

## **Part I: Introduction**

“How will I be judged by a court of law if someone sues me for using excessive force?” That is a fair question from a law enforcement officer. This chapter focuses on the legal aspects for using force in the course of effecting an arrest, investigatory stop, or other seizure of a free citizen.

The leading case on use of force is the 1989 Supreme Court decision in Graham v. Connor.<sup>1</sup> The Court held, “...that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its objective reasonableness standard...”

A seizure occurs when a law enforcement officer terminates a free citizen’s movement by a means intentionally applied. Traffic stops, investigative detentions, and arrests are all Fourth Amendment seizures. To seize someone, an officer may yell “Stop!” The officer may use handcuffs, a baton, or firearm to make him stop. A seizure must be objectively reasonable – meaning reasonable in its inception, the degree of force used, and its duration. This chapter focuses on the degree of force an officer may use. The Fourth Amendment chapter discusses when, and for how long someone can be seized; but they all go to the overall question – was the seizure reasonable?

Mr. Graham was a diabetic. He felt the onset of an insulin reaction on day, called his friend Berry, and asked for a ride to a convenience store. Graham hoped to buy some orange juice. He thought that the sugar in the juice would counteract the reaction.

After the two men arrived at the store, Graham got out of the car and hastily went inside. Unfortunately, the check-out line was too long. Graham “hastily” returned to the car, got in, and told his friend to drive to another friend’s house. Maybe this

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<sup>1</sup>Graham v. Connor, 490 U.S. 386 (1989); See the *Legal Division Reference Book*.

friend would have some juice.

Officer Connor had watched Graham hastily enter and leave the store and suspected something was amiss. Connor activated his overhead lights and pulled them over. Berry tried to explain that his friend was just having a “sugar reaction” but Connor was not convinced. Connor told the two men to wait at their car while another officer returned to the store to determine what happened. Things got worse from that point. Graham got out of the car. He ran around the car two times, sat down on the curb, and momentarily passed out. Back-up officers arrived. According to Mr. Graham, he was violently placed into the backseat of a cruiser. All this time, Berry, and Graham after he regained consciousness, tried to explain that Graham was just having an insulin reaction. But their pleas had no effect. One officer commented that he thought Graham was drunk.

Connor finally received the report from the officer who returned to the store. Nothing was amiss. Graham sued the police officers. On appeal, the Supreme Court stated that the officers should be judged based on the Fourth Amendment’s objective reasonableness test.

### **The Objective Test and the Reasonable Officer**

The Court stated, “The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” The objective test requires the court to envision a reasonable officer and ask: Based on the totality of the facts and circumstances, could such an officer believe that the force was reasonable?

Since the objective test judges the officer through the lens of a reasonable officer, the subjective beliefs of the actual officer, whether they are good or bad, are not relevant. For instance, Officer Connor may have honestly believed that Graham was a shoplifter; however, the objective test asks what a reasonable officer could believe based on the facts. *Facts make force*

*reasonable*. The objective test requires officers to rely on their senses (... or what they saw, heard, smelled, tasted, or touched) and then articulate a factual basis for what they did.

Was it reasonable to stop and use force on Mr. Graham? The Supreme Court said this was the relevant question. What follows are some facts and circumstances that could cause a court to find that the force was reasonable. Some of these facts are for illustrative purposes, only, and are not in the Graham decision.

For example, Officer Connor might write in his use of force report:

“I saw Mr. Graham run into the store. Less than 10-seconds later, I saw him run back out and get into Berry’s car. I heard the tires screech as the car drove away at a high rate of speed.”<sup>2</sup>

Based on those facts, what could a reasonable officer say? The Supreme Court’s decision in Terry v. Ohio states that an officer may conduct an temporary investigative detention based on reasonable suspicion that criminal activity is afoot.<sup>3</sup>

An officer’s training and experience is also relevant. Connor might add:

“Based on what I saw, and my department having received no less than four complaints of shoplifting from this store within the past two weeks, I activated my overhead lights and stopped the car.”

Connor would be admitting to effecting a Fourth Amendment seizure; but a seizure is reasonable if he can point to specific, articulable facts indicating that criminal activity is afoot.

It should be obvious by now that the officer must help the court

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<sup>2</sup> This is a hypothetical use of force report that is intended for instructional purposes only. It is not Officer Connor’s report.

<sup>3</sup> Terry v. Ohio, 392 U.S. 1 (1968); See the *Legal Division Reference Book*.

*visualize* what happened. Using good action verbs in a written report makes that visualization possible. Connor might write:

After Berry stopped, I *walked* to his car. I told both of the men to wait there. I *ordered* another officer to go back to the convenience store and find out what happened. Then Graham *got out* of the car. Graham *opened* the passenger door. He *ran* around the car two times, sat down on the curb, and fell over as if he had passed out.

*Objective* opinions or conclusions are appropriate; they are supported by facts. Connor might state:

I believed that Graham was under the influence of alcohol, based on my experience with intoxicated people. They are generally irrational. Graham was irrational; he ran around the car two times after I (a police officer) told him to wait at the car. Then he sat on the curb and fell over - as if he passed out.

