

State-Created Danger Should Police Officers be Accountable for Reckless Tactical Decision Making?

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Police officers are called upon to resolve our society's shortcomings by arresting those who commit crimes, manage those with mental illness, and resolve violent and dangerous situations. Often these situations happen in the middle of the night, with little or no warning, and no opportunity to develop a comprehensive plan, seek advice, or refer to a manual. The police are expected to intervene quickly and make what are often critical decisions. For the most part America's police are up to the task, but not all tactical decisions are sound. And while poor judgments based on limited information or insufficient time or even mistakes may be understandable, reckless acts that provoke violence must not be tolerated.

Situations where police officers respond with force to extricate themselves from a dangerous position that they created are particularly troubling. For example, officers who use their bodies as a barricade to prevent a driver from fleeing goes beyond being simply foolish, and may be considered reckless when the officer who deliberately placed him- or herself in danger fires at the vehicle in "self-defense." This is magnified when the police have the opportunity to plan, to summon resources, and to respond in a tactically sound manner, but fail to do so through incompetence, laziness, or expediency. This article will review the implementation of force by police officers and consider the implications of tactically unsound or reckless decision making when the police use force in a dangerous situation not created by the suspect, but by the officer.

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POLICE TACTICS

Police officers are the nation's front line in dealing with noncompliant, resistive, combative, mentally ill, and violent subjects. Because these situations are almost always fluid, dynamic, and unique there are no predetermined steps that may be applied in every case to achieve a desired result and it is impossible to prepare a police officer for every imaginable field situation. There are, however, predictable types of behavior and reasonable tactical strategies that allow officers to avoid placing themselves and others at a substantial risk of injury and decrease the need to impose a significant level of force to resolve the situation. To achieve these worthwhile goals police management can structure meaningful guidelines and training. The methods and techniques employed by officers to exercise legitimate control are referred to as tactics. Tactics are best described as a sequence of moves that limit the suspect's ability to inflict harm and advance the ability of the officer to conclude the situation in the safest and least intrusive way.

Police officers are trained how to evaluate and manage potentially violent field situations and how to apply tactics to minimize the danger of risk to themselves and others. Officers are trained to formulate a plan whenever possible by gathering information, considering risk factors, assembling sufficient resources, communicating with other officers, and using available time to their advantage. Officers understand the value of cover and concealment, contact and cover strategies, and calm and effective negotiation skills. They are well-versed in containing scenes, setting perimeters, isolating suspects, and evacuating those in harm's way. Modern police officers are also provided a wide range of tools (including less lethal options like pepper spray, Tasers, and impact projectiles) to minimize the necessity of using serious or deadly force. Police officers are taught tactics in the police academy and through continuing professional training throughout their careers. Supervisors debrief tactical situations with their officers and apply lessons to real-life situations. Police tactics are routinely discussed, emphasized, and reviewed at all levels of a police organization. This focus on officer safety stems from the recognition that when officers perform poorly an officer, a community member, or a suspect may suffer a severe or fatal injury.

Law enforcement continually considers high-risk situations and sometimes makes wholesale changes in their tactics based on an incident or a series of incidents. For perspective, consider the 1966 Texas tower incident where Charles Whitman began randomly shooting at people, killing 14 and wounding dozens more.¹ The police response depended on the independent actions of responding officers, which mostly consisted of uncoordinated handgun and rifle fire that had little effect other than to chip away at the tower. Some officers commandeered armored cars to rescue the wounded and others commandeered an airplane that allowed the officers to shoot down on Whitman, but the plane was quickly driven back by Whitman's gunfire. Finally, several officers were able to access the tower through a system of tun-

nels. After climbing 30 flights of stairs the officers confronted Whitman, who was killed in an ensuing gun battle.²

The Austin police stopped Whitman, but their improvised efforts were uncoordinated, depended on a large amount of luck, and took over 90 minutes. Although the independent actions of the officers resolved the incident, police departments across the nation recognized the need for a better response to critical incidents of this magnitude. The Texas tower incident, along with the Watts riots a year earlier, were the impetus for the formation of special teams of police officers equipped and trained to deal with these types of dangerous and unusual criminal incidents. Known by various names and acronyms, Special Weapons and Tactics (SWAT), Hostage Rescue Teams (HRT), Special Response Teams (SRT), Special Emergency Response Teams (SERT), and Special Operations Units (SOU), tactical teams have proliferated since the Texas tower incident.³

