

Part V Intermediate Weapons-Batons

Hi. I'm Tim Miller. This is Part V of our Podcast Series. In the last two section, we discussed deadly force. Tennessee v. Garner provides some good examples of when deadly force with a firearm is objectively reasonable. It is clearly established that police officers may use deadly force when the suspect poses an immediate threat of serious bodily harm to the officer or others and gives a warning, if feasible. Now we are going to cover intermediate weapons, and when they are an objectively reasonable force option.

III. Intermediate Weapons

A. What are they?

Batons, tasers, and oleoresin capsicum (OC) spray are often called intermediate weapons and like any force option, they must pass the objective test. Courts weigh the *nature of the intrusion* against the countervailing *governmental interest* at stake. In short, what did the officer do, and why did she do it?

1. The Nature of the Intrusion.

Or, what can an officer do with an intermediate weapon? That depends. A baton can be held at port arms and used to gently push a protestor back to the sidewalk. It can also be used to strike attacking limbs. A baton is capable of causing deep bruising, blood clots capable of precipitating a stroke, and death.

Tasers come in two modes – dart and drive-stun. In the dart mode, the taser uses compressed nitrogen to propel a pair of “probes” – or aluminum darts, tipped with stainless steel barbs – towards the target. The darts travel over 160 feet per second and are connected to the taser gun with insulated wires. When the darts strike the suspect, the taser gun delivers a 1200 volt, low ampere electrical charge through the wires and probes and into the suspect’s muscles. The impact is powerful and swift. The electrical impulse momentarily overrides the suspect’s central nervous system. The suspect falls to the ground, and due to the temporary paralysis, is unable to protect himself from the fall. Serious, secondary impact injuries like

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broken teeth, spinal injuries, and even death have been reported.

In the drive-stun mode, the officer removes the dart cartridge and pushes two electric contacts located on the front of the taser directly against the suspect. In drive-stun, the taser delivers an electronic shock to the suspect. While the shock may not be as *shocking* as overriding the suspect's central nervous system - like the dart-mode - the stun-drive mode is painful, and that pain may deter a suspect from continuing bad behavior.

Another *pain compliance tool* is oleoresin capsicum (OC) spray. OC comes from the oily extract of the cayenne pepper plant. Spraying a suspect with OC irritates the skin, eyes, and mucous membranes of the upper respiratory tract. OC causes dilation of the capillaries, which inhibits the ability to breath.

OC has earned a place on a police officer's belt. With its ability to temporarily incapacitate suspects, OC has been credited with *decreasing* injuries among officers and suspects, alike. It may reduce the need for a more serious force options, and the pain is generally temporary.

Tasers facilitate arrests when suspects actively resist and are generally less harmful than a baton or gun. They have been credited with reducing injuries, to include the need for deadly force.

2. The Governmental Interest.

Or, why did the officer use the intermediate weapon? Officers should look to the Graham factors to find the governmental interest. "Threat" is generally respected as the most important, but the Graham factors do not exist in a vacuum.

B. Batons

A use of force report might state:

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“I told Mr. Jones that I was a U.S. Capitol Police Officer and that he was under arrest for failing to appear at a grand jury.” *[Arguably, this is a minor offense; but again - the Graham factors do not exist in a vacuum.]* Jones said, “I’m not going!” *[Now the officer has at least some evidence that the suspect will resist the arrest.]* The report continues, “Jones is about 6 feet tall and 190 pounds; I’m about the same height and weight. I was also the only officer on the scene. Jones bladed his body towards me, meaning that he put one foot in front of the other like a boxer. Jones clinched both of his hands in a fist, and raised them towards his chest. He stepped towards me. *[Now the officer has facts to believe that Jones is an immediate threat.]* The report ends, “I struck Jones’s right thigh with my baton and he fell to the ground.”

A baton is a reasonable force option against combative suspects – meaning someone who poses an articulable threat of harm to the officer. *These are fights.* Fights are dynamic encounters, and while officers cannot always predict what will happen in a fight, the Physical Techniques Division teaches officers to strike at the suspect’s attacking limbs and large muscle groups and to avoid areas like the head, neck, or spine - unless deadly force is objectively reasonable.

Cotton v. Busic¹ was a very violent fight. Officers responded to a call that Bobby Cotton was causing a disturbance. Cotton was a schizophrenic and off his medication. The officers met Cotton, armed with two hunks of concrete in each hand. Cotton initially refused to put the concrete down. A scuffle ensued. A by-stander stated that Cotton was the aggressor and that Cotton got one of the officers in a “bear hug.” One of the officers stated that Cotton was “strong as hell.” Cotton was taken to the ground, but continued to struggle. The officers struck Cotton with nightsticks and flashlights and when the fight was over, Cotton was missing one eye. The court stated, “A police officer need not suffer brutalizing injury before he inflicts it; rather, the restraint on an officer’s use of force is that it must be reasonable...”

¹ Cotton v. Busic, 793 F.Supp. 191 (S.D. Ind. 1992).

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In Cotton, a call about a disturbance escalated into something much more serious. In Kellough v. Bertrand, the seriousness of the offense effected the officers' initial response. Kellough was an armed robbery suspect. Officers stopped his car and ordered him out. He got out - and did so, the court acknowledged, in a non-threatening manner. But the court also found that the suspect did not immediately lie face down on the ground, like the officers ordered him to do. Instead, he asked what he had done. That caused an officer to kick his legs out from under him. One of the officers also struck him on the arm with a flashlight as he fell. Even accepting as true the suspect's argument that he exited the car in a non-threatening manner, his refusal to follow the officer's orders - and to lie face down on the ground - could cause a reasonable officer to employ some force to make him. And while the court described the strike to the arm as "troubling," it also said it occurred before the suspect was handcuffed and secured.

The seriousness of the offense played a big part in the court's decision in Kellough. Change the facts, however, and the court may change the answer. What if the nature of the offense was drunk driving? Or, what if Kellough was stopped based on an arrest warrant for multiple felony counts of *fraud*. It is doubtful that a reasonable officer would find the same urgency to get him on the ground.

And while the court in Kellough was "troubled" by the blow with the flashlight, the blow occurred *before* the robbery suspect was secured. Blows that occur *after* a suspect is secured leave a reasonable officer asking, "Then why was it necessary?"

In Lewis v. Downs,² for example, the suspect tried to stop two officers from arresting his mother and confronted them with an iron rake. One of the officers drew his pistol and ordered him to drop it. He did, and while handcuffing and arresting him for obstruction posed no constitutional objection, striking him in the mouth with a nightstick after he was being led away,

² Lewis v. Downs, 774 F.2d 711 (6th Cir. 1985)

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certainly did.

And the reasonable officer would pose the same question about striking someone who was not resisting? In Dixon v. Richer,³ officers had sufficient facts to stop and frisk the suspect for weapons, but the suspect did as the officers ordered. He placed his hands on the car. And still the officers allegedly struck him so forcefully that he started to fall. Another allegedly hit him in the stomach with a flashlight. And while on the ground, the deputies got on top of him and began to beat and choke him. Again, “why?”

Let’s take a short break. When we come back we will talk about Tasers in the dart-mode.

³ Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991)