RECENT DEVELOPMENTS IN THE USE OF EXCESSIVE FORCE BY LAW ENFORCEMENT

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I. INTRODUCTION

PROFESSOR BLUM: A variety of circumstances and contexts may give rise to a Section 1983 action asserting a claim of excessive use of force. Depending upon the context in which the force is used, different constitutional standards will apply.

A. Use of Force Under the Fourth Amendment

Where force is used in the context of an arrest, an investigatory stop, or other seizure of a free citizen, the Fourth Amendment will apply.[1] The standard governing the officer's conduct under the Fourth Amendment is one of objective reasonableness, as stated by

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[1] U.S. CONST. amend. IV states, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

the Supreme Court in *Graham v. Connor*.[2] The test of constitutionality is whether the officer's conduct was objectively reasonable given "the totality of the circumstances."[3]

With respect to the use of deadly force in terms of the Fourth Amendment, we now know, after the Supreme Court's decision in *Scott v. Harris*, that there are no "magical on/off" pre-conditions that must be satisfied to justify the use of such force.[4] *Scott* has clearly impacted the approach to deadly force cases, especially in the Ninth Circuit, but also in any other jurisdiction where a deadly force instruction has been used.[5]

Prior to *Scott*, *Tennessee v. Garner*[6] was interpreted by some courts to have required that a jury receive an instruction indicating the special circumstances under which deadly force could be used.[7]

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[2] 490 U.S. 386, 388 (1989).

[3] *See* Tennessee v. Garner, 471 U.S. 1, 8-9 (1985). *See also* United States v. Cortez, 449 U.S. 411, 417-18 (1981); Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

[4] 127 S. Ct. 1769, 1777 (2007).

[5] *See generally* Karen M. Blum, Scott v. Harris*: Death Knell for Deadly Force Policies and Garner Jury Instructions?*, 58 SYRACUSE L. REV. 45 (2007).

[6] 471 U.S. 1.

[7] Currently, the Third and Seventh Circuits include *Garner* language in their Model Jury Instructions for deadly force cases. For a plaintiff to succeed in a deadly force claim, the Third Circuit requires that the plaintiff prove:

> [D]eadly force was not necessary to prevent [plaintiff's] escape; or [defendant] did not have probable cause to believe that [plaintiff] posed a significant threat of serious physical injury to [defendant] or others; or it would have been feasible for [defendant] to give [plaintiff] a warning before using deadly force, but [defendant] did not do so.

THIRD CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 4.9.1 (2008), *available at* http://www.ca3.uscourts.gov/civiljuryinstructions/Final-Instructions/january2008/Chap_4_2008_revised.pdf. Similarly, the Seventh Circuit instructs that "[a]n officer may use deadly force when a reasonable officer, under the same circumstances, would believe that the suspect's actions placed him or others in the immediate vicinity in imminent danger of death or serious bodily harm." SEVENTH CIRCUIT FEDERAL CIVIL JURY INSTRUCTIONS § 7.09 (2005), *available at* http://www.ca7.uscourts.gov/7thcivinstruc2005.pdf. While the Eighth Circuit does not have a separate deadly force instruction that tracks *Garner*, the Court held, in *Rahn v. Hawkins*, 464 F.3d 813 (8th Cir. 2006) that "[j]ury instructions that discuss only excessive

Based on *Scott*, the Ninth Circuit, in *Acosta v. Hill*,[8] overruled *Monroe v. City of Phoenix*[9] which had held an excessive force instruction based on the more general reasonableness standard of *Graham* was not a substitute for a *Garner* deadly force instruction.[10] Therefore, after *Scott*, a *Garner* instruction is no longer required, at least the Ninth Circuit and most likely in other jurisdictions as well. A post-*Scott* decision out of the Southern District of New York, *Blake v. City of New York*[11] indicated that court likewise would not require a deadly force instruction.[12]

To trigger Fourth Amendment protections and activate the objective reasonableness standard, there must be an arrest, an investigatory stop or some other "seizure" within the meaning of the Fourth Amendment.[13] The definition of seizure can be nuanced, but the Supreme Court has held that a seizure requires the "termination of freedom of movement through means intentionally applied."[14]

This is why ramming the suspect's car in *Scott* was a sei-

force in only a general way do not adequately inform a jury about when a police officer may use deadly force." *Id.* at 818.

[8] 504 F.3d 1323 (9th Cir. 2007).

[9] 248 F.3d 851 (9th Cir. 2001).

