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**State-Created Danger**

**Should Police Officers Be Accountable for Reckless Tactical Decision Making?**

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 to 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 are not only foolish but are also reckless—a significant problem that is compounded when officers who deliberately place themselves in danger fire their weapons 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 use of force by police officers and consider the implications of tactically unsound or reckless decision making when the danger necessitating the force was created by the officer.

**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; 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 to decrease the need to impose a significant level of force to resolve the situation. Police management can structure meaningful guidelines and training to achieve these worthwhile goals. 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 to minimize the necessity to use serious or deadly force, including less lethal options like pepper spray, Tasers®, and impact projectiles. Tactics are first taught in the police academy and are reinforced and refreshed through continuing professional training. Supervisors debrief officers about tactical situations so that the lessons learned can be applied in other situations. Police tactics are routinely discussed, emphasized, and reviewed at all levels of a police organization. The focus on safety stems from the recognition that when officers perform poorly, they place themselves, community members, and/or suspects at risk of severe or fatal injuries.

Law enforcement continually considers high-risk situations and sometimes makes wholesale changes in recommended 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](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_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; 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 tunnels. 569After climbing 30 flights of stairs, the officers confronted Whitman, who was killed in an ensuing gun battle.[2](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_2)

The Austin police were fortunate to stop Whitman, but the efforts took over 90 minutes. Although the independent, improvised actions of the officers resolved the incident, police departments across the nation recognized the need for a better response to 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 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](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_3)

Just as the Texas tower incident and the Watts riots of the 1960s were the impetus for the formation of police paramilitary units (PPUs), events in the 1990s dramatically changed the police response to dynamic reactive incidents. North Hollywood (CA), Littleton (CO), Jonesboro (AR) and Atlanta (GA) all shared the common tragedy of ongoing random shootings of unarmed citizens. Individuals exhibiting aberrant human behavior kept firing until there were no more victims in the area or because of an independent act of courage by a uniformed police officer. Law enforcement officials recognized that the traditional tactics of containment, negotiation, and activation of PPUs were ineffective in these situations. Learning from their collective experience, law enforcement trainers developed an “active shooter” rapid response technique.[4](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_4)

While the development of PPUs 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 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. Confronting threats of serious or deadly injury that require immediate action differs significantly from considering theoretical sets of circumstances or situations that allow time to gather resources for a comprehensive response. While it is reasonable to expect mistakes in situations that require split-second decisions, it is unreasonable to allow officers to act recklessly to provoke a violent response.[5](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_5)

**Unsound Tactical Decision Making**

Unsound decisions in the face of predictable violent behavior sometimes set a series of events into motion that can result in tragedy. Officer-created jeopardy often results when dealing with suspects inside vehicles, failing to use available cover, and acting too hastily without waiting for backup. Incidents involving vehicles are perhaps the most common root cause of officer error 570involving lack of discipline and poor decision making. The officer may engage in 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 include officers using their bodies as barricades, attempting to grab keys from the ignition, forcibly trying to extricate someone from a vehicle, or holding onto a moving vehicle. Unfortunately, there are many court cases over the use of deadly force that illustrate these errors in judgment.

Kimberly Raso, an off-duty officer, attempted to arrest a shoplifter who managed to flee from the store and enter his vehicle.[6](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_6) 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.

Terry Allen left his house after an altercation with his wife and children. He took ammunition and several guns with him and parked in front of his sister’s house. The Muskogee Police Department was alerted that Allen was armed and had threatened family members; a radio dispatcher advised that he was suicidal.[7](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_7) Instead of containing the scene, seeking a position of cover, and trying to talk the man into surrendering, arriving 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; in response the officers shot and killed the man.

Ernestine Ruffin, a police officer working a prostitution sting, observed a woman believed to be a prostitute entering a vehicle with a man. Ruffin followed the car until it parked, keeping in radio contact with other officers from the vice squad.[8](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_8) Ruffin approached the car with a handgun in one hand and opened the car door with her other hand. She ordered the two passengers to place their hands in view. The officer did not wait a few seconds for additional backup, and she did not illuminate the interior of the car with a flashlight. The driver moved suddenly, and Ruffin shot the unarmed suspect, thinking he was reaching for a shotgun (it was a wooden nightstick). The bullet lodged near his spinal cord causing permanent damage.