Connor might add:

“Graham’s eyes were glassy. His speech was slurred. His breath smelled sweet, as it may after drinking alcoholic beverages.” Referring back to his training and experience, Connor could explain why intoxication is relevant. “I know that many assaults on police officers are committed by people under the influence of alcohol or narcotics.”<sup>4</sup>

Good fact articulation helps the court make an objective decision. With facts, the court can visualize what happened. Facts “paint the picture.”

But the court cannot make an objective decision based on *mere* conclusions. If a statement makes someone ask “how?” or “why?” it is probably a mere conclusion. Note the differences:

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<sup>4</sup> Darrell L. Ross, “Assessing Patterns of Citizen Resistance During Arrest,” FBI Law Enforcement Bulletin 1999.

- These are facts: “I ordered the suspect to stay in the car. Instead, he got out.” The reader can visualize that.
- Now consider a mere conclusion: “He was non-compliant.” How?

With facts, the reader can visualize what happened. The mere conclusion makes the reader asked, “How?”

“Cop talk” creates the same confusion as a mere conclusion. “Fuzzy words” like “indicated, suggested, or implied” do the same thing. They make the reader ask how. How did he indicate? Note the differences:

- Facts: “I ordered the suspect to keep his hands on the steering wheel of the car. Instead, he reached under the seat with his right hand.
- Cop talk: “The suspect made a *furtive movement*.”
- Fuzzy word: “He *indicated* that he might be going for a gun.”

Officers may experience tunnel vision, auditory exclusion, and memory loss in stressful situations where they have to use force. But they must paint the picture with the sights and sounds they remember. While it may be impossible to recall exactly what the suspect said, the officer may still remember “He screamed at me and clenched his fists, like a boxer.”

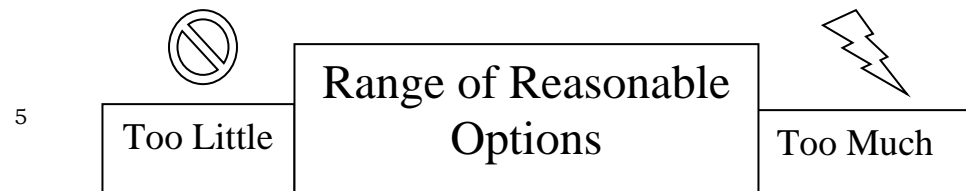
## **Part II: The “No 20/20 Hindsight” Rule**

What was not available to the officers when Graham was initially stopped, handcuffed, and put in the cruiser was the report from the officer who returned to the store. Nothing was amiss. But using that information to judge Connor could violate the “no 20/20 hindsight” rule.

“The no “20/20” hindsight rule probably worked to Officer Connor’s advantage, in this case. But what if Connor had learned the next day that Graham had a violent criminal record? Considering that information would also violate the rule. Officers are judged based on the facts reasonably known at the time.

### **Perfect Answers vs. Range of Reasonableness**

“The test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” the Court stated. Allowance must be made 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.” Obviously, there may be more than one way to effect a seizure - and while hindsight may prove one option better than another - what matters is whether the chosen one fell within the range of reasonableness.



### **The Graham Factors are Reasons for Using Force**

The Court stated that whether force is reasonable requires a careful balancing of the nature of the intrusion on the suspect’s liberty against the countervailing governmental interest at stake. In short, *what did the officer do* (or what was the nature of the intrusion on the suspect’s liberty) and *why did the officer do it* (or what was the governmental interest at stake)? The Graham factors act like a checklist of possible justifications for using force. They are not a complete list and all of the factors

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<sup>5</sup> Using too little force is not a constitutional violation, but may unnecessarily endanger the officer or others.

may not apply in every case.

The Graham factors are the severity of the crime at issue; whether the suspect posed an immediate threat; and whether the suspect was actively resisting or trying to evade arrest by flight.

### **1. The Severity of the Crime**

The “severity of the crime” generally refers to the reason for seizing someone in the first place. Officer Connor may have been acting under a reasonable suspicion that Graham stole something. Arrests and investigative detentions are traditional, governmental reasons for seizing people. Generally, the more serious the crime at issue, the more intrusive the force may be.

There may be a reasonable basis for seizing someone who is not suspected of any wrongdoing. Reasonable force may be used to control the movements of passengers during a traffic stop.<sup>6</sup> When executing a warrant in a home, reasonable force may be used to detain the occupants.<sup>7</sup> The operative word under the Fourth Amendment is reasonableness. Reasonableness depends on the facts.

### **2. The Immediacy of the Threat**

Whether the suspect is an immediate threat to the safety of the officer or others is generally considered the most important governmental interest for using force. The greater the threat, the greater the force that is reasonable.

### **3. Actively Resisting Arrest**

Resisting an arrest or other lawful seizure affects several governmental interests. It may prevent the officer from effecting an arrest, investigating a crime, or executing a warrant. The

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<sup>6</sup> Pennsylvania v. Mimms, 434 U.S. 106 (1977); Maryland v. Wilson, 519 U.S. 408 (1997); See the *Legal Division Reference Book*.

