. Connor*, 490 U.S. 386 (1989)

About the author

Ed Flosi is a police sergeant in San Jose, California. He has been in law enforcement for over 25 years and is currently assigned as a supervisor in the Training Unit. Ed has a unique combination of academic background and practical real world experience including patrol, special operations and investigations. Ed is the current lead instructor for; (1) use-of-force training, and (2) defense and arrest tactics for the San Jose Police Department. He has been retained in several cases to provide testimony in cases when an officer was alleged to have used excessive force. He has assisted the California Commission on Peace Officer Standards and Training (POST) in providing expertise on several occasions related to use-of-force training. He has a Master of Science degree from California State University – Long Beach and holds an Adult Learning Teaching Credential from the State of California. He teaches at West Valley College and serves as the Law Enforcement Training Coordinator for Martinelli and Associates: Justice & Forensic Consultants, Inc.