Officers who fail to seek or who abandon a position of cover are rejecting a basic tenet of officer safety. A position of cover allows officers to attempt to negotiate a peaceful solution while waiting for additional resources that may provide the means to conclude a tense and potentially dangerous situation safely. When officers do not use available cover, tactical situations may quickly escalate into unnecessary use of force. In a 2001 court case, officers were attempting to arrest a man for violating bail.[9](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_9) The man claimed he had a gun and exited his home holding something wrapped in towel. Officers initially reacted appropriately by shooting a blunt force round (beanbag) and released a police dog, but neither less-lethal force 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 571had 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, wait for resources to arrive and be deployed, and to consider alternative tactics. Unnecessary hurried actions are almost always a significant tactical error, particularly when there is clear evidence of the dangers of moving too quickly. Joel Dickerson was intoxicated and fired a handgun nine times inside his home. A neighbor called the police, and the dispatcher issued the highest priority code for officers to respond. McClellan saw the neighbor but failed to ask whether anyone else was inside the house. He parked and waited for backup. The two officers immediately entered the home without waiting for additional backup, without setting a perimeter, and without making any attempts to negotiate the suspect’s surrender. Once inside, the man threatened the officers with a 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 under those circumstances exhibited a wanton disregard for the officers’ own safety as well as 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 being harmed. While the government permits the police the authority to use force on behalf of the community, that force is closely monitored. Any force that is not objectively reasonable is deemed to be excessive.[10](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_10) 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.”[11](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_11) 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.”[12](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_12)

One aspect of this holding that has not been studied sufficiently is the effect of stress and adrenalin on an officer’s perception of an event. While research has shown that stress affects officers’ performance and perception, it has not pinpointed the ways in which officers interpret threats under extreme stress.[13](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_13) In its holding, *Graham* refers to the Court’s prior holding in *Garner* that the question is “whether the totality of the circumstances justified a particular sort of search or seizure.’”[14](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_14) Although the standard outlined in *Graham* 572instructs 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 that have created rules neglecting the totality of the circumstances and focusing analysis only on the final frame. “With respect to a claim of excessive force, the same standard of reasonableness at the *moment* [italics added] applies: ‘Not every push or shove, even if it may later seem unnecessary in the peace of a judges’ chambers,’ (citation omitted) 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.” 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.[15](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_15)

**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 review the totality of the circumstances to determine reasonableness, others review only the moment force was used, and still others have created their own rules. The circuits that employ a totality of the circumstances analysis include the First, Third, Sixth, Seventh, and Eleventh Circuits. 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, 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.[16](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_16) The Third Circuit is willing to review evidence of events preceding the seizure and has 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. “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?”[17](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_17)

The Sixth Circuit found that the court should first identify the seizure at issue and then examine whether the force used to effect that seizure was reasonable in the totality of the circumstances—not whether it was reasonable for the police to create the circumstances. The court reasoned that “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.”[18](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_18)

573The Seventh Circuit reviews the totality of the circumstances[19](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_19) and has held that police officers who unreasonably create a physically threatening situation in the midst of a Fourth Amendment seizure cannot be immunized for their use of deadly force.[20](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_20) The Eleventh Circuit also looks at the officer’s conduct to determine if the officer created the circumstances where it became necessary to use deadly force in self-defense[21](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_21) and reviews the totality of the circumstances that include officer’s statements.[22](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_22)

Other circuits look at the moment of the seizure but add qualifying language that creates a unique analysis in each circuit. The Second Circuit looks at conduct “immediately prior to and at the moment” that the officer used force.[23](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_23) The Fourth Circuit found that evidence that an officer may have recklessly created a dangerous situation during the arrest was not relevant to deciding the reasonableness of the behavior,[24](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_24) yet they will consider actions “immediately prior” to the use of force.[25](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_25) The Eighth Circuit excludes evidence about whether the officers’ created the need to use force by mishandling the encounter because that evidence is not related to the reasonableness of the seizure itself. However, it adds to confusion about when prior actions are relevant to the reasonableness standard 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.”[26](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_26) The Tenth Circuit looks at the precise moment that force was used but will also consider the officer’s conduct prior to the suspect’s threat of force if the conduct is “immediately connected” to the suspect’s threat of force.[27](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_27)

Still other circuits have created their own unique rules to determine how, if, or what circumstances should be considered. The Fifth Circuit found “The constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest. There is no question about the fundamental interest in a person’s own life, but it does not follow that a negligent taking of a life is a constitutional deprivation.”[28](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_28) The Ninth Circuit has created an entirely different test. It 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, it requires that the provocation be an independent Fourth Amendment violation.[29](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_29) 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 massively disproportionality of the response to the problem of a leaky sewer pipe rendered the entry unreasonable; based on the Fourth Amendment violation of an unlawful, entry the court held the use of force to be unreasonable.[30](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_30)

