TIMELINE

This is why it will be very hard to prosecute the cop who shot Terence Crutcher

A fraught 1989 Supreme Court decision makes it very tough

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At the end of last week, 40-year-old Terence Crutcher was shot and killed by Tulsa police officer Betty Shelby. Video released by the department shows Crutcher walking away from police officers with his hands up while moving toward his vehicle, which had apparently broken down on the road. As he approached the door of his car, one officer deployed a taser on Crutcher and officer Shelby fired her weapon.

Despite repeated public outcry in highly publicized cases like this one, data shows that police officers are in fact very rarely charged or successfully prosecuted for on-duty shootings or other uses of force. According to a *Washington Post* investigation, between 2005 and 2015, just 54 officers were prosecuted for shootings. Assuming that the almost 1,000 police shooting deaths recorded in 2015 wasn't a statistical outlier, that's 54 cases out of nearly 10,000 fatal shootings.

The reasons for so few prosecutions are many, of course. And it's often the case that shootings are both justified and arguably necessary.

But there is one protection that shields officers from prosecution and civil liability for killing even unarmed people: the case of *Graham v. Connor*.

A landmark Supreme Court ruling that still features prominently today in determining the propriety of officer use of force, *Graham* was decided in 1989. This case involved Dethorne Graham, who had been seen running out of a convenience store in Charlotte, North Carolina. A police officer who thought Graham was a fleeing thief detained Graham, roughed him up, and injured him in the process.

In actuality, Graham was diabetic and trying to get sugar to counter an insulin reaction, and the line at the store was too long, so he abruptly left. He sued under federal civil rights law, accusing the officer of using excessive force.

The court ruled that to be held liable under federal civil rights law, a police officer must have acted in a way that was "objectively unreasonable" to other officers in similar situations. In other words, because the officer believed that a crime may have occurred and that his actions were generally in line with encountering criminal suspects, the officer was not held liable.

In use of force cases, this evolved into what has been colloquially dubbed the "reasonably scared cop rule." That is, if the officer can reasonably articulate that he was in fear of his life, the use of force will likely pass muster with prosecutors and investigators. The upshot of the rule is alarming, as Scott Greenfield explained on his blog *Simple Justice*:

As long as the question is whether the cops can piece together vague excuses to justify their fear as being objectively reasonable, particularly in light of the great deference paid the police by the courts and public, there will be no incentive to not kill when the opportunity presents itself.

The background notion is that if the law places a heavier burden on police before pulling the trigger, they will hesitate when faced with a true threat and, in at least some instances, lose the race to survival. The flip side, of course, is that they will shoot first, shoot prematurely. They will shoot not because of an actual threat, but because of the fear of a potential threat, a huge step removed. Yet, the ability to craft a viable excuse for fear is all that's required as a matter of law to protect the cop from culpability for his kill.

Put simply, a fearful police officer is a very dangerous one. If he can articulate a plausible narrative that he believed he or his life was in danger—often involving the suspect making a "sudden" or "furtive movement," or "reaching for his waistband" as if for a gun—any lack of actual danger or dangerous weapon is not relevant to the officer's legal culpability. Absolved of criminal or civil responsibility by investigators, the officer may keep his job and go back on the streets.

The real problem with the "objectively reasonable" standard of accountability is that it's actually much closer to "subjectively reasonable." The perspective of sympathetic officers who can imagine themselves shooting someone in a potentially life-or-death scenario given a set of stipulated facts effectively trumps the individual rights of an unarmed person shot to death.

In practice, such a standard can provide an abundance of caution in favor of the officer's safety at the cost of the lives of people they are sworn to serve. In some circumstances, officer caution can save a suspect's life in critical situations. But *Graham* protects officers who may overreact to a perceived threat so that they shoot first and look for a weapon later. Putting officer safety first and foremost subverts the protections that the government is supposed to provide to its citizens. While officer safety is undoubtedly important, it is also important to remember that there is no officer safety exception to the Constitution.

Almost 30 years since *Graham*, it remains the crucial ruling that governs the actions in so many police shooting cases. Given the actions of Terence Crutcher in the critical moments before his death, it will likely be invoked again.

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