In Defense of Self and Others…

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Issues, Facts & Fallacies — The Realities of Law Enforcement's Use of Deadly Force

SECOND EDITION

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Carolina Academic Press
Durham, North Carolina

Library of Congress Cataloging-in-Publication Data

Patrick, Urey W. (Urey Woodworth)
In defense of self and others-- issues, facts & fallacies : the realities of the law enforcement's use of deadly force / Urey W. Patrick, John C. Hall. -- 2nd ed.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-59460-854-4 (alk. paper)
1. Police shootings--United States. 2. Police--United States. I. Hall, John C. (John Creighton) II. Title.

HV8139.P37 2010
363.2'32--dc22

2010019413

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Contents

Foreword

I first met Pat on September 30, 1986. Through a remarkably complex series of unlikely events, I found myself driving to Quantico, Virginia, where the FBI Academy is co-located with the United States Marine Corps—this is not a coincidence—with instructions to park at the pistol range for instruction in sub-machineguns, where Pat would check me out on several light automatic weapons. You see, I'd just published *Red Storm Rising,* and was at work on *Patriot Games,* in which Jack Ryan would have to defend himself with such weapons against an attack from Irish terrorists of the fictional Ulster Liberation Army. The FBI has many such weapons in its possession, mostly for training purposes, and Pat, I was told, was (and remains) an expert with such arms. So, I drove there, parked, and walked in the range shack. To my right was a conference room in which I saw some heavier weapons lying on a table. I remember one was an AK-47 of Soviet manufacture, sitting there with the bolt closed. My Boy Scout training came back to me: weapons are supposed to be left in a condition that makes them obviously safe, which usually means an open bolt which exposes an empty chamber. Curious at this oversight, I lifted the weapon and pulled back on the bolt handle and set the weapon back down. It turned out that I was wrong. Full-automatic weapons, since they fire from an open bolt, are actually safer when the bolts are closed on an empty chamber. You live and learn. On a later trip I met John Hall, a member of the bar and a pretty good guitar player and Country & Western singer, in addition to being a skilled investigator and weapons expert. John had been made Unit Chief of the Firearms Unit and was Pat's immediate boss. His keen legal mind (John would make a pretty good judge) did most of the policy and legal research in this book. John is recognized throughout the law enforcement world as *the* authority on deadly force law and was the impetus for the complete revision of federal deadly force policies.

Pat's a big boy, an inch or so taller than I am, with a Zapata mustache and a manner that seems to say Texas rather loudly. In fact, he's a Princeton grad, and a former naval officer, but he looks like the sort of fellow you see driving a Kenworth diesel tractor on an interstate highway, complete to the ostrich-skin cowboy boots, but he speaks quietly and politely, and his vocabulary in-

dicates a man with a brain. In due course we were out on the range. Pat demonstrated the two weapons in which I had expressed interest, the American-made Ingram SMG, in 9mm caliber, and the well-known Israeli Uzi. Pat showed me (unnecessarily) how they worked, and soon I was shooting the Ingram, which, I immediately learned, looks good in the movies, but is difficult to shoot accurately, even with the enormous screw-on suppressor (*not* a silencer) on the muzzle. The Ingram rapidly climbs upward and to the right, and after three or four rounds, you are a danger to birds rather than people. Its rate of fire, however, is very rapid indeed, and you can empty a magazine in two seconds flat. It probably won't kill anybody, but the noise (absent the suppressor) is certain to get everyone's attention. Even with the short strap that attached near the muzzle, to hold the weapon down in the target area, the Ingram is very difficult to control. Not what Jack Ryan needed to stay alive, Pat made clear to me.

The somewhat bulkier Uzi, on the other hand, is far easier to control, with a slower rate of fire, and it will actually hit a target, if you use the sights (yes, I know: in the movies such weapons are fired from the hip, but you can't really hit anything that way, and the purpose of firing a weapon is to put steel on target). Afterwards Pat and I sat in his office and I explained the tactical environment into which I was going to drop Jack Ryan. Pat approved of my scenario, offering a few bits of advice along the way, all of them relevant. Then he told me that the next time I came to the FBI Academy, to bring my pistol with me, and he'd teach me how to shoot properly.