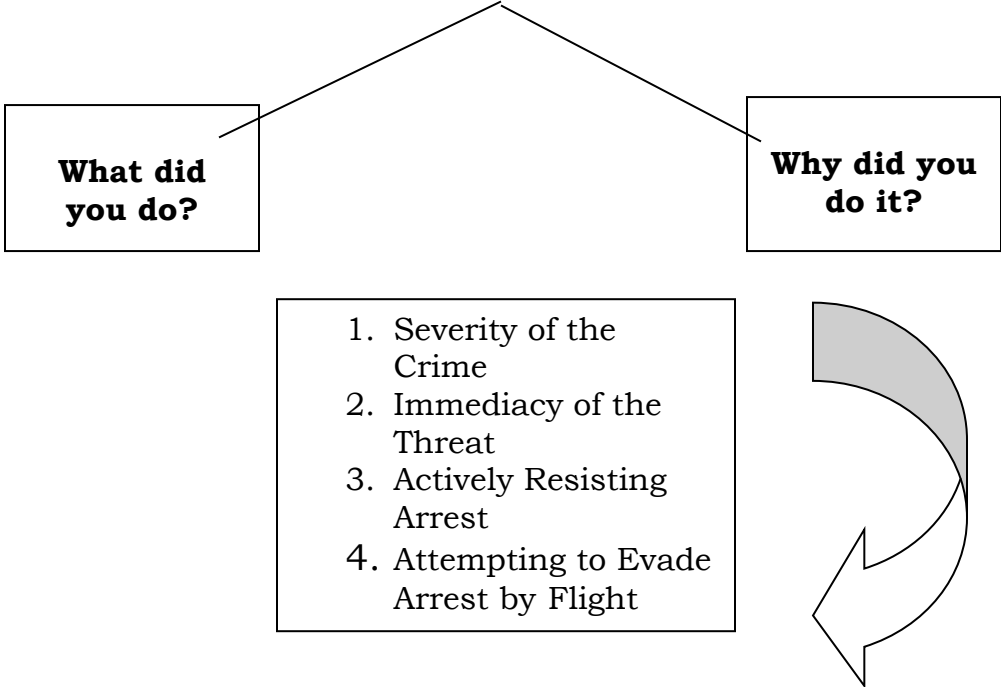
<sup>7</sup> Michigan v. Summers, 452 U.S. 693 (1981); See the *Legal Division Reference Book*.

Graham factors are not considered in a vacuum. Active resistance may also pose a threat.

**4. Attempting to Evade Arrest by Flight**

Attempting to evade an arrest or other lawful seizure by flight frustrates some of the same governmental interests as resistance. Flight (especially by means of a speeding vehicle) may even pose a threat.

With the facts, the court can determine what Graham factors apply and whether the force was objectively reasonable. In Graham, for example, the offense at issue was possible shoplifting; and the *initial* intrusion on Graham’s liberty was sitting in a car beside the road. But the intrusion on Graham’s liberty also became much greater. *Did the governmental interest at stake?* Recall that Officer Connor told the men to wait at the car and Graham resisted that order. *He got out.* Add that to evidence of Graham’s possible intoxication, and a reasonable officer might believe that Graham posed an immediate threat to Officer Connor; to other motorists on the adjoining road; and to Graham, himself.





## Other Factors

The Graham factors are not a complete list. While the lower courts have listed others, most are a subset of what is generally considered the most important factor: *Immediate threat* to the officer or others. For example, the number of suspects verses the number of officers may affect the degree of threat. Initially, it was Officer Connor against two suspects. Also affecting the degree of threat is the size, age, and condition of the suspect confronting the officer. Is the suspect 75 years old and frail, or 25, 6'2" and about 250 pounds? The duration of the action is important. Struggling with someone can be physically exhausting?

Any officer would want to know a suspect's criminal or psychiatric history, if possible. But mental impairment is not the green light to use force. Shocking a man several time with an electronic control device was excessive in a situation where he had been involuntarily committed, but not committed any crime. The man grabbed a post, was seated on the ground, and was surrounded by police and hospital staff. The static stalemate did not create an immediate threat.<sup>8</sup>

Time is a factor. The Court stated, "The calculus for reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - - in situations that are tense, uncertain, and rapidly evolving - - about the amount of force that is necessary in a particular situation." A robbery suspect who reaches into his waistband creates some split-second decision making for the officer; more deference should be given to the officer's decision. But not every situation requires a split-second decision. Consider the mentally impaired man who grabbed the post. If he does not pose an immediate threat, there is probably time to consider other, less intrusive options.


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<sup>8</sup> *Armstrong v. Village of Pinehurst*, 810 F.3d 892 (4th Cir. 2016)

### Part III: Deadly Force

Shooting a suspect is often called “deadly force” and is the highest level of intrusion on someone’s liberty. It must be justified by a very high governmental interest. Shooting a suspect with a firearm is not unconstitutional when a reasonable officer could believe that he poses a significant threat of death or serious bodily harm to the officer or others.