[10] *See Acosta*, 504 F.3d at 1324 ("*Monroe*'s holding that an excessive force instruction based on the Fourth Amendment's reasonableness standard is not a substitute for a deadly force instruction is therefore overruled."). *See also Monroe*, 248 F.3d at 859. The Ninth Circuit has since withdrawn its *Garner* deadly force instruction, instead combining deadly and nondeadly force under a single excessive force instruction. *See* NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS §§ 9.22, 9.23 (2007), *available at* http://207.41.19.15/web/sdocuments.nsf/1ae2dda702db203388256aae0064d796/$FILE/3.2008%20final%20civil.pdf.

[11] No. 05-CV-6652, 2007 WL 1975570, at *1 (S.D.N.Y. July 6, 2007).

[12] *See Blake*, 2007 WL 1975570 at *2-4.

[13] *See Graham*, 490 U.S. at 388.

[14] Brower v. County of Inyo, 489 U.S. 593, 597 (1989).

zure.[15] The contact was not accidental. This was not an officer unintentionally bumping into a suspect's car, but was rather an officer terminating Harris's movement by "means intentionally applied." The officer's actions constituted a seizure, bringing into play the objective reasonableness standard.

One question raised by the *Scott* scenario of force applied to stop a vehicle is that of who exactly is being seized when there is more than one occupant. The Supreme Court recently decided *Brendlin v. California*,[16] finding that a passenger is seized when a driver is pulled over.[17] In other words, when an officer pulls over a car, the officer initiates a Fourth Amendment seizure of not just the driver, but anyone else in the car.

A similar question existed in *Fisher v. City of Memphis*,[18] where an officer, not necessarily aiming at any of the occupants, shot at a car that nearly ran him down, striking a passenger. The Sixth Circuit held that the passenger was seized when the car was shot at, even though the officer was not aiming for the passenger, but rather the car itself.[19] Therefore, where the intent of the officer was to stop the car and the officer fires his gun, anybody in the car may be considered "seized" for purposes of the Fourth Amendment.

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[15] *See Scott*, 127 S. Ct. at 1776.

[16] Brendlin v. California, 127 S. Ct. 2400 (2007).

[17] *Id.* at 2403.

[18] 234 F.3d 312 (6th Cir. 2000).

[19] *Fisher*, 234 F.3d at 318-19. ("[The] car was the intended target . . . . By shooting at the driver of the moving car, [the officer] intended to stop the car, effectively seizing everyone inside, including the Plaintiff [passenger].")

B. Excessive Force Claims Under the Eighth and Fourteenth Amendments by Persons in Custody

In addition to excessive force claims in the Fourth Amendment context, claims are brought by convicted prisoners complaining about the use of force by prison officials under the Eighth Amendment.[20] With respect to the standard applied, it is no longer one of objective reasonableness. Rather, the Supreme Court cases of *Whitley v. Albers*[21] and *Hudson v. McMillian*[22] govern, and call for a standard that is much more deferential to prison officials.[23] A prisoner complaining of excessive force must show a much higher level of culpability in the form of a malicious and sadistic use of force to cause harm, unrelated to any legitimate penological purpose.[24]

Excessive force claims are also brought under the Fourteenth Amendment[25] by persons who are in custody but not convicted, such as pretrial detainees. In the context of Fourteenth Amendment claims, especially by pretrial detainees, standards vary widely. In a use of force case, some circuits borrow from the Eighth Amendment, some from the Fourth Amendment, and still others hold force cannot be used against pretrial detainees for punitive purposes, but must instead serve a legitimate non-punitive function—a standard taken from

[20] U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[21] 475 U.S. 312 (1986).

[22] 503 U.S. 1 (1992).

[23] *See Hudson*, 503 U.S. at 6-7; *Whitley*, 475 U.S. at 320-21. *See also* Linda Greenhouse, *High Court Defines New Limit on Force by a Prison Guard*, N.Y. TIMES, Feb. 26, 1992, at A1.

[24] *Hudson*, 503 U.S. at 6-7; *Whitley*, 475 U.S. at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

[25] U.S. CONST. amend. XIV, § 1 provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Bell v. Wolfish.[26]

In *Fuentes v. Wagner*,[27] the Third Circuit applied the same Eighth Amendment standard to a pretrial detainee's excessive force claim that is applied to claims by convicted prisoners.[28] A pretrial detainee involved in some sort of disturbance while in the prison would have to show a malicious and sadistic use of force occurred in order to prevail on what would be a Fourteenth Amendment substantive due process claim.[29] However, the Ninth Circuit in *Gibson v. County of Washoe*[30] applied the Fourth Amendment objective reasonableness standard to use of force claims by pretrial detainees.[31]

The courts that apply the *Bell* standard look to whether there is a rational, legitimate reason for using force or whether it is, in essence, an arbitrary use, constituting punishment.[32] The reasoning behind this position is that while convicted prisoners may not be subjected to "cruel and unusual" punishment, pretrial detainees cannot be punished at all.[33] So if the use of force against a pretrial detainee is

[26] 441 U.S. 520, 535-37 (1979).