Teach me how to shoot properly? I thought. *I learned how to do that when I was twelve years old!*

But I'd just seen Pat with the Uzi, and I remembered that the chief firearms instructor at the FBI Academy just might know some things I did not, and I agreed. And a few weeks later I had to give a speech at the Academy, and I brought my Browning Hi-Power with me. For this lesson we went to the indoor range. Choosing a target lane, and attaching a Q-target to the clip, Pat showed me how to hold a pistol in a steady Weaver grip and stance, and after donning our ear-protectors, I let fly. I immediately learned that shooting a pistol and hitting a target is rather more difficult than it appears on TV and in the movies. It's easier than hitting a straight drive on a golf course, but harder than eating a Big Mac. Well, it turned out that I did have much to learn, but Pat turned out to be a superb teacher, and a closet intellectual.

I yelled at him for some years to write a book. Why? He knows this subject and others. First of all, Pat's a cop, and an unusually smart one at that. Next, he knows firearms better than anyone I have ever met, both how to use them and the scientific principles that make them work. When two FBI agents, Ben

Grogan and Jerry Dove, were killed in Miami, Florida, in 1986, Pat was part of the team that analyzed the event, in which both bad guys were also killed. Pat's work resulted in specifications for a new FBI pistol (written by Pat) and the implementation of the revolutionary FBI Ammunition Test Series (one of John's ideas). Their efforts led to the design and adoption of a sub-sonic 10mm cartridge by the FBI that largely replicated the effectiveness of the older .45 ACP in a smaller diameter (as a result of which an automatic pistol can carry at least one more round), and with lesser recoil to distract the shooter. Pat and John initiated and managed the complete conversion of the FBI from revolvers to semi-automatic pistols. Pat created the training program for the conversion program and the FBI basic training curriculum, as well as the new "practical" firearms training that are included in all Bureau training.

The 10mm in turn led to the development of the .40 S&W (a shorter 10mm) that has since become the standard law enforcement caliber, killing off less effective, smaller rounds like the 9mm and the .38/357 class. As a part of this ongoing process, Pat completed a scientific study on the issue of how bullets kill, the results of which were the basis of the FBI ammunition test protocols and used to define bullet performance parameters for law enforcement ammunition analysis and procurement. This study rewrote the accepted knowledge on the subject. Pat essentially proved that Sam Colt was right back in the mid-1800s when he invented and manufactured handguns that fired large, heavy, but relatively slow bullets. That old .45 Colt cartridge remains a premier man-stopper in the world, though the weapons chambered for it tend to be overly large and heavy for proper concealment. Pat also wrote the FBI Sniper Manual, reading which I learned more about rifles than I had ever known.

Under Pat's tutelage I also turned into a fairly decent pistol shot. As good as Pat? Not quite.

I was sufficiently impressed that in 1989, I made Pat into a continuing character in my novels, Major Case Inspector Pat O'Day, where I try to emphasize his intellectual gifts in addition to his skill with firearms, because the majority of the effort in police work will always be intellectual—intelligence gathering and analysis. Pat continues this trait to this date, consulting in deadly-force incidents, in which he mostly explains reality to investigators, litigators and juries, as opposed to the mistaken prejudices which come to us from Hollywood, and are remarkably difficult to overcome, egregiously false though they may be.

This book is a textbook, mostly aimed at police officers, the attorneys who defend them in court, students of law enforcement and its many badly informed critics. For that purpose it is admirably clear and easy to understand. It combines John's unique depth of knowledge of the law with Pat's compre-

hensive and extensive practical expertise in weapons and deadly force factors. Reading it will make for better cops, and for cops who will be more likely to return home alive at end of watch after having done good work while on duty. That is a harder task than most of us realize. It's important to remember that the term "public defender" is less likely to mean an attorney paid by the government to ensure due process for indigent (accused) criminals than it is to mean a well-trained police officer who enforces the law on the street in a fair and *professional* manner. Those cops are also the principal protectors of our Federal Constitution, and, along with that, our civil liberties. Any free society depends absolutely on fair and honest cops. If this book helps to teach them to be real professionals, then it will have served a worthy purpose.

Tom Clancy
Huntingtown, MD

Preface to the Second Edition

"People sleep peaceably in their beds at night only because rough men stand ready to do violence on their behalf."

—George Orwell

The authors must express their deep appreciation to all those readers who have made the first edition of this book so successful. We have been particularly gratified by its reception within the legal, law enforcement, and military communities. We must also express our thanks to Carolina Academic Press. They made the first edition possible, and they prodded us into producing this second edition.