*Significant threat?* A murderer may pose an *imminent* threat to society if allowed to evade arrest and remain at large. Someone stopped for a minor traffic offense may pose an *immediate* threat by grabbing a gun. And how much proof is necessary? Some of the federal circuit courts use a probable cause standard (...i.e., a reasonable officer could believe the suspect *probably* posed a significant threat, based on the facts known at the time.) Probable cause is a common-sense, all things considered standard for assessing probabilities in a particular situation.

	<p><b>Could a reasonable officer believe that the suspect posed a significant threat of serious bodily harm to the officer or others? Warn if feasible.</b></p>
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Tennessee v. Garner<sup>9</sup> - Examples when force highly likely to have deadly effects is reasonable.

In Tennessee v. Garner, the Supreme Court held that it was *unreasonable* to shoot Edward Garner. While investigating a burglary, an officer saw Garner run out of a house. The officer yelled at him to stop, but Garner continued to flee and managed to climb to the top of a fence. At that point, the officer had two options - let Garner escape, or shoot. The officer shot Garner in the back of the head. Garner died a few hours later on the operating table. Tennessee law at the time authorized all

<sup>9</sup> Tennessee v. Garner, 471 U.S. 1 (1985)

necessary force to stop any fleeing felon, and the officer assumed the law allowed him to shoot Garner. But the Supreme Court held that the Tennessee statute was unconstitutional in so far as it authorized the use of deadly force to stop *any* fleeing felon.

The Supreme Court decided Garner before Graham; however, it is easy to understand how the Court reached their decision by applying the facts to the Graham factors. The “severity of the crime” was burglary and Garner “attempted to evade arrest by flight.” But that was all. The governmental interest was not strong enough. “It is not better that all felony suspects die than that they escape” the Court stated.

### **Qualified Immunity – What happened to the officer?**

This is a good place to pause and ask, “So what happened to the officer that shot Edward Garner?” He was sued, but while it is true that anyone can sue, that does not always mean that the officer must stand trial. It seems unfair that the officer in Garner should be made to suffer the burdens of litigation, when state law at the time authorized what he did.

The officer requested and received qualified immunity. Qualified immunity is the officer’s defense to standing trial in a *civil case* for a constitutional tort.<sup>10</sup> It is raised by the officer well in advance of trial, and if granted, the court dismisses the case. The rationale behind qualified immunity is two-fold. First, it permits officers to perform their duties without fear of constantly defending themselves against insubstantial claims for damages. On the other hand, it allows a plaintiff to recover damages when any reasonable officer would know that the officer violated a *clearly established* constitutional right.

Qualified immunity is like a contract that police officers have with the federal courts. The officer’s end of the bargain is to use constitutional force (meaning force that falls within the range of reasonableness). Still, the force may not be

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<sup>10</sup> Qualified immunity is not an available defense in a criminal case.

constitutional. If not, the question becomes whether the courts lived up to their end of the bargain. Did the courts clearly establish the law so that any reasonable officer would know, *that's wrong, ... that's unconstitutional?* If the law was not clear, or the court finds that the force fell within that *grey area* between constitutional and excessive, the court must dismiss the case. The officer that shot Garner received qualified immunity because the law was not clearly established when he fired the fatal shot. The civil case against him was dismissed.

In short, there are *two* ways to get qualified immunity. The judge may find that: (1) the force was constitutional; or (2) that the law was not clearly established at the time. The judge is not required to go in any particular order, either. The judge may simply find that the law is not clear, and save the harder *constitutional question* for another day.

To *deny* an officer qualified immunity, the judge must find that the the facts could support both: (1) a constitutional violation that (2) was clearly established. If denied qualified immunity, the case may proceed to trial.

Students sometimes ask, "*If the judge finds that the officer violated a clearly established constitutional right, why not just hold the officer liable?*" The answer is simple. Recall that qualified immunity is raised well in advance of the actual trial. If granted, the case is dismissed. Qualified immunity denies the plaintiff (the person suing the officer) his day in court; therefore, before dismissing the plaintiff's case, the judge must consider the facts in his favor. Before the judge can grant qualified immunity to the officer, the judge must be able to say, "*Mr. Plaintiff, I have considered your version of what happened. No reasonable jury could find for you.*" Only in that case is it fair to deny the plaintiff his day in court.

If there is a material dispute between the officer and the plaintiff about what happened, the judge must send the case to trial to resolve the dispute. The bottom line: Denying the officer qualified immunity does not mean that the officer is liable.

**Part IV: Scott v. Harris<sup>11</sup> - The Supreme Court established the relationship between Garner and Graham.**

Edward Garner was a fleeing burglary suspect who posed no articulable threat to the officer or others. But what if Garner was someone who posed a continuing threat to society if allowed to remain at large, like a *murderer*? The Supreme Court stated:

“If...there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”

For several years, the lower courts believed that the Garner decision set rigid, preconditions as to when deadly force was authorized to stop a suspect’s flight. The fact that Graham’s objective reasonableness test is the standard for judging all force was not made clear until the Supreme Court’s decision in Scott v. Harris:-

Mr. Harris was speeding when an officer signaled for him to stop. Harris fled and a high-speed car chase ensued. Enter Officer Scott. Officer Scott pushed Harris off the road by ramming the rear bumper of Harris’ vehicle. At the speeds both cars were traveling (almost 100 miles per hour) Harris claimed that the *push* was “deadly force” and that it was unreasonable to use it to stop his flight. He referenced the example in Tennessee v. Garner. Harris’ argument was that he was a mere speeder, not someone who posed a continuing threat to society if allowed to remain at large, like a murderer.