Just as the Texas tower incident and the Watts riots of the 1960s were the impetus for the formation of SWAT teams, events in the 1990s dramatically changed the police response for tactical dynamic reactive incidents. North Hollywood (CA), Littleton (CO), Jonesboro (AR), and Atlanta (GA) all share a common tragic experience—individuals exhibiting aberrant human behavior that resulted in the ongoing random shooting of unarmed citizens. The shootings continued until there were no further possible victims or due to some “independent” act of courage by a uniformed police officer. As a result of these incidents, law enforcement officials recognized that the traditional tactics of containment, negotiation, and the activation of SWAT teams were ineffective in these types of events. Learning from their collective experience, law enforcement trainers developed an “active shooter” rapid response technique where the first responders—the uniformed police officers—can and must take an immediate independent action to resolve tactical dynamic life-threatening situations.⁴

While the development of SWAT teams and active shooter response protocols have increased the ability of police officers to resolve certain types of violent behavior, law enforcement has continually worked to improve the tactics employed by officers to resolve a myriad of unplanned and unpredictable high-risk situations. Although officers are generally well-trained, well-prepared, and quite capable of resolving violent confrontations in a safe and reasonable manner, mistakes are made. Police officers are not faced with a theoretical set of circumstances and provided sufficient time and resources to develop a comprehensive response, rather they face the immediate threat of what could be a serious or deadly injury to themselves or others. In these types of situations it is reasonable that some mistakes will be made; however, it is unreasonable to allow officers to act recklessly to provoke a violent response.⁵

UN SOUND TACTICAL DECISION MAKING

Unsound decisions in the face of predictable violent behavior sometimes sets a series of events into motion that can result in tragedy. All too frequently

poor tactics dealing with suspects inside vehicles, officers who fail to use available cover, and officers who act too hastily without waiting for available back up are the root cause of officer-created jeopardy. Incidents involving vehicles are perhaps the most widespread events where an officer's lack of discipline and poor decision making result in an officer's provocative acts that cause the suspect to respond in a way that leaves the officer no reasonable alternative other than to use force in self-defense.

Tactical shortcomings involving vehicles are most often instances where officers use their bodies as barricades, attempt to grab keys from the ignition, when they try to forcibly extricate someone from a vehicle, or when they latch onto a moving vehicle only to be dragged away. Unfortunately, there are many examples to illustrate these points. In *Abraham*,⁶ an officer attempted to arrest a shoplifter who managed to flee from the store and enter his vehicle. The officer placed her body in front of the vehicle to prevent the suspect's escape after the suspect had already collided with other vehicles. The shoplifter inched his vehicle toward the officer, but when the officer refused to move, the shoplifter suddenly accelerated toward the officer and the officer fired in self-defense. In *Allen*,⁷ an armed suicidal man was sitting in his car. Instead of containing the scene, seeking a position of cover, and trying to talk the man into surrendering the weapon, the officers left their cover and tried to wrestle the gun from the man's hand. During the struggle, the man pointed the gun at one of the officers and in response the officers shot and killed the man. In *Greenidge*,⁸ an officer working a prostitution sting approached a suspect sitting in a vehicle. The officer had a handgun in one hand and tried to open the car door with her other hand. The officer did not wait a few seconds for additional back up nor did the officer illuminate the interior of the car with a flashlight. The suspect moved suddenly and the officer fired, striking the unarmed suspect.

Similarly, officers who fail to seek or abandon a position of cover are also rejecting a basic officer safety tenet. A position of cover allows officers to attempt to negotiate a peaceful solution while waiting for additional resources that may be applied as alternative means to safely conclude a tense and potentially dangerous situation. When officers do not use available cover, tactical situations may quickly escalate into what may otherwise be an unnecessary use-of-force application. In *Medina*,⁹ officers were attempting to arrest a man for violating bail. The man claimed he had a gun and exited his home holding a staple gun wrapped in a towel that he intended to represent as a firearm. Officers initially reacted appropriately by shooting the man with a less-lethal beanbag and released a police K-9, but neither was effective. Rather than attempting any additional tactics, an officer decided to leave his position of cover to knock the man down. Believing that the man was armed, the officer had no alternative once he left his position of cover than to fire when the man turned in his direction.