Any book that purports to address the myriad legal and practical issues that govern the use of deadly force by law enforcement officers can never be truly complete. Although the fundamental constitutional principles that govern this subject matter have remained fairly constant over the past twenty-five years, the countless factual patterns to which those principles must be applied require constant study and evaluation. The first edition of this book was published five years ago, and to state a tautological platitude, things change! The now ubiquitous use of electronic control devices such as the eponymous TASER is but one example of that. The validation of this second edition is further exemplified by the fact that it is approximately 40% larger in volume alone, and that figure does not reflect the expansion of the book's substantive content.

Every chapter has been revised to some degree. New information has been incorporated. New issues have been addressed and more recent court decisions have been incorporated to recognize and explain developments in constitutional law. Additional case studies have been added to illustrate the manner in which the legal principles and the practical realities affect the legal outcomes. And an entirely new chapter has been added to address some of the legal and practical issues relating to the use of non-deadly force.

The perspective of this second edition is unchanged from that of the first edition—a "reasonable officer at the scene." The U.S. Supreme Court mandated

that perspective in 1989[1] and it has not changed either. It is a perspective with which we are intimately familiar due to our decades of experience in law enforcement. We believe that the interests of society are synonymous with, and inseparable from, the interests of its law enforcement officers. We have been strengthened in that belief by the continuing trends in the courts that clearly and consistently reflect that harmony of interests. The law is the source that defines the duties of law enforcement officers. And it is the law that clothes them with the authority to protect themselves while they perform those duties.

The authors have been motivated from the beginning to disseminate and substantiate this positive message throughout the law enforcement community. Since the decisions of law enforcement officers will always be reviewed in the courts of public opinion as surely as in the courts of law, it is also our hope and intention that this book will be a resource for those outside the law enforcement community that can foster greater understanding of the realities that define and influence the perspective and decision making of that reasonable officer at the scene. To the extent that such an educational effect may result in less agenda-driven outrage over police uses of force and more informed examination of police risks and realities by the public, it would be an even more successful achievement—one for which we have hopes.

1. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Preface to the First Edition

"I decline utterly to be impartial as between the fire brigade and the fire."
—Sir Winston Churchill (1926)

There are some topics about which decent folk cannot afford to be impartial. Sir Winston's statement provides a good example. There is an obvious parallel between the fireman and the policeman. Just as the fireman's helmet represents our determination as a community to protect ourselves from the dangers posed by fire, the law enforcement officer's badge and gun represent our determination as a community to protect ourselves from the dangers posed by those individuals whose actions threaten our safety. The folly of taking a neutral stance between that which is dangerous and that which we create to protect us from that danger should be self-evident.

This book is about the use of deadly force by law enforcement officers. It makes no pretense of being impartial "as between the fire and the fire brigade." Its perspective is clearly and unabashedly that of law enforcement. That is not due to the subjective reason that the authors share almost 60 years of law enforcement experience between them, but for the objective reasons that the law enforcement perspective is compelling for both the interests of society and the dictates of the Constitution.

The interests of any society that purports to be committed to the rule of law are inherently synonymous with the interests of those who enforce that law. It would be an anomaly to suggest otherwise. That does not mean that we are to ignore the gravity of the authority granted to law enforcement officers, or the need to closely scrutinize the exercise of that authority. It simply means that to further society's interests in effective law enforcement it is essential to ensure that those who serve that interest are guided and judged by standards that are objective and fair and that they fully comprehend the range of factors that affect an officer's decision to use deadly force.

The law enforcement perspective is also mandated by the U.S. Supreme Court as the means of assessing whether an officer's decision to use force is "objectively reasonable" under the Fourth Amendment to the Constitution.

Observing "*the fact that 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 Court concluded that the issue must be viewed "*from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight.…*"[1]

Judicial recognition of the uniqueness of the law enforcement perspective in applying constitutional standards is well established. The Supreme Court once noted that:

> "*… when used by trained law enforcement officers, objective facts, meaningless to the untrained, [may permit] inferences and deductions that might well elude an untrained person.*"[2]

A Federal appellate court explained the practical implications of this principle *for the courts*:

> "*… we must avoid substituting our personal notions of proper police procedures for the instantaneous decision of the officer on the scene. We must never allow the theoretical, sanitized world or our imagination to replace the dangerous and complex world that policemen face every day.*"[3]

A second Federal appellate court described its implications *for juries*:

> "*When a jury measures the objective reasonableness of an officer's action, it must stand in his shoes and judge his action based upon the information he possessed.…*"[4]

The practical effect of these judicial developments is to emphasize that it is not possible to accurately determine whether a particular law enforcement action is objectively reasonable under the Constitution without viewing the relevant facts from the law enforcement perspective.