The Supreme Court disagreed with Harris’ argument. Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute “deadly force.” Graham v. Connor’s objective test controls every case.

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<sup>11</sup> Scott v. Harris, 550 U.S. 372 (2007).

The heart of Graham is to weigh the nature of the intrusion on the suspect's liberty (what the officer did) against the countervailing governmental interest at stake (or why the officer did it.) So what did Officer Scott do ...?

Scott pushed Harris' car off the road while Harris was traveling almost 100 miles per hour. But why? What was the governmental interest at stake ...?

The Court applied the facts to the Graham factors. True, the underlying offense was only speeding, but Harris fled. And this was no foot chase. This was flight by means of a two-ton vehicle. Harris raced down narrow, two-lane roads in the dead of the night, and at speeds in excess of 85 miles per hour. Harris swerved around more than a dozen other cars, crossed the double yellow line, and forced other cars off the road to avoid being hit. He ran multiple red lights and traveled for considerable periods of time in the occasional center left-turn-lane. Harris did all that while being chased by numerous police cars. Harris even rammed one of the police cruisers. Only after observing those facts did Officer Scott push Harris off the road.

Harris' flight *by means of a speeding vehicle* posed a significant threat of serious physical harm to others and created the strong governmental interest that made what Scott did fall within the range of reasonableness.<sup>12</sup> Scott received qualified immunity.

Scott v. Harris established the relationship between the Garner and Graham decisions. Graham established the test for judging *all force*. The test is objective reasonableness. The Garner decision provides *examples* as to when force highly likely to have deadly effects is reasonable. One is a murderer

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<sup>12</sup> There is not a Fourth Amendment prohibition against vehicle pursuits of fleeing misdemeanants. Harris argued that the public would have been protected, and the tragedy avoided, if the police simply ceased their pursuit. However, the Court stated, "...we are loath to lay down a [constitutional] rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives at danger." Still, state law and agency policy may place heightened restrictions on pursuits due to the extreme risks they pose to the officers and the public. See Day v. State of Utah, 980 P.2d 1171, 1179 (Utah 1999).

who would pose an continuing threat to society if allowed to remain at large. But that is just one example. Scott states that there are no rigid pre-conditions (or set of facts) that must exist before using deadly force. The court must wade through the facts, and when the facts come together so that a reasonable officer could believe that the suspect poses a significant threat of death or serious bodily harm, deadly force falls within the range of reasonableness.

### **1. Plumhoff v. Rickard – Shooting at Moving Vehicles.<sup>13</sup>**

Scott v. Harris left open under what circumstances *shooting* at a fleeing motorist was reasonable. That question was answered in Plumhoff v. Rickard. Like Mr. Harris, Mr. Rickard started a high-speed pursuit after a minor traffic offense. The chase exceeded 100 miles per hour and lasted over five minutes. Rickard passed more than two dozen vehicles, several of which were forced to alter course. He eventually collided with a police car and came to a temporary standstill. Still, Rickard promised to continue the chase. With his front bumper flush against a police car, Rickard hit the accelerator causing the tires to spin. Officer Plumhoff fired the first three shots into the car. Rickard then threw the car into reverse and started to drive away. Other officers fired 12 more shots into the car. Richard crashed and he and his passenger died of some combination of gunshot wounds and injuries from the crash.

Rickard's estate sued. The officers requested qualified immunity, but the lower court refused to grant it. The lower court believed that there were significant differences between this case and Scott v Harris. The lower court noted: (1) Richard was only traveling 4 or 5 miles per hour when force was used; (2) Richard had a passenger in the car; and finally, (3) instead of being pushed off the road, the officers fired 15-rounds at him.

The Supreme Court reversed the lower court. The differences were insignificant. While traveling much slower than Harris, the facts demonstrated that Richard would continue his dangerous flight. All 15-shots were fired to end that threat.

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<sup>13</sup> Agency policy may also place restrictions on shooting at moving vehicles.

And the passenger did not make any difference. The question was whether the officers violated Richard's Fourth Amendment rights, not his passengers.<sup>14</sup>

## **2. San Francisco v. Sheehan – Immunity for Tough Decisions.**

Before a judge can deny an officer qualified immunity, the judge must find that the officer violated a clearly established constitutional right. The law was not clear in the Sheehan case. Ms. Sheehan lived in a group home for people suffering with mental illness and was not taking her medications. "Get out of here!" she shouted after a social worker entered her room. "You don't have a warrant! I have a knife and I'll kill you." Two officers were dispatched to the home to take her to a hospital. When they entered her room, Sheehan charged with the knife and the officers retreated to the hallway.

From the relative safety of the hallway, the officers had some options. One was to wait for backup and try to de-escalate the situation. Instead of waiting, however, the officer re-entered the room. Predicatably, Sheehan charged again with the knife. *Predicatably* (her lawyer would argue) the officers were forced to shoot her.