Finally, officers are trained to understand that time is a valuable tactical asset. Time allows officers to plan, resources to arrive and be deployed, and

tactics to be considered. Unnecessary hurried actions are almost always a significant tactical error, particularly when there is clear evidence of the dangers of moving too quickly. Consider the facts in *Dickerson*.¹⁰ In that case, an intoxicated man fired a handgun nine times inside his home. Two officers arrived at the scene and immediately entered the home without waiting for back up, without setting a perimeter, or making any attempts to negotiate the suspect's surrender. Once inside, the man threatened the officers with the handgun and the officers shot and killed the man. Police radio tapes showed that only one minute had passed from the time that the officers arrived to the time when they shot the man. Entering a home in these circumstances evidences a wanton disregard for the officers' own safety and the safety of others.

USE-OF-FORCE LAW

Police officers are entrusted to use some physical coercion to control and apprehend those who are suspected of engaging in criminal activity or those who place the officer or others at risk of harm. While the government permits the police the authority to use force on behalf of the community, that force is closely monitored and any force that is not objectively reasonable is deemed to be excessive.¹¹ The seminal case on police use of force is *Graham v. Connor*. In that case, the Court held that force claims are analyzed under the Fourth Amendment's reasonableness standard, which balances the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interest at stake."¹² The Court held that the "proper application requires careful attention to the facts and circumstances of each case including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Reasonableness "of a particular use of force must be judged from the perspective of a reasonable officer on scene, rather than with the 20/20 vision of hindsight."¹³ One aspect of this holding that has not been studied sufficiently is the effect of stress and adrenaline on an officer's perception of an event. While research has shown that stress affects officers' performance and perception, it is not known the ways in which officers interpret threats under extreme stress.¹⁴ In its holding, *Graham* refers to the Court's prior holding in *Garner* and states that "the question is 'whether the totality of the circumstances justify[s] a particular sort of . . . seizure.'"¹⁵

Although the standard outlined in *Graham* instructs one to look at the totality of the circumstances to determine if the officer's actions were objectively reasonable, one portion of *Graham* has caused confusion among the circuit courts, which have created rules neglecting the totality of the circumstances and focused their analysis only on the final frame.

With respect to a claim of excessive force, the same standard of reasonableness at the *moment* applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judges' chambers," violates the

Fourth Amendment. 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. (citation omitted, italics added)

Some circuit courts have interpreted the word “moment” and “split-second judgment” to limit the analysis of a use-of-force incident to only the facts at the moment of the use of force. These courts hold that the events leading up to the use of force are irrelevant. This is referred to as the “final frame” analysis because only the instant prior to the use of force is considered.¹⁶

Final Frame

There is little consistency among the circuit courts in determining the scope of actions to be reviewed in a police use-of-force case. Some circuits do review the totality of the circumstances to determine reasonableness. The First Circuit has held that the proper rule is to examine the events leading up to the use of force, not just the moment before because such a rule is more consistent with the Supreme Court’s mandate for courts to consider these cases in the totality of the circumstances.¹⁷ The Third Circuit is willing to review evidence of events preceding the seizure and found that “totality” is an encompassing word that implies that reasonableness should be sensitive to all of the factors bearing on an officer’s use of force and reasoned that “a more fundamental point is that it is far from clear what circumstances, if any, are left to be considered when events leading up to the shooting are excluded. How is the reasonableness of a bullet striking someone to be assessed if not by examining preceding events?”¹⁸

Other circuits will not look beyond the seizure itself. For example, the Seventh Circuit has held that pre-seizure conduct cannot be reviewed as the Fourth Amendment prohibits unreasonable seizures—not unreasonable, unjustified, or outrageous conduct in general.¹⁹ The Fourth Circuit found that based on the Supreme Court’s focus on the very moment when the officer makes the split-second judgment, the events that occur before the seizure are not probative of the reasonableness of the use of force.²⁰ The Eighth Circuit excludes evidence relating to whether the officers created the need to use force by mishandling the encounter because it is not related to the reasonableness of the seizure itself. However, the court adds to the confusion by stating, “But this does not mean we should refuse to let juries draw reasonable inferences from evidence about events surrounding and leading up to the seizure.”²¹

Still other circuits have created their own unique rules to determine how, if, or what circumstances should be considered. The Sixth Circuit opts to carve up the incident into separate segments and judges each on its own terms to see if the officer was reasonable at each stage.²² The Sixth Circuit opined:

The time frame is a crucial aspect of excessive force. Other than random attacks, all such cases begin with the decision of a police officer to do

something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.²³

The Tenth Circuit has held that a use of force can be deemed unreasonable if the officer's reckless or deliberate tactics during the seizure unreasonably create the need for the use of force.²⁴ The court added that the police conduct that provokes the use of force must be immediately connected with the use of force, however, the primary focus of the review remains on the exact moment of the use of force.²⁵

The Ninth Circuit has created an entirely different test. The Ninth Circuit will look beyond the moment of the force application and will hold an officer liable for his otherwise reasonable use of force if the officer intentionally and recklessly provokes a violent confrontation. However, the Ninth Circuit requires that the provocation be an independent Fourth Amendment violation.²⁶ The requirement is based on a prior Ninth Circuit decision where public health officials obtained an administrative forcible entry warrant to investigate a sewage leak. Upon their arrival, the resident threatened to get a gun, so a SWAT team was summoned. The SWAT officers forced entry into the home and confronted the mentally ill resident who twice tried to shoot the officers. The officers returned fire and killed the man. The court held that the massive disproportionality of the response to the problem of a leaky sewer pipe rendered the entry unreasonable, and based on the Fourth Amendment violation of an unlawful entry the court held the use of force to be unreasonable.²⁷

The circuits that advocate a final-frame analysis are overlooking the holding in *Graham* that requires careful attention to the facts and circumstances of each case (such as the severity of the crime or whether the suspect is actively resisting or is attempting to evade arrest by flight) and are focusing only on whether the suspect poses an immediate threat to the officers or others. Such a limited view prevents a thorough analysis of what could be the most intrusive action that can be perpetrated by the state—taking the life of one of its citizens. Most importantly, this wide disparity among the circuits demands some intervention by the Supreme Court to create a rule that may be uniformly applied.

Split-Second Decision Making

There are clearly sound policy reasons for being differential to the tactical decisions of police officers who are confronted with resistance and little time to consider alternatives. Indeed, the law should not be so strict that it creates a hesitancy for officers to act (thereby increasing the likelihood of injury to the officers), or worse, the unwillingness of officers to act at all (thereby placing the community at risk). Police officers who make split-second decisions in dangerous situations should be provided with a fairly wide zone of protec-

tion in close cases even if there is a plausible claim that the situation could have been handled better or differently.²⁸ However, when a situation does not require a split-second decision and it evolves at a pace where reasonable alternatives may be considered and implemented, the law should encourage officers to avoid acting in reckless ways. In fact, officers should be trained and encouraged to reduce the need for making split-second decisions and to slow down the pace of an encounter rather than to intensify it.²⁹

Ideally, police officers' decisions to implement the use of force, whether minimally intrusive, a physical encounter, or the use of deadly force, will be made by an experienced and well-trained, well-meaning officer. The officer should be informed about the situation and/or be able to interpret the situation she approaches properly, not be faced with time restraints to develop a rational response. Further, the officer should have the opportunity as well as the ability to implement the appropriate course of action. However, this ideal situation does not often exist in the real world of policing. There are always situations where police officers are required to make critical decisions under adverse conditions, with insufficient information, with acute time stress, and significant risk of injury to themselves or others. But even these factors may not place the officer in a position where there is truly only a *split-second* to make a decision.

The idea that police officers will only make key decisions in most potentially violent confrontations at the last instant under acute time stress, known as the *split-second syndrome*, overlooks the thought process of officers in advance of any decision to use force.³⁰ The reality of policing is that there are very few instances where police officers only have a split-second to make a significant use-of-force determination. If an officer is suddenly and without warning confronted by an armed man or if an officer responds to a traffic collision and is instantaneously assaulted by a person suffering from a mental illness, the officer must make split-second decisions to defend himself and others. In these situations of random violent acts officers may have no control over the preliminary frames and are forced to make split-second decisions to prevent serious bodily injury to themselves or others. In a true instance of split-second decision making, the analysis is much easier to complete as there are no preliminary frames to review.³¹

More frequently officers will have at least some knowledge about the situation that they are about to confront. It is when officers have both knowledge and time, yet still recklessly provoke a violent response, that unnecessary force occurs.³² Indeed, most situations offer police officers three frames of analysis to aid in their decision-making process. These three frames include activities prior to any contact with the suspect, when the officer makes contact with the suspect, and finally the decision to use force that causes the injury.³³

