

Preliminary Thoughts on the Danner Shooting

I offer two broad points that might serve as a meaningful framework in evaluating the reasonableness of force employed by police in volatile encounters.

The first point is that one must understand what the law permits--what a police officer *can* do (not necessarily what he *should* do--that is an issue of context and tactics). This is captured primarily in the robust network of case law on what constitutes reasonable force by police. In *Graham v. Connor*, the Supreme Court noted that “[T]he 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.” The principle is a standing reminder about the often fluid, chaotic and unpredictable nature of policing. And it should, so it seems to me, inform the analysis of this case. To cite case law of more direct relevance to this incident, in *Plakas v. Drinski* (7th Circuit), an intoxicated person charged an officer with a fireplace poker raised above his head. The officer shot and killed him. The court reckoned his actions reasonable under the circumstances. The general din of criticism in that case, as in this, was rooted in the idea that the officer ought to have employed “less intrusive” methods of force before employing deadly force. The officer in that case--as in this one--did, in fact, employ less intrusive alternatives, namely, verbal persuasion, but to no avail. In part, the court noted the following: “There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can be justifiably used.” Pushing further, and with subtle insight, the court noted why a “least intrusive” requirement would be unreasonable: “Nearly every Court has commented on the fact that all decisions about deadly force (or any force) ‘must embody allowance for the fact that police officers are often forced to make split second judgments—in circumstances that are tense, uncertain and rapidly evolving’...we recognize that the decision to shoot can only be made after the briefest reflection, so brief that ‘reflection’ is the wrong word. As Plakas moved toward Drinski, was he supposed to think of an attack dog, of Perras’s CS Gas, of how fast he could run backwards? Our answer is, and has been no, because there is too little time for the officer to do so and too much opportunity to second-guess that officer.” The same idea is echoed in *Scott v. Henrich* (9th Circuit). In *Biggs v. City of New York* (2nd Circuit), officers shot a car thief who was holding a knife and staring at them. He did not charge at them but the officer who shot reasoned that it would place him at a significant tactical disadvantage if he waited for the subject in this case to pick his moment and attack. The court agreed with the officer, evaluating his actions as constitutionally reasonable under the circumstances. One may mine the details of the cases for relevance. They strike me as decisive. Legally, if a person is charging a police officer with a baseball bat, the police officer *may* shoot.

The second point is this: what are the detailed facts as currently known and what,

if anything about them, screams unreasonableness? The issue is not, please note, whether the incident screams tragedy. These are separate issues often conflated. All would agree, not least the Sergeant involved, that the incident ended tragically. But the tragic nature of the incident does not in itself entail that the actions of the officer were unreasonable. Here are the facts of the incident as currently known: police officers respond to a scene in which an emotionally disturbed woman, behaving "irrationally" according to reports, is gripping a pair of scissors while threatening the officers. They manage to convince her to drop the scissors. Soon after, she grabs a bat and lunges at the responding Sergeant. He shoots her.

Does a bat in the hands of an emotionally disturbed person who is lunging forward represent a threat of "serious harm or death?" Might she have cracked his skull or his face? If you think not, why not? Of most pertinence: could the Sergeant have reasonably believed, given the facts confronting him at the moment, that she might have? To answer in the negative seems oddly tendentious. I have heard Ms. Danner's age cited as if it were in some sense relevant without any substantive explanation as to why it is relevant. Have 66-year-old women committed acts of violence in the past? Have they killed? 80 year olds have committed murder. 11 year olds have committed mass murder. Age, in itself, hardly seems relevant. In any case, when a person charges you with a bat, you see the bat and the hurtling forward motion, not age. That Ms. Danner was psychologically unbalanced has also been cited as if it carried some tactical relevance but, again, without any substantive explanation as to why. I would suggest that the imbalance is relevant but in a way that tends to support the actions of the sergeant. People who suffer psychological imbalance that disposes them to violence--I take it that threatening with scissors and lunging forward with a bat suffices as evidence of a disposition to violence--experience a distorted perception of reality. That reality may be teeming with threats, demons, aliens; it may be girded by anger and paranoia. In any event, there is no magic word or phrase, there is no inflection of the voice, that can magically return them to clarity. Any Psychologist that pretends that there is may be doing something but he is not doing science. So, if a person who is, at the moment, suffering a distorted perception of reality lunges forward with a bat, what precisely is the sufficient response to secure the safety of the person attacked that will also satisfy all who were not there, were not attacked with a bat, sitting comfortably in the peace of their offices or homes playing arm-chair strategist? If the sergeant had employed a taser and the woman was seriously injured or killed would we not be having essentially the same discussion?

And, yes, there are "multi-threat" targets used in training at the NYPD Range. The bat wielding threat may be considered a lethal one depending on the context framed by the Range Instructor.

A final point. This is an incident that should inspire discussion and debate. There are many weighty issues involved that merit a thorough hearing. Is training all

that it should be? Is training anything *like* it should be in the NYPD? It most certainly is not. To what extent have the predations of micro-managing executives undermined independent decision-making of subordinates in the field? When dealing with the emotionally disturbed what is and what is not realistically possible--in rapidly evolving encounters? How does real world stress affect performance? What is the nature of decision-making under stress? What obligations does Government have in monitoring the emotionally disturbed? These are but a few. But evasion and cheap, weak, hipshot, bureaucratic responses like the ones we have heard thus far from politicians and police executives are vapid and vane. To say, as the Commissioner has, that the sergeant did not follow internal procedure, evading all the weighty issues of law and fact and everything that they imply, is precisely the kind of transparent political legerdemain that you would expect from a simpering functionary. The statement suggests a facile, pandering kind of criticism, a simplistic, internal focus, prior to analysis, without actually saying anything substantial about what happened. Bald maneuvering of that sort is unbecoming a leader. There's your Police Commissioner.