The issue in this case was *not* whether the officers could enter Sheehan's room without a warrant. They could; this was an emergency. Deadly force to seize Ms. Sheehan - - *viewed at least from the moment of the shooting* - - was also reasonable. The issue was over the Ninth Circuit's provocation doctrine. The Ninth Circuit denied the officers qualified immunity because the court believed that the officers may have needlessly provoked the deadly encounter when they entered the room the second time.

The Supreme Court reversed. Even assuming the officers did

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<sup>14</sup> There is some disagreement among the lower courts as to whether a passenger in this situation can recover under a Fourth Amendment theory. See Plumhoff v. Rickard, 134 S. Ct. 2012, fn. 4 (2014).



provoke the encounter, the law was not clear. The Court found wanting any robust consensus of precedent that would have put any reasonable officer on notice about when it was reasonable, or not, to re-enter the room.

Qualified immunity is designed to protect *all but the plainly incompetent* or those who knowingly violate the law. It is certainly not a noble standard to live up to. However, qualified immunity has a vital purpose in cases where police officers are likely to face public ridicule for not acting and personal liability when they do. Before the officer can be forced to face the burdens of litigation the law must be clearly established so that any reasonable officer would know “*that’s unconstitutional - - I can’t do that!*”

#### **Part V: Myth vs. Reality:**

Probably no subject is plagued with more myths than use of force.

1. **Myth.** *You can’t fire unless fired upon.*

The reality is that waiting to be fired upon, or waiting for the suspect to point the gun, ... or even waiting to see the gun may be too late for the officer. The Graham analysis allows police officers to react to the threat of violence, not violence itself.



**An objective test allows officers to react to the threat of violence, rather than violence itself.**

2. **Myth.** *Deadly force can only be used as a last resort.*

Many law enforcement agencies have use of force policies. A

policy may state, “Deadly force can only be used as a last resort.” Another may state, “Use the minimal force” and “Always give a warning.” Objective reasonableness is the law; not policy. When the facts come together that the suspect poses a significant threat, shooting falls within the range of reasonableness. Using the minimal force, exhausting all lesser means of force, or always giving a warning could create an unnecessary risk for the officer.



**The law requires officers to use objectively reasonable force, not the minimal force.**

3. **Myth.** *Anyone with a gun is a danger.*

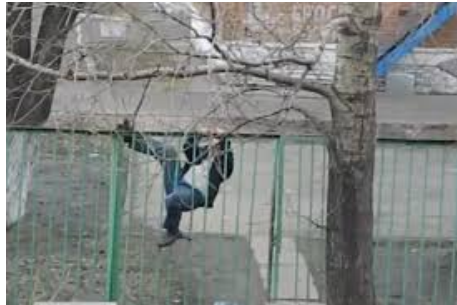
The United States is a democracy that balances individual freedoms with law enforcement. One right that free citizens have is to bear arms. Home owners have a right to keep firearms in their homes for self-defense. A homeowner who steps out onto his front porch with a gun to investigate a possible disturbance is doing nothing more than any free citizen might do. But when officers are lawfully present (to investigate crimes or execute warrants) they may order occupants to put their firearm down, and where the order goes unheeded, they are not required to wait for someone take a bead on them.



**The mere fact that someone has a gun does not mean that he is *armed and dangerous*.**

## Part VI: Intermediate Weapons

Batons, electronic control devices (ECDs), and oleoresin capsicum (OC) spray are often called *intermediate* weapons because they offer an intermediate level of force between a firearm and going hands-on. But objective reasonableness depends on the facts. Baton blows to the head, neck, or groin area may cause serious injuries. The electrical charge from a dart-mode ECD causes neuromuscular incapacitation and is very likely to cause serious injuries to someone standing in tree, climbing over a fence, or saturated with flammable liquids. Absent a strong governmental interest, as when the suspect poses a significant threat, intermediate weapons are excessive when any reasonable officer would know that they are likely to cause serious injuries.



**Absent a significant threat, intermediate weapons are not reasonable when any reasonable officer would know they are likely to cause serious bodily harm.**

### **The Nature of the Intrusion – What does an intermediate weapon do?**

A baton can be held at port arms to gently push a protestor back to the sidewalk. It can also be used to strike his attacking limbs. A baton is capable of causing deep bruising, blood clots capable of precipitating a stroke, and even death.

Oleoresin Capsicum (OC) spray comes from the oily extract of the cayenne pepper plant. Exposure to OC creates a deep

burning sensation and difficulty breathing.

Electronic control devices (ECDs) come in two modes – dart and drive-stun.<sup>15</sup> In the dart mode, the ECD propels a pair of “probes,” or aluminum darts tipped with stainless steel barbs towards the suspect. When the darts strike the suspect, the ECD delivers an electrical charge through the wires and probes and into the suspect’s muscles. The electrical impulse momentarily overrides the central nervous system. The suspect falls, momentarily incapacitated, which provides an opportunity for the officer to move in with handcuffs.