The first frame includes activities prior to any contact with the suspect. Police officers rarely stumble onto the scene of a crime without any warning. Most often, they respond to some external stimulus. Typically information is provided to officers verbally by a witness, through a dispatcher after a community member calls the police, or from their own observations. This com-

munication provides the officer with at least a minimum amount of information and allows the officers to conduct some level of tactical planning. These initial bits of information allow the officers to begin their planning process and to make assessments for subsequent steps. The purpose of preparation through planning in a tactical sense is that it allows police officers to make sound decisions that will minimize the danger to the officer, the community, and to the actor who is creating the risky situation. The opportunity to plan for a tactical response can be divided into three categories: those where there are hours, days, or weeks; those where there are minutes; and those where the officer is instantly confronted and there is no legitimate opportunity to formulate a plan.

Police officers are trained to develop plans before taking action whenever possible. The more time available during the planning process, the more comprehensive of a plan can be expected. The first step in the planning process is to collect as much relevant and reliable information as possible. This information gathering stage may be complex, like conducting undercover reconnaissance to determine the layout of a building prior to the execution of a search warrant, but may be limited to asking the dispatcher for additional information as an officer responds to a call, or to request another officer for back up or cover. In situations such as a search warrant execution or the response to a scheduled protest, where there are hours, days, or weeks before the event, the planning should be extensive. In these types of events, one would expect a comprehensive written plan that indicates staffing, supervision, a clear mission statement, and considerable contingency planning. Conversely, when time is limited to a few minutes the planning process may consist of coordinating the response with other responding officers, efforts to seek additional information, or requests for additional resources.³⁴

Concurrently during the information-gathering phase the officer is engaged in analysis. The officer should consider specific risk factors, available resources, the area where the incident is occurring, the speed of their response, the potential need to contain the scene, isolate the suspect, or evacuate those at risk of harm in the area. The analytical process breaks down the overall incident into its component parts and allows the officer to develop her initial tactical plan. This progression of observation, orientation, decision making, and actions allows officers to gather information, conduct some level of analysis, make decisions, and act with speed and accuracy.³⁵

Officers similarly have an opportunity to continue their decision-making efforts at the point when they initially contact the suspect. The officer is able to make visual observations of the suspect that provide the officer with a wealth of information. It is during these first few critical seconds that officers will be able to assess whether the suspect is armed or is potentially armed, whether others are at immediate risk, whether the suspect is coherent or irrational, the size of the suspect, the environment, and most importantly, the suspect's response as the officer begins to negotiate by communicating in a calm and deliberate way. Even if this initial contact lasts only a few seconds,

the officer has had an opportunity to gain a vast amount of information that may be used in a force decision.

Typically, it is only after these steps that the officer will make a force decision. Clearly, all force decisions are made at the last moment and should be based on the totality of the circumstances that confronted the officer and ultimately the actions of the suspect that places the officer or others at risk of immediate harm. Making a force decision early would be imprudent as circumstances may change, eliminating the need for the level of force. Holding the officer accountable for only the final frame would be equally imprudent as the final frame alone may not justify the officer's actions. Consider an officer who fires at an individual who was reaching for his waistband. This frame alone could never justify a use of force, particularly the use of deadly force. However, if an imaginary motion picture of events were backed up to the series of frames preceding the final frame where the force was implemented, those frames may reveal facts that would make the officer's action objectively reasonable and the use of force may be justified.

STANDARDS

Although the *Graham* Court clearly articulated the standard of objectively reasonable conduct to differentiate the amount of force that may be exercised and the amount of force deemed to be excessive, reasonableness is sometimes an elusive concept. The concept of reasonableness is particularly difficult when applied to a police use of force where the officer lacks a bad motive and the suspect is morally blameworthy. Yet, our system of justice demands that judgments be made and despite the inherent subjectivity of the Fourth Amendment balancing test clear guidance can be provided for officers.³⁶ The test then, from a police procedural standpoint, is: What is a reasonable error? Should officers be held accountable for their mistakes or negligent acts, should some higher standard such as gross negligence or recklessness be applied, or are the standards developed by the circuit courts, who only review the moment that the force was applied, ignoring all of the officer's actions prior to that point?