The circuits that advocate an analysis other than the totality of the circumstances are overlooking the holding in *Graham* that requires careful attention 574to the facts and circumstances of each case including the severity of the crime and whether the suspect is actively resisting or is attempting to evade arrest by flight. These circuits focus only on whether the suspect poses an immediate threat to the officers or others. Such a limited view prevents a thorough analysis of the most intrusive action of the authority of the state—the death 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 deferring to the tactical decisions of police officers confronted with resistance and little time to consider alternatives. Indeed, the law should not be so strict that it makes officers hesitant to act—increasing the likelihood of injury to the officers, or worse, the unwillingness of officers to act at all, placing the community at risk. Police officers who make split-second decisions in dangerous situations should be provided with a fairly wide zone of protection even if there is a plausible claim that the situation could have been handled better or differently.[31](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_31) 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.[32](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_32)

Experienced, well-trained, and well-meaning police officers will make informed decisions about whether the use of force is necessary under ideal circumstances. If informed about the situation they will confront and provided sufficient time to develop a rational response, they will implement the appropriate course of action. However, this ideal situation does not often exist. There are always situations where police officers are required to make critical decisions under adverse conditions, with insufficient information, under severe time restraints, and with the potential for significant risk of injury to themselves or others. Even these very difficult factors do not necessarily place the officer in a position whether 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 confrontation 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.[33](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_33) The reality of policing is that there are very few instances where police officers have only 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 him- or herself and others. In these situations of random violent acts, officers may have no 575control 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.[34](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_34)

More frequently officers will have at least some knowledge about the situation that they are about to confront. When officers have both knowledge and time yet still recklessly provoke a violent response, unnecessary force has occurred.[35](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_35)In most situations, police officers have three available frames of analysis for the decision-making process: (1) activities prior to any contact with the suspect, (2) contact with the suspect, and (3) the decision whether to use force to control the situation.[36](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_36)

Regarding the first frame, 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 members calls the police, or from their own observations. This communication 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 officer to begin their planning process and to make assessments for subsequent steps. Tactical planning and preparation allows police officers to make sound decisions that will minimize the danger to the officer, to 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 for preparation; those where there are minutes; and those where the officer is confronted instantly.

Police officers are trained to develop plans before taking action whenever possible. The more time available during the planning process, the more comprehensive the plan. 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. It may be limited to asking the dispatcher for additional information as an officer responds to a call or to a request for another officer for backup. The execution of a search warrant or the monitoring of a scheduled protest allows hours, days, or weeks for extensive planning. For 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.[37](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_37)

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 the response, and 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 576overall incident into its component parts and allows the officer to develop the initial tactical plan. The progression is from observation to orientation to decision making to action.[38](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_38)

Officers 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 the officer 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—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 deciding whether the use of force is necessary.

Typically, it is only after these steps that the officer will make a decision to use force. Clearly, all force decisions are made at the last moment and should be based on the totality of the circumstances that the officer confronts 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; circumstances may change that eliminate the need for or the level of force necessary. Holding the officer accountable for only the final frame would be equally imprudent because the final frame may not justify the officer’s actions. Consider an officer who fires at an individual who reaches for his waistband. This frame alone could never justify the use of force, particularly the use of deadly force. However, if the imaginary motion picture were backed up to the series of frames that led to the final frame where the force was implemented, those frames may reveal facts that would make the officer’s action objectively reasonable, justifying the use of force.

**Standards**

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. However, 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. From a police procedural standpoint, there are several significant questions. What is a reasonable error? How should officers be held accountable for their mistakes or negligent acts? Should some higher standard such as gross negligence or recklessness be applied, or should departments employ the standards developed by the circuits 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 577officer misinterprets information or when factors crucial for the decision-making process are not recognized or identified.[39](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_39) Mistakes are a subset of simple negligence. Simple negligence is defined as the failure to exercise ordinary care or a deviation from the conduct of a reasonable person of ordinary prudence under the circumstances.[40](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_40) Under such a standard, the intention of the officer is not a factor, and acts of inadvertent behavior could create officer liability. Application of a simple negligence standard would not consider the reality of policing where decisions are made in a rapidly changing and possibly dangerous environment. Such a standard 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 20/20 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 backup. 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 officers had all their equipment (or better equipment), if their weapons were holstered safely, if their attention had not been diverted, if they were neither too close nor too far—or any other mitigating factor—the situation could have been resolved peacefully. It is exactly this type of review that the Supreme Court sought to avoid. Subjecting crisis decision making that involved mistakes or simple negligence to hypercritical assessment in the calm and safety of a courtroom could 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 of one’s actions.[41](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_41)Intentional acts involving a known or obvious risk create a high probability that harm will occur.[42](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_42) 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 his or her 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 causes the suspect to react. The suspect is faced with a split-second decision; 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, and may suffer from a mental deficiency.

