FORCE SCIENCE® NEWS

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In This Edition:

The persistent urge by police critics to tighten restrictions on the use of force surfaced again this month after a controversial shooting in Sacramento, California.

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LAWYER PANEL: What changing the UOF standard would mean to cops

Training reminder: An additional *Realistic* De-escalation course, scheduled for July 10-11 in Chicago, has been added to our training calendar. For a list of all de-escalation course dates and locations, please **click here** or visit: **www.forcescience.org/deescalation.html**

LAWYER PANEL: What changing the UOF standard would mean to cops

A state legislator told a press conference that she will introduce a bill to change the legal standard for law enforcement in California from using "objectively reasonable force" to "necessary force." That means officers would be legally allowed to use deadly force only if "there were no other reasonable alternatives to prevent serious injury or death," according to a spokesperson for the ACLU, which is among the activist groups behind the measure.

Also the bill would "encourage prosecutors to consider whether officers could have de-escalated a situation with verbal warnings or used nonlethal force" before resorting to gunfire, according to reports of the conference.

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At this writing, exact wording of the bill has not been publicly revealed, but we asked a select group of police attorneys with Force Science credentials to comment on implications of the proposal. One noted in responding that "there are efforts in several parts of the country" to alter the current standard, so the drive for change is not unique to California.

Here's what our panel has to say:

Cost will be fatal hesitation, court confusion, monetary windfall for plaintiffs
Atty. Mildred O'Linn, Force Science Analyst, Manning & Kass law firm, Los Angeles

What is required in use-of-force situations by officers under current law is a stringent enough burden without imposing additional scrutiny via a subjective "necessary" standard.

Under the Supreme Court's decision in *Graham v. Connor* in 1989, force used by law enforcement must be "objectively reasonable under the totality of the circumstances." That means that officers must take into account everything they knew and believed to be true up to that moment when they made their force decision, and then they will be judged on whether their assessment was reasonable and their force appeared to be necessary.

Potentially relevant factors for consideration can be extensive, ranging from the perception of immediate threat to the relative size, strength, and age of the suspect compared to the officer.

If the legal standard goes from an objective "reasonable and appears to be necessary" standard to a subjective "necessary" standard—and the "appears to be" disappears—officers will be faced with impossible decisions with unbearable consequences. The evaluation of their choices and actions in those "split-second decisions" in life-threatening circumstances would then be based on the ultimate outcome of the incidents.

Judging an officer's decisions in the bright light of day, when the smoke has cleared and the danger has passed and when you know the actual facts and circumstances, is clearly untenable. Officers cannot be expected to determine in the split-seconds available to them whether the weapon is real, the knife is sharp, the attacker is skilled, or even if the object in the hand is a gun or a phone when there is what reasonably appears to be an immediate threat to safety.

Requiring officers in dangerous circumstances to further evaluate and make sure their actions are necessary could mean death, for example, when an individual reaches for his waistband. Maybe the suspect is just pulling up his pants or grabbing his cell phone—or maybe he's drawing a gun.

The cost of a "necessary" standard will be officer hesitation and deaths, a confusion in the legal standard for state and federal claims, and a monetary windfall to plaintiffs in civil litigation at great cost to taxpayers.

This proposal is politically and financially motivated in a time when criminal consequences have been minimized and offenders are empowered by the lack of meaningful consequences. The reality is that we already ask so much of officers and

we need to be reasonable in our expectations.

"They want to prosecute more LEOs"
Atty. Lance LoRusso, Force Science Analyst, LoRusso Law Firm PC, Atlanta, GA

The goal of those who seek to change the standard is simple. They want to prosecute more LEOs who use deadly force.

Much of their criticism of police behavior is born of ignorance regarding not only the laws of the use of force, but also the mechanics of the use of force, the force options available to LEOs, the potential danger of a suspect, and the speed and reality of deadly force encounters.

These advocates look at the number of deadly force encounters with LEOs and argue they speak loudly of the clear need for additional training and changes to the legal standards by which LEOs are judged. In fact, the numbers speak loudly to the contrary. On average, LEOs arrest approximately 12-13 million people each year; they shoot and kill approximately 960. In truth, the use of deadly force by LEOs is rare.

Perhaps the knowledge gap and intervention of politics is precisely why the Supreme Court recognized in *Graham v. Connor* that the actions of a LEO must be judged from the perspective of a "reasonable officer" who is trained and aware of the realities of the use of force—by police and against them. The reasonable belief standard now prevails as the clear statutory standard in more than 40 states.

Changing from a "reasonable belief" standard to a "necessary" standard would be unworkable in the daily reality of law enforcement.

"The calculus of reasonableness [allows] 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," *Graham* states. If force that appears reasonable to the involved officer at the time and under the stress of the event is later found to be unnecessary, the LEO should not face a penalty for his or her actions, the Court ruled. A "20/20 hindsight analysis...in the peace of a judge's chambers" is expressly forbidden.

A "necessary" standard invites and virtually ensures a hindsight analysis of LEOs' actions. Any standard that invites the use of hindsight disregards the reality of policing.