[27] 206 F.3d 335 (3rd Cir. 2000).

[28] *See Fuentes*, 206 F.3d at 347 (holding that the Eight Amendment standards found in *Whitley* and *Hudson* also apply to a pretrial detainee's prison disturbance excessive force claim).

[29] *Id.* at 347-48.

[30] 290 F.3d 1175 (9th Cir. 2002).

[31] *Gibson*, 290 F.3d at 1197 ("Although the Supreme Court has not expressly decided [this issue] . . . we have determined that the Fourth Amendment sets the applicable constitutional limitations for considering claims of excessive force during pretrial detention." (citations and internal quotations omitted)).

[32] *See, e.g.*, United States v. Budd, 496 F.3d 517, 530 (6th Cir. 2007). "Under *Wolfish*, in the absence of 'an expressed intent to punish,' the question is whether the challenged practice or behavior 'is reasonably related to a legitimate government objective.' " *Id.* (quoting *Bell*, 441 U.S. at 538). "If the action is 'arbitrary or purposeless[,] a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.' " *Id.* (quoting *Bell*, 441 U.S. at 539).

[33] *See* Hubbard v. Taylor, 399 F.3d 150, 158 (3rd Cir. 2005) (holding punishment may not

simply for the purpose of punishment, the force is not sanctioned by the Constitution.[34]

In addition to cases involving pretrial detainees, you have cases such as *Davis v. Rennie*[35] and *Andrews v. Neer*,[36] that involve involuntarily committed mental patients. These individuals are not convicted, they are not really even pretrial detainees, but are in the custody of the state because they were involuntarily committed. Both the First and the Eighth Circuits apply the objective reasonableness test to the use of force against involuntarily committed persons.[37]

C. The Twilight Zone

In your practice, you may confront a set of facts that falls into what courts often refer to as the "twilight zone."[38] Such cases involve conduct that occurs in the time between when the arrest is made and pretrial detention begins.[39] This zone might include, for example, the period after an individual who has been arrested is placed in the back of a squad car but before arriving at the stationhouse, or the period during which an arrestee is at the stationhouse being processed or booked. Here, the courts must determine what standard applies—is the challenged conduct committed in the context

be inflicted upon detainee prior to a finding of guilt).

[34] *Id.*

[35] 264 F.3d 86 (1st Cir. 2001).

[36] 253 F.3d 1052 (8th Cir. 2001).

[37] *See Davis*, 264 F.3d at 101-02; *Andrews*, 253 F.3d at 1061.

[38] *See* Wilson v. Spain, 209 F.3d 713, 715 (8th Cir. 2000). *See also* Stephens v. Butler, 509 F. Supp. 2d 1098, 1108 (S.D. Ala. 2007).

[39] *See Stephens*, 509 F. Supp. 2d at 1108 ("[T]here is a practical gap, a 'legal twilight zone,' between the completion of the arrest as that term is commonly used and the beginning of pretrial detainment.").

of a seizure, and thus governed by the Fourth Amendment, or is the suspect now a detainee, and the conduct subject to Fourteenth Amendment standards?

Most circuits take the position that if the arrestee is still in the custody of the arresting officer—if the incident happened shortly after the arrest or even at the stationhouse during the booking or fingerprinting processes, the incident is still in the context of the Fourth Amendment and the objective reasonableness standard will therefore apply. [40] The Eleventh Circuit, however, appears to have conflicting cases on this question, illustrating the difficulties inherent in determining the correct standard.[41] In one instance, a person was in the back of a squad car after arrest, on the way to the stationhouse when force was used. The Eleventh Circuit analyzed the plaintiff's claim in terms of the Fourth Amendment.[42] In an earlier case, however, also involving a suspect subjected to force while being transported in the back of a police car following his arrest, the court invoked the Fourteenth Amendment substantive due process analysis.[43] The

[40] *See, e.g.*, Williams v. Rodriguez, 509 F.3d 392, 403 (7th Cir. 2007) (holding claims regarding conditions of confinement brought by pre-trial detainees are governed by Fourth Amendment until there has been judicial determination of probable cause); Bryant v. City of New York, 404 F.3d 128, 136 (2d Cir. 2005) ("[I]t is well established that the Fourth Amendment governs the procedures applied during some period following arrest."