AFTERMATH OF CLEVLAND POLICE SHOOTING 11/29/2012

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Unarmed and Dead

Understanding the complexity of police shootings.

It is never predictable what particular event will get attention paid to an important but previously almost completely ignored issue. This is the kind of opening paragraph which will:

(CNN) — *Police in North Carolina shot and killed a man running toward them Saturday morning — but he may have just been looking for help after a car wreck.*

My profession as a lawyer is oversight of law enforcement agencies. I closely examine discipline, policy, training and, most importantly in my view, use of force and officer involved shootings. Someone from the oversight team I am on is on call 24/7 to respond to the scene of any shootings involving members of the department we are contracted to oversee. In that role I could not tell you how many recently deceased individuals I have looked at because I have lost count. We take what we do seriously because we are the set of eyes and ears at the scene who are not part of the criminal justice structure of cops and prosecutors. When we examine an officer involved shooting we do so from the view of whether the incident was "in policy" but are very aware of the other perspectives of criminal and civil liability as well as public perception. My job is to tell the department when I conclude that a shooting is out of policy and that something has to be done about it.

With that background, I want to dispel some myths and point readers in a direction where they come to understand how civilians get shot by the police under a legal framework that gives officers massive leeway in deciding to shoot to kill. The foundation for this article is the

material for a panel I am moderating soon on shootings by the police of unarmed civilians with a particular focus on a shooting in Cleveland last November where officers fired 137 rounds at two unarmed suspects.

How many civilians are getting shot by the police and how many of them were unarmed?

The answer is very difficult to answer because of a lack of uniform reporting on that question. The FBI collects statistics supplied by local departments on "justifiable homicide," which is defined as "The killing of a felon by a law enforcement officer in the line of duty." That definition presupposes that the civilian was acting feloniously, so it impossible to tease out from the FBI numbers which of the deadly officer shootings were when a felony was actually being committed versus tossing the event into a catch-all of say, the threat of an assault. If that sounds confusing, it is because the FBI definition of a justifiable homicide differs from what the Supreme Court has ruled are justifiable shootings. I will explain more below.

Nevertheless, the FBI reports that in 2011 there were 393 justifiable homicides committed by law enforcement. In 2010 there were 397 and in 2009 police committed 414 justifiable homicides. I honestly don't trust those numbers because the FBI also claims that in two of the killings in 2011 the suspect was armed with a knife. That is nationwide. That is impossible unless the only two such events took place in my jurisdiction and my colleagues looked at them. What the FBI is not reporting is how many officer involved shootings are

occurring where it is determined that a felony was not being committed nor does it collect statistics of how many civilians were unarmed when they were killed.

A recent study by Darrell Ross, Director of the Center of Applied Social Sciences at Valdosta State University sought to analyze lethal use of force. He examined 5,500 federal §1983 lethal force case decisions from 1989 to 2012. Not all officer involved shootings lead to lawsuits and not all are filed in federal court. Professor Ross concluded, "In 32% of the incidents, the suspect shot at the officer, pointed a weapon at the officer, or pointed it at him- or herself; in 30%, the suspect drove a vehicle/struck the officer with a vehicle; in 13%, the suspect attacked the officer with a personal weapon and in 10%, the suspect stabbed at the officer with a stabbed weapon." Moreover, "in 19% of the incidents, *the suspect did not possess any weapon*." In other words, in about 1 in 5 officer involved shootings filed in federal court, the civilian was unarmed!

Unless your local agency keeps and publishes use of force, lethal force and unarmed civilians shot numbers you have no way of knowing who is getting shot and killed by the police other than what the media reports—or if you have a civilian oversight agency that publishes reports.

Why didn't they shoot the gun out of his hand?