A mistake is an error that results from a defect in judgment or a deficiency of knowledge. Mistakes in policing most frequently occur when an officer misinterprets information or when factors crucial for the decision-making process are not recognized or identified.³⁷ Mistakes are a subset of simple negligence. Simple negligence is defined as the failure to exercise ordinary care or as a deviation from the conduct of a reasonable person of ordinary prudence under the same circumstances.³⁸ Under such a standard the intention of the officer is not a factor and acts of mere inadvertence could create officer liability. The application of a simple negligence standard would not consider the reality of policing in that such decisions are made in the field in what is often a dangerous and rapidly changing environment and could create a chilling effect on officers who may fear that their well-intentioned or inadvertent actions may subject them to civil liability.

Using the benefit of hindsight, use-of-force experts are very adept at identifying mistakes or negligent actions that officers could have performed differently. They will point out that the officer could have retreated, used a less-lethal tool like pepper spray, or waited for back up. They will suggest that the officer should have called for more officers, a supervisor, a SWAT team, a negotiator, a K-9, an armored vehicle, or even a helicopter. They will advocate that if the officer had all of her equipment, or better equipment, if their weapon was holstered safely, if their attention was not diverted, if the officer was not too close or too far, or if any of these factors had occurred the situation would have resolved peacefully. It is exactly this type of review that the Supreme Court sought to avoid. The hypercritical assessment of crisis decision making involving mistakes or simple negligence that is conducted later in the calm and safety of a courtroom would be an obstruction to effective policing.

A standard of recklessness is a more serious transgression against common police practice than simple negligence. Recklessness is a disregard for or indifference to the dangers of a situation or for the consequences for one's actions.³⁹ These intentional acts carried out during a known or obvious risk create a high probability that harm will occur.⁴⁰ Recklessness should not be confused with bravery, where a person demonstrates a reasonable level of fear rather than none at all. A reckless officer may be seen by some as heroic; consider an officer who, without regard for their own safety, fearlessly charges into a building to confront an armed assailant. This type of reckless display is more often a blunder that places the officer or others at great risk with little true benefit. The reckless act of charging into a situation necessarily causes the suspect to react. The suspect is faced with a split-second decision of her own and unlike the officer, the suspect has had no training, has demonstrated poor decision-making skills by failing to immediately surrender or comply with the officer's commands, may be under the influence of a drug or alcohol, or may suffer from a mental illness.

Unfortunately, neither simple negligence nor recklessness is an appropriate standard. The application of a simple negligence standard would be too unforgiving to officers who are responding to the actions of a suspect in situations that may be dangerous and volatile. Such a standard may cause officers to refuse to act to avoid the risk of liability while allowing the community to absorb the risk that the police were intended to resolve. Recklessness, on the other hand, may be too lenient of a standard. Recklessness would be very difficult to prove even if the officer's intention was imputed due to the evident errors committed by the officer.

A gross negligence standard is perhaps the appropriate standard to apply in the determination of objective reasonableness. Gross negligence is not easy to define, but it falls somewhere between simple negligence and recklessness.⁴¹ Gross negligence is a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons. It is conduct that is extreme when compared with simple negligence, which is a mere failure to exercise reasonable care. Gross negli-

gence is much more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simple inattention.⁴² A standard of gross negligence to determine reasonableness would balance the need to allow officers to make mistakes or acts that may amount to simple negligence, but at the same time create a remedy to discourage officers from conducting themselves in such a manner that needlessly provokes a violent confrontation.

EFFECTIVE REALISTIC TRAINING TO IMPROVE TACTICAL DECISION MAKING

While it is true that no amount of perfect planning can prevent random violence, it is also true that planning and training can aid first-responding officers to exercise good judgment and good tactics as they engage in independent actions to save lives, prevent injuries, and resolve dynamic tactical situations. Much of police use-of-force training has been appropriately criticized due to (1) the reliance on shooting drills that focus on fixed targets engaged by officers who are comfortably positioned a few yards away, (2) the use of two-dimensional interactive videos that test only the “final frame” of an encounter, eliminating the opportunity to train officers on how to plan and coordinate their approach and initial actions, or (3) the use of role playing, although it is more realistic, fails to create a level of stress in the officer that would be generated by the danger and uncertainty of a field situation.⁴³ Recognizing that police tactics require practical application and have little value if officers cannot apply their learning to field situations, many police organizations have begun to focus their use-of-force training on decision-making models that are applied in the most realistic environments possible.