In the drive-stun mode, the officer pushes two electric contacts located on the front of the ECD directly against the suspect. The drive-stun delivers an electronic shock. The drive-stun does not override the central nervous system like the dart-mode, but it is painful and may cause a struggling suspect to release his grip on something.<sup>16</sup>

### **The Governmental Interest at Stake – When are intermediate weapons objectively reasonable?**

An immediate threat is the most important Graham factor. Intermediate weapons fall within the range of reasonableness if, after applying the facts to the Graham factors, the suspect poses an immediate threat.

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<sup>15</sup> Experts have testified that ECDs may cause abnormal heart beat leading to stoppage and death. On the other hand, a National Institute of Justice panel determined that there is no conclusive evidence that indicates a high risk of serious injury to humans from short-term ECD exposure in healthy, non-stressed, non-intoxicated persons. Statistically, ECDs carry a significantly lower risk of injury than physical force.<sup>15</sup> John H. Laub, Director, National Institute of Justice, Study of Deaths Following Electro Muscular Disruption 31 (2011).

<sup>16</sup> The Physical Techniques Division provides electronic control device training to students attending the Federal Law Enforcement Training Center. The students are issued the manufacturer’s warnings. Attention to these warning can help the officer stay within the range of reasonableness.



**Does the suspect pose an immediate threat due to the severity of crime at issue, the nature of suspect's resistance, or flight?**

### **Immediate Threat**

The severity of crime at issue may help establish an immediate threat. Consider an armed robbery suspect who refuses an officer's order to lay on the ground. An intermediate weapon may be reasonable to make him.

But change the facts, and the answer may change. Assume the same person was only suspected of drunk driving. While a serious crime, drunk driving is not indicative of someone who is an immediate threat. The same urgency to get him on the ground may not exist.



**The violent nature of an offense (armed robbery) plus resistance (not getting on the ground) may support a credible threat.**

The crime is only one factor to consider in deciding whether a threat exists. Police officers have a right to protect themselves even while investigating minor crimes. Consider a case where a patrolman stopped a truck driver for a simple traffic violation. The driver became immediately confrontational. "Get that flashlight out of my eyes" he stated. Five-times the officer asked for license and registration. Instead, the driver ranted and raved by the highway, "Why don't you just take me to f---ing jail" and "I don't have to kiss your damn a—because you're a police officer." After the fifth request, the officer shot the man with an electronic control device (ECD) in the dart-mode. The ECD caused neuromuscular incapacitation, he fell, and was

taken to jail.

The truck driver's failure to provide documentation was an arrestable offense; *but, was it reasonable to use the ECD ... and without warning?* That was the issue before the court. The truck driver claimed that he would have obeyed the officer's arrest commands, had the officer warned him. The officer, on the other hand, claimed that arrest commands would only escalate an already tense and difficult situation into a more serious struggle. This time the facts supported the officer.

But in another case, the facts viewed in a light most favorable to the plaintiff did not support an immediate threat. Here a young man drove onto Coronado Island wearing nothing but boxer shorts and tennis shoes. An officer also saw that he was not wearing his seat belt and directed him to pull to the side of the road. He did, but began to pound the steering wheel and to curse, ... apparently upset about the pending traffic ticket. Then the the young man got out of the car. The slightly clad young man must have looked strange. Adding to his bizarre behavior, he began to yell gibberish, expletives (though not at the officer's face, like the truck driver) and to hit his thighs. The officer was about twenty to twenty-five feet away from the young man when, without warning, the officer shot him with an ECD in the dart-mode. He fell due to neuromuscular incapacitation and shattered his teeth on the pavement.

The reviewing court believed that the only similarities between this case and the truck-driver's were that the two men were stopped for a traffic violation; they were loud; and, they were shot by an ECD. While the *in-your-face behavior* of the truck driver could cause a reasonable officer to believe that there was a threat, the behavior of the young man on Cornoado could not. He was further away and just having a temper-tantrum.



**People may get upset with law enforcement; however, a temper tantrum does not always mean that someone is a threat.**

Each use of force must be objectively reasonable. Not all of them were in a domestic violence case. The officers had probable cause to arrest the suspect who was acting erratically, holding a baseball bat, and advancing on the officers. The first three deployment of an ECD were not excessive because the facts supported a threat. However, seven more were excessive. At this point he had been disarmed, brought to the ground, and was restrained by several other officers.<sup>17</sup>

Similarly, OC spray is reasonable against a combative suspect who poses an immediate threat. But once the suspect is under control, he should be decontaminated as soon as reasonably possible.<sup>18</sup>

Active resistance may be combative or mechanical in nature. Whether combative resistance poses a credible threat depends on the number of officers and the size, height, weight and condition of the suspect compared to the officers.



**Combative resistance may pose an immediate threat.**

Mechanical resistance is a situation where the suspect's resistance is not directed at the officer; instead, the suspect grabs ahold of something to thwart the officer's attempts to control him. When the suspect is not an immediate threat, time

<sup>17</sup> Meyers v. Baltimore County, 713 F.3d 723 (4th Cir. 2013)

<sup>18</sup> Lalonde v. Co. of Riverside, 204 F.3d 947 (9th Cir. 2000)

is an important factor. Is there time to consider other, less intrusive options than an intermediate weapon?