This is a question we get all the time during community forums and when I tell people what it is I do. The answer is pretty straight-forward:

the use of a gun is a lethal instrument. It is only supposed to be fired when the officer has decided lethal force is justified. Once the officer decides to fire, the intent is to stop the threat, i.e. the suspect. That is not achieved by shooting at someone's hand but by shooting at the center body mass. Hit rates are low enough as it is due to distance, lighting, movement, training (or lack thereof)—somewhere in the neighborhood of 20%, thus shooting at the hand where lethal force is justified will be even less accurate. Furthermore, it would increase the liability of the department if an officer's intent was merely to shoot the gun out of suspect's hand but he instead kills the suspect.

The reality is that shooting guns out of hands is for television. Shootings occur extremely quickly—the average reaction time from deciding to use lethal force because of a perceived threat to actually shooting is somewhere under two seconds in 90% of officer involved shootings. The harsh truth is that in the majority of shootings the suspect is armed and threatening or attacking the officer or another civilian and the situations unfold extremely quickly in less than ideal conditions with a multitude of factors ranging from the officer's fatigue levels to lighting conditions to the behavior of the suspect. Those factors, though, do not necessarily serve to justify the officer's actions—unfortunately the U.S. Supreme Court has opened the door to many more shootings because the officer is given such leeway to decide when to take someone's life away in less than two seconds.

If it turns out the civilian was unarmed the officer gets in trouble, right?

Wrong. In 1985 the Supreme Court ruled in *Tennessee v. Garner* that "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." Then the court went on to explain what it meant:

"It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

Note what the court said. Deadly force can't be used to stop any fleeing felon, but it can be used on a suspect who threatens an officer with a weapon or threatens to inflict serious physical harm.

Four years later in *Graham v. Connor*, the Supreme Court described the framework for how courts decide if the use of force is justified.

By coincidence, the incident which led to the 1989 landmark case occurred in Charlotte, North Carolina:

Respondent Connor, an officer of the Charlotte, North Carolina, Police Department, saw Graham hastily enter and leave the store. The officer became suspicious that something was amiss and followed Berry's car.

About one-half mile from the store, he made an investigative stop. Although Berry told Connor that Graham was simply suffering from a "sugar reaction," the officer ordered Berry and Graham to wait while he found out what, if anything, had happened at the convenience store. When Officer Connor returned to his patrol car to call for backup assistance, Graham got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly.

In the ensuing confusion, a number of other Charlotte police officers arrived on the scene in response to Officer Connor's request for backup. One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M. F. but drunk. Lock the S. B. up." App. 42. Several officers then lifted Graham up from behind, carried him over to Berry's car, and placed him face down on its hood. Regaining consciousness, Graham asked the officers to check in his wallet for a diabetic decal that he carried. In response, one of the officers told him to "shut up" and shoved his face down against the hood of the car. Four officers grabbed Graham and threw him headfirst into the police car. A friend of Graham's brought some orange juice to the car, but the officers refused to let him have it. Finally, Officer Connor received a report that Graham had done nothing wrong at the convenience store, and the officers drove him home and released him.

At some point during his encounter with the police, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day.

The Supreme Court did not rule on whether the conduct of the officers was justified; but the case is important because for the first time they articulated an objectively reasonable test for lower courts to analyze whether the force used on the civilian was reasonable:

The old standard was a substantive due process four part test which was to determine if the use of force "shocked the conscience": "(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) '[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.'"

That seems pretty straightforward from a public perspective, because it is a I-know-it-when-I-see-it criteria. The court in *Graham v. Connor* found that an objective standard based on Fourth Amendment seizure jurisprudence was more applicable to police use of force, since the civilians was essentially being seized, and thus ruled:

"Today we make explicit what was implicit in Garner's *analysis, and hold that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."*

Thus the officer's motivation was no longer relevant:

"As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. (in analyzing the reasonableness of a particular search or seizure, 'it is imperative that the facts be judged against an objective standard'). An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."

