Part VIII Myths v. Reality

Hi. I'm Tim Miller. This is Part VIII of our podcast series on use of force. This is good place to *pause* for a few minutes and distinguish some myths from the realities about using force. A police officer trigger's the Fourth Amendment's objective reasonableness test when she seizes someone or otherwise makes a suspect submit to governmental control. The test is a fact bound determination viewed through the lens of a reasonable officer. The issue is whether such an officer could believe that the force option used by the actual officer on the street was reasonable.

Hopefully, you should now be able to distinguish some myths from the reality of using force.

IV. Myths vs. Reality

No subject is plagued with more myths than use of force. What follows are some of those myths about using force, and the law.

A. *I thought that I had to fear for my life.*

The first myth is that an officer must fear for her life before using deadly force. "I feared for my life" is like saying, "I did it for officer safety." It is a subjective conclusion and plays no part in the fact bound determination about whether the force was reasonable. Facts make force reasonable. While a police sniper may not fear for her *own* life in a hostage situation, deadly force may still be objectively reasonable.

B. *I thought warning shots were illegal.*

Warning shots are often regulated by agency policy. One example is the Department of Homeland Security Policy on the Use of Deadly Force; it generally prohibits warning shots, with an exception that allows warning shots by the Secret Service exercising protective responsibilities. Policy restrictions on use of force are important, and officers should be familiar with their

own policy, but only excessive, unreasonable force can result in a successful lawsuit against the officer.

C. *I thought deadly force was only reasonable when responding to a felony.*

No; whether the officer is responding to a felony or misdemeanor is only one factor in a use of force decision. The relevant inquiry is whether the force was reasonable. Many state and local officers agree that responding to *misdemeanor* domestic disturbances can turn very violent, very quickly.

D. *I thought you always had to give a warning.*

No; a warning adds to the objective reasonableness of any force option. However, warnings are not always feasible – especially in a tense, uncertain, and rapidly evolving deadly force encounter. For example, *shouting* at an armed robber, "Stop or I'll shoot!" may simply cause the robber to turn and shoot the officer.

E. *I thought you had to use minimal force.*

Agency policies may caution officers to use the minimal amount of force necessary to effect a seizure. Others may advise officers to exhaust all lesser means of force before resorting to deadly force. But the law requires officers to be objectively reasonable. In a tense, uncertain, and rapidly evolving encounter on the street, it is not possible to consider *all lesser means of force.* It would require superhuman judgment.

There is a difference, however, between choosing the minimal amount of force necessary and using force that is reasonably necessary. The following example illustrates that difference:

> Assume two officers went to Mr. Jones' house and told Jones he was under arrest. Jones yelled, "I ain't going!" and lunged for a handgun on a coffee table. Assume further that one of the officers shot Jones with a taser

> and at the same time, the other officer shot Jones with a firearm. Both weapons knocked Jones to the floor and prevented Jones from reaching the gun. Now Jones is suing the officer that shot him with the pistol. Jones alleges that the officer that shot with the pistol him did not use the *minimal amount of force necessary*.
>
> Jones is judging the officer based on his own subjective beliefs and 20/20 hindsight. The objective test examines the facts through the lens of a reasonable officer. *Could* a reasonable officer believe that shooting Jones with a pistol was reasonably necessary under this tense, uncertain, and rapidly evolving encounter?

The words "should" and "could" often mark the differences between a *subjective belief* and the *objective test*. In the example, Jones claims, "You *should* have used a lesser means of force." Jones' opinion is subjective. The objective test begins with "could." "*Could* a reasonable officer believe that the force was necessary?"

F. Thelast myth: *I thought that you had to try to retreat*.

While state law often imposes a duty on private citizens to retreat before permitting them to use deadly force, imposing that requirement on police officers is often inconsistent with their duty to protect the public and to enforce the law.[1]

Let's stop. When we come back, we'll discuss a police officer's defense to standing trial called qualified immunity in Part IX.

[1] The law certainly does not prohibit officers from retreating and there may be sound tactical reasons for doing so.