Technology has improved over the last several years and allowed developers to create much more realistic interactive video simulators. Although not as ideal as interacting in the field, this new generation of simulators allows officers to plan their approach, communicate with other officers, and be tested on their tactical decision-making skills. These new simulators use firearms identical to those that officers deploy in the field. The weapons are no longer tethered to a machine; they are carried in the officer’s holster to be deployed only when necessary. The videos now have multiple branches allowing the trainer to change the scenario based on the officer’s actions. Trainers can create situations that may, or may not, require a force application. This type of “shoot–don’t shoot” training reinforces the officer’s decision-making skills and forces the officer to consider alternatives ranging from no force to deadly force to resolve the encounter. But perhaps the greatest innovative aspect of these simulators is the ability to literally shoot back at the officer. Equipped with a compressed air cannon the trainer can fire plastics projectiles at the student. These plastic balls do not injure the student, but they are painful and serve as an immediate reminder that the officer failed to take appropriate cover when cover was available. The ability to fire back at

the officers also places the officers under duress, forcing officers to make decisions much as they would in the field.

The first generation of 360-degree simulators that function as part of a live firing range have also become available for trainers. Over the last decade, these simulators allow the officers to drive their vehicle onto a firing range and confront situations that may be occurring in front of them, to their sides, or even behind them. This type of simulation allows a greater amount of time to judge the officer's initial actions, to hear their plans, and to require the officer to communicate to other officers, witnesses, and suspects alike.

Range qualifications have also improved. Traditionally, police officers have qualified by firing at a "bull's-eye" target. These targets were changed to silhouettes, which were slightly more realistic, but the officers remained standing a few yards away firing from a position of comfort or at worst from behind a small barricade. Range masters are now requiring officers to shoot while moving, while kneeling, from behind objects that may provide cover, and from the open door of a police car, emphasizing the need to use cover, to reload while remaining in a position of cover, and to communicate with other officers who may be engaging the same target.

Finally, the most realistic training available for officers is role playing, which has evolved into force-on-force training. Through the use of simunitions, cartridges that are used in the officer's own gun that fire a marking agent, trainers are able to put officers into scenarios and evaluate the officer's response from the beginning. Officers can be trained how to diffuse situations, contain scenes, set perimeters, communicate information, formulate plans, and to make tactical approaches. Trainers offer advice on the effective use of low light situations, back lighting, the use of a flashlight, cornering, and a myriad of other tactical advantages. The simunitions provide immediate feedback to the officer should they fail to take appropriate cover, if they miss their target, or if they engage a target with a poor backdrop. Through this type of interactive role playing officers are better able to deal with the stress that they are under in the field and understand the advantages of proper tactics.

Police departments owe their officers proper policies, training, supervision, and a system of accountability. Departments must train officers not to create dangerous situations or to put themselves in situations that require force as self-defense. There are many tactics that may seem reasonable at the time and provide officers with a quick and simple response to an uncooperative suspect, but result in a use of force that could have been avoided. As we have noted, reaching into a car that is running to turn it off and get the keys is one of those seemingly reasonable responses that can result in an officer being dragged down the street and then shooting the driver to save his own life. Regardless of the specific scenario, officers must be taught to avoid self-created danger or jeopardy, and must learn how to respond safely to situations that can lead to injury or death.

Notes

- ¹ Snow, Robert. 1996. *SWAT Teams: Explosive Face-Offs with America's Deadliest Criminals*. New York: DaCapo Press.
- ² *Id.*
- ³ Rojek, Jeff and David Klinger. 2005. SWAT Teams. Pages 447–448 in *The Encyclopedia of Law Enforcement*, Marie Simonetti Rosen, Dorothy Moses Schultz, and M. R. Haberfeld, Eds. Thousand Oaks, CA: Sage.
- ⁴ *Id.*
- ⁵ Fyfe, James J. 1996. Training to Reduce Police-Civilian Violence. Pages 165–179 in *Police Violence: Understanding and Controlling Police Abuse of Force*, William A. Geller and Hans Toch, Eds. New Haven, CT: Yale University Press.
- ⁶ *Abraham v. Raso*, 183 F.3d 248 (8th Cir. 1996).
- ⁷ *Allen v. Muskogee, Oklahoma*, 119 F.3d 837 (10th Cir. 1997).
- ⁸ *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991).
- ⁹ *Medina v. Cram*, 252 F.3d 1124 (10th Cir. 2001).
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