The significance of that perspective is readily seen when contrasted with the pervasive misperceptions that prevail outside the law enforcement community with respect to the legal and practical realities that affect an officer's decision to use deadly force. For example, it is apparently a commonly held belief that officers are required to know for a *certainty* that a non-compliant suspect is armed with a gun and *actually* intends to shoot the officer before the officer is justified in believing that deadly force is justified to counter an immediate dan-

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1. *Graham v. Connor*, 490 U.S. 386 (1989).
2. *United States v. Cortez*, 449 U.S. 411, at 418 (1980).
3. *Smith v. Freland*, 954 F.2d 343, at 347 (6th Cir. 1992).
4. *Sherrod v. Berry*, 856 F.2d 802, at 804–5 (7th Cir. 1988).

ger. Those who are accustomed to seeing the silver screen hero wait until the villain's gun is clearly visible and pointed in his direction before shooting the villain are unlikely to understand why a police officer shot a suspect who was *believed to be reaching* for a gun. The reality that "action beats reaction" and that the law *"does not require police officers to wait until a suspect shoots to confirm that a serious harm exists"*[5] is lost in the *misperception* depicted so dramatically on the screen.

Another commonly held view is that a gunshot wound always results in visible, dramatic, and instantaneous reactions from those who have been shot. Those who have thrilled to see the Hollywood hero fire a shot (it matters not from what type or caliber of weapon) that strikes the villain (it matters not where), lifting him bodily from his feet and propelling him through a conveniently located plate-glass window, will probably not comprehend why it was necessary for a police officer to shoot an assailant multiple times in order to stop his attack. The reality of wound ballistics, which teaches that bullets don't knock people down and that officers have no reliable means of instantaneously halting a threat, is lost in the *misperception* of instant and dramatic response portrayed on the screen.

And, of course, those who have cheered the hero as he, or she, successfully and with bare hands took on an aggressive assailant who was armed "only" with a knife, or club, or nothing at all, will find it incredible that a law enforcement officer judged it necessary to use deadly force to counter such threats. The reality that law enforcement officers are frequently killed or seriously injured during such encounters because the outcome is largely subject to the vagaries of chance is not as entertaining or comforting as the *misperception* that the hero or heroine always wins.

Few things highlight the disconnect between reality and misperception more graphically than the way cases are usually evaluated in the public forum as opposed to the way those same cases are evaluated in the courts of law. The obvious reason for this disconnect is that in the courts the final judgment is based on the facts and the law while in the public forum the vocal judgments are generally made before the facts are known and without reference to the law by those whose views are unaffected by either. Equally important, the courts are bound to view the facts and circumstances of a given case through the perspective of a reasonable officer at the scene while in the public forum the perspective is too often the product of the misperceptions described above or the deliberate manipulation of opinion to serve other agendas.

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5. *Elliott v. Leavitt*, 99 F.3d 640, at 643 (4th Cir. 1996).

Unfortunately, the clamor of ignorance can sometimes drown out the voice of reason. If we are to remain a society committed to the objective rules of law the evaluation of an officer's actions cannot be relegated to the subjective whims of the ill-informed. There are established processes for assessing the legality of an officer's decision to use deadly force. The obvious challenge is to ensure the safety of law enforcement officers and the community while deterring the abuse of authority. Unchecked power leads to tyranny as surely as unenforced law leads to anarchy. To avoid either extreme, the legal rules and the physical realities that govern the use of deadly force must be clearly understood both by the officers who make the decisions and those who subsequently judge them, whether in the court of public opinion or a court of law.

The *rules of law* can readily be found in statutes or judicial interpretations of constitutional provisions. The *physical realities* that give meaning to the legal rules are found in the collective knowledge and practical experience of law enforcement. Those physical realities include the objective factors that define a threat; the limited time available to see, recognize, react, initiate and implement a response to that threat; the sensory distortion that occurs in any high stress incident; and the limited means available to compel a timely halt to the threatening activity.

Objective and realistic legal standards have been developed in the last several years as the lower courts have followed the mandate of the Supreme Court and interpreted and applied the law through the prism of that practical knowledge and experience. These remarkable achievements are amply documented in this book.

The challenge remains to achieve in the court of public opinion what has been achieved in the courts of law. To do so, law enforcement agencies must assume the burden of proactively educating the community and addressing the disconnection commonly present between the realities and the misperceptions. There is no other realistic way for the community to comprehend the law enforcement perspective, and no better way to ensure that the public can "stand in the shoes" of its officers and evaluate their decisions objectively.