This was a watershed change—what the individual officer was thinking was no longer relevant, regardless of his motivations. The test changed to "would a prototypical officer find that using force is reasonable under the totality of the circumstances?" The standard is not one of hindsight, "but from the perspective of the officer and the rapidly evolving events of the situation." As the case law has evolved, the conventional wisdom that a gun has to be brandished, or at the very least be visible, has gone out the window.

Sudden movements, furtive gestures, reaching for the waistband, ignoring an officer's commands are all factors that have led courts to find against plaintiffs in civil rights cases and *Graham v. Connor* is the basis now for analyzing violations of force policies and officer criminal liability. A whole cottage industry has sprung up of police experts and training specialists, such as the Force Science Institute, who educate departments and officers throughout the country that waiting for the

gun to come out is too late. As Professor Ross argues, logically, there will have to be a nexus between the officer's stated belief as to what occurred and his actions in response, but in my view that nexus can get awfully shaky but still withstands official scrutiny.

But Ross comes from the camp which stands solidly behind *Graham v. Connor*. He is not alone in mindset when he suggests that department policies and training "should direct an officer to respond to the pre-assault threat cues of an assault without waiting for the *actual assault* to commence." That's right—shoot to kill because you think you will be assaulted at some point in the near future.

Most police involved shootings take place at nighttime (73% took place between 9:00 p.m. and 3:00 a.m. in the Ross study) when very few non-involved witnesses are around. Who is there to contradict the officer who says he thought the suspect reached for his waistband? Usually the only other person other than officers is dead. The American criminal justice system is fully invested in believing that the officer has credibility. When prosecutors decide on filing criminal charges, judges rule on summary judgment motions or department executives decide if a use of force is in policy, it is virtually universally assumed that the officer is telling the truth—thus his claim that the civilian reached for a waistband will always be accepted unless proven otherwise.

Thus we have a condition where the law allows use of deadly force on nothing but the perception that its use is justified and a condition

where that belief is proven with nothing more than the statements of the involved officer. In some cases, such as this weekend in North Carolina, it is abundantly clear that the officer was not being reasonable; but that is the rare exception. Proving that an officer is not telling the truth if he chooses to lie is even more of a challenge.

So, where does that leave the public?

It means that innocent civilians like Jonathon Ferrell are getting killed by police officers. It means that, what we call "waistband shootings," go on all too often. Most importantly, it means that a whole body of case law, policies and training have been put in place over the last two plus decades with little public scrutiny. How we go forward is not very clear, but here are some suggestions:

1. The public needs to educate itself over what its local police or sheriff

is up to. What is their shooting policy? How are shootings reviewed? When is the last time anyone on the department has been disciplined for unreasonable force?

2. Get involved. If there is a civilian review board find out when their public meetings are. If your jurisdiction has civilian oversight which is not a review board with public meetings, ask for and read their reports.

3. Turn around broken windows. If you believe an officer used unnecessary force or lost his cool in an encounter with you, file a complaint. A provable track record of prior unreasonable conduct —even the little stuff—is critical to the work I do, but if no one complains about a bully officer nothing can be done. It is critical to do so, because that bully may also be more likely to pull the trigger when he perceives a threat.

4. Demand transparency and accountability from you local law enforcement. Police chiefs answer to mayors, city councils or a city manager. Sheriffs are directly elected, but Boards often hold the purse strings and they write the multimillion dollar payout checks. If you believe your department is engaged in too much unreasonable force, those elected officials are often where you want to apply pressure. Also your local news media has a job to do here too.

I will say this, objectively analyzing officer involved shootings is a difficult challenge. Even though I am there an hour or so after the fact,

the moment when the decision to pull the trigger was made has already receded. What is left at the scene is police tape, physical evidence and the remains of the civilian. While unlike you, I can step beyond the tape and later listen to all the witness and officer interviews, you still ought to demand answers from those we pay to carry a gun and badge.

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I am a lawyer in Los Angeles. I write about procedural justice and police accountability. Views are my own.

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