**Mechanical resistance is a situation where the suspect grabs ahold of something. Time is an important factor.**

### **Part VII: Control vs. Compliance and the Time Factor**

Intermediate weapons have posed a challenge to the courts, to the officers using them, and to law enforcement trainers. When do they fall within the range of reasonableness? The Supreme Court has not ruled definitively. Circuit courts have held that an officer does not violate the Fourth Amendment by using an ECD to control the active resistance of a suspect.<sup>19</sup> Others hold that active resistance, alone, is not enough and that an ECD may only be used when a police officer is confronted with an immediate threat.<sup>20</sup> It would be *unreasonable* to use a stun-drive ECD simply to remove an arrestee from a car in a circuit requiring an immediate threat, even after the arrestee stiffened her body and clutched the steering wheel to frustrate the officers' efforts.<sup>21</sup>

“So how do we get the arrestees out of the car?” seems a reasonable question from officers. To quote one judge, “There are only so many ways that a person can be extracted from a vehicle against her will, and *none of them is pretty*.”<sup>22</sup>

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<sup>19</sup> See Hagans v. Franklin Co. Sheriff's Office, 695 F.3d 505, 509 (6<sup>th</sup> Cir. 2012); see also Crowell v. Kirkpatrick, 400 Fed.Appx, 592 (2<sup>nd</sup> Cir. 2010)(using a stun-drive ECD to force a protester to release herself from a heavy barrel to which she had chained herself did not violate the Fourth Amendment. She was told to leave; warned that the ECD would be used; told that it was painful; and given the opportunity to release themselves before subsequent applications.)

<sup>20</sup> See Armstrong v. Pinehurst, 810 F.3d 892, 903 (4<sup>th</sup> Cir. 2016)

<sup>21</sup> See Brooks v. City of Seattle, 661 F.3d 433 (9<sup>th</sup> Cir. 2011)

<sup>22</sup> Brooks, 661 F.3d at 459 (Judge Silverman, Concurring)



Perhaps the greatest challenge is for law enforcement trainers. What should they teach the students about intermediate weapons? That question is particularly difficult for instructors at the Federal Law Enforcement Training Center where graduating students may find themselves assigned to any circuit. The goal is to find the best practice so that officers can be reasonable *anywhere*.

Teaching the difference between control and compliance is a step in the right direction. Intermediate weapons are control tools, not compliance tools. Even in a situation where active resistance would be enough to use an intermediate weapon, the facts must still suggest a need for one. Simple statements that “The suspect was non-compliant” or “He didn’t do what I said” are never enough. Finally, “time” is an important factor. And this may be the key to *being reasonable in any circuit*. If the suspect is not an immediate threat, there is generally time to consider other less intrusive options.



**Intermediate weapons are control tools. They are not compliance tools. If the suspect is not an immediate threat, there is generally time to consider other, less intrusive options.**

## **Part VIII: Myths vs. Reality**

1. **Myth.** *ECDs have been credited with reducing injuries to suspects and officers alike; therefore, they can be used anytime the suspect disobeys the officers’ orders.*

Part of that statement is true; specifically, ECDs have been credited with reducing injuries. But ECDs also hurt, a lot. They cannot be used anytime the suspect refuses to obey arrest commands.

2. **Myth.** *The law does not require an officer to re-assess a suspect's resistance after using an ECD because the pain is only temporary.*

Each use of an ECD (or any intermediate weapon) must be objectively reasonable. Objective reasonableness always requires an application of the facts to the Graham and other factors.

3. **Myth.** *An officer does not have a duty to decontaminate a suspect after using OC spray so long as the initial use was reasonable.*

A Fourth Amendment seizure triggers a duty to render aid to the suspect when it's reasonable to do so. Once the suspect is under control, the officer should decontaminate a suspect.

4. **Myth.** *Agency policy is the law.*

Agency policy is not the law. The Supreme Court established the law in Graham v. Connor. Agency policies may establish restrictions on using force that are more restrictive than what the law requires. Officers may be fired or suffer administrative sanctions for violating policy. If sued, however, the court will apply the objective reasonableness standard.

## **Part IX: After the Fight**

Taking a suspect into custody creates a duty to care for him.<sup>23</sup>

- As soon as the suspect is handcuffed, get him off his stomach, and belt him inside the car in the seated position. In-custody deaths may result from positional asphyxia – i.e., death as a result of positioning the suspect's body in a way that interferes with his ability to breathe.

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<sup>23</sup> Jones v. City of Cincinnati, 507 Fed.Appx. 463 (6th Cir. 2012) citing Ewoiski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2012).

- Monitor the suspect carefully and obtain medical treatment if needed. Ask the suspect if he has used drugs recently or suffers from any other medical condition. Do not assume that the suspect is “playing possum” and obtain medical care on his request.
- If the suspect is not breathing or there is other evidence that he suffers from a serious medical condition, call EMS, apply CPR, and provide first aid as necessary.
- Inform the detention facility’s custodians of any medical problems.

Thanks for listening. I hope you have found these podcasts useful. If you have suggestions or comments, please send them to Tim Miller at my email address: [Tim.Miller@dhs.gov](mailto:Tim.Miller@dhs.gov).