Impossible, unworkable standard will cost police & civilian lives
Atty. Scott Wood, Force Science Analyst & Force Science faculty, Wood Puhl & Wood law firm, Tulsa, OK

If necessary means you have to wait to see a gun, and wait to see if it is pointed, and wait to see if the suspect fires, it will be an *unconstitutional* statute. If it requires you to exhaust all other less lethal options before using deadly force, it will be an impossible standard, and extremely costly to law enforcement in terms of lives lost.

If such a statute were passed, and I was an officer in California and did not quit my job, I would demand to be retrained in this new way of analyzing whether deadly force was "necessary."

One of my favorite citations on the use of force is from, ironically, a Ninth Circuit Court of Appeals case, *Scott v. Henrich*, (39 F3d 912, 914):

"Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission.

"Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only.

"Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment."

Exactly right.

If an impossible and unworkable standard is adopted, more calls will turn into "drive through" investigations. On the most dangerous calls, lives will be lost, police and civilian, while the numerous calculations of what is "necessary" are carried out.

The genius of *Graham v. Connor*, which bends and moves with the facts of every case, has guided use-of-force training for almost 30 years. Tinkering with such a cornerstone of law might have serious and far-reaching consequences we can't even see now.

A "feel good" gateway into no man's land
Atty. Emanuel Kapelsohn, Force Science Analyst & Advanced Force Science Specialist candidate, president of the Peregrine consulting corporation, Fogelsville, PA

The feel-good attempt to change the standard from "objective reasonableness" to "necessity" would discard well-established case law, and put the police officer, and the courts, into no man's land.

A standard of *necessity* for the use of force does not require officers to exercise reasonable judgment, but instead requires them to *foretell the future*. Consider this hypothetical:

An enraged man, screaming obscenities and brandishing a machete, advances toward an officer from less than 20 feet away, ignoring commands to stop. At some point before the attacker is within contact distance, most courts would say it is "objectively reasonable" for the officer to fire in defense of his life.

But was it "necessary"? How do we know that if the officer had simply holstered his gun, knelt down, and pleaded for his life, the attacker wouldn't have abandoned his attack? Or if the officer had used pepper spray or a Taser or empty-hand defensive tactics or had simply run away, it would not have proven effective? We cannot say any of these unlikely options would not work without trying them. And if any did work, then shooting the attacker was not necessary, was it?

If your response to this is that *necessary*, as a use-of-force standard, doesn't actually mean "necessary"—it means what the officer *reasonably believes* is necessary—

then we have returned to the "objectively reasonable" *Graham v. Connor* standard that already exists. But if "necessary" means what most people would understand it to mean—that the officer *had* to use the force he used, because no lesser force would have sufficed; in other words, that the officer used the *minimum* amount of force that would control the violent situation—then this is requiring the officer to foretell the future.

The fact is the untrained media commentator—or politician or member of the public—usually has little, if any, understanding of the factors that properly enter into an officer's decision to use high levels of force. Changing the standard that guides that decision is merely a "feel good" measure that scraps 29 years of carefully established federal case law and imposes an impossible, superhuman task on officers.

Challenge to politicians: Experience reality exposure before supporting change
Atty. Laura Scarry, Force Science Analyst & Force Science faculty, DeAno & Scarry law firm, Chicago

It is clear the proposed legislation is purely emotional, a knee-jerk reaction to a recent controversial shooting as opposed to a well-thought-out and educated response to a complicated issue.

What I find most frustrating about the proposed bill is that the legislature spends so much emphasis placing the responsibility on police officers in deadly force situations. Sure, officers must be held accountable when they engage in criminal behavior but in my experience representing officers after shootings, I have yet to represent one who "wanted" to kill the suspect who confronted them with real or perceived threats. A common thread I see with all my clients is that they felt they had "no choice" but to react the way they did and often ask, "Why did he/she do what they did to force me to act?"

The power of that question resonates with me deeply. Officers KNOW that they work in a fish bowl, they KNOW that their every move can be found on video, whether it's from their dash cams, body cams, civilian cell phones, or surveillance cameras. So why would an officer murder someone when they know their actions are going to be criticized afterward? Even those who were justified in using deadly force to subdue a suspect risk losing everything they worked hard for.

Officer behavior, as we well know, is primarily in response to suspect behavior. I often wonder what the outcome would be in these high-profile incidents had the suspects just complied with the officers' lawful orders to stop, get on the ground, or show their hands.

By Illinois law, deadly force is justified when an officer "reasonably believes that such force is necessary to prevent death or great bodily harm to himself or another person." I am not really concerned about the use of the word "necessary" per se. What I am concerned about is whether the proposed bill in California eliminates an officer's "reasonable belief" that such force was necessary.

Also I have concerns about the suggestion by the bill's sponsors that officers must use other alternatives before resorting to the use of force, including "warnings, verbal

persuasion, or other nonlethal methods of resolution or de-escalation." This is completely unrealistic.

I challenge supporters of this bill to experience reality-based training simulators/videos to truly understand why police officers may make mistakes in the use of deadly force, before requiring the unattainable.

Thoughts? Feel free to e-mail us at: **editor@forcescience.org**

Written by Force Science Institute
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