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 578absorb the risk that the police were intended to manage. Recklessness, on the other hand, may be difficult to prove. Gross errors alone do not necessarily indicate the intentional disregard of known and obvious risks.

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.[43](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_43) Gross negligence is a conscious and voluntary disregard of the need to use reasonable care to prevent 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 negligence is much more than any mere mistake resulting from inexperience, excitement, or confusion—and more than mere thoughtlessness, simple inattention, or inadvertent errors.[44](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_44)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 with the necessity for a remedy when officers needlessly provoke 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 help first responders exercise good judgment and employ effective tactics to save lives, prevent injuries, and resolve dynamic tactical situations. Much of police use-of-force training has been criticized. For example, shooting drills for officers who are comfortably positioned a few yards away from a fixed target have limited utility when dealing with the random violence of a disturbed individual. Two-dimensional interactive videos that test only the “final frame” of an encounter do not teach officers how to plan and coordinate their approach and initial actions. Role playing, although more realistic, does not always create the level of stress that would be generated by the danger and uncertainty of a field situation.[45](https://jigsaw.chegg.com/books/9781478629191/epub/OEBPS/42_chapter32.xhtml#chnote32_45) Recognizing that police tactics require practical application and have little value if the officer cannot apply his or her 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 environment possible.

Technology has improved over the last several years; with video simulators, developers can create much more realistic interactive simulations. 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 trainer has the option to change the video scenarios based on the officer’s actions, creating situations that may, or may not, require a force application. This type of “shoot—don’t 579shoot” training reinforces the officer’s decision-making skills and forces the officer to consider alternatives other than 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 simulating conditions 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 into a firing range and confront situations that may be occurring in front of them, to their sides, or even behind the officer. This type of simulation allows a greater amount of time to judge the officer’s initial actions, to hear his or her plans, and to require the officer to communicate to other officers, witnesses, and suspects alike.

Traditionally, firearms training for police officers involved shooting at a “bull’s eye” target. Those targets were changed to silhouettes, which were slightly more realistic, although the officers were standing only a few yards away firing from a position of comfort or perhaps from behind a small barricade. Range masters are now requiring the officers to shoot while moving, while kneeling, from behind objects that may provide cover, or from the open door of a police car. Trainers emphasize 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, technology has helped make role playing more realistic; it has evolved into force-on-force training. Simunition® was designed to train officers to improve their tactical skills and to condition their responses to fear in life-threatening situations through the use of nonlethal training ammunition. Service weapons are converted to fire reduced-energy, nonlethal cartridges that leave a detergent-based, water-soluble marking compound. The markings left after officers fire their weapons allow trainers to assess the lethality of the actions taken. Trainers put officers into scenarios and evaluate responses from the beginning of the interaction. Officers can be trained how to diffuse situations, contain scenes, set perimeters, communicate information, and formulate tactical plans 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 simulations provide immediate feedback to the officers should they fail to take appropriate cover, if they miss their target, or if they engage a target with a poor backdrop. Officers learn to function in stressful situations and to understand the advantages of proper tactics.

Police officers deserve effective policies, training, supervision, and a system of accountability. Policies must be written to guide officers in responding safely to situations that can lead to injury or death. Departments must train 580officers 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 and would provide officers with a quick and simple response to an uncooperative suspect, but if the strategies would result in a use of force that could have been avoided, they should be revised. Reaching into a car that is running to turn it off and to take the keys might seem like a reasonable response, but we learned earlier that such tactics can result in an officer being dragged down the street and then shooting the driver to save his own life. Supervisors must analyze the actions taken by their officers to be sure that policies are followed and to determine if additional training is necessary. Finally, if officers fail to learn policies and procedures and take actions that jeopardize their own safety or that of the public, there must be a system to hold them accountable.

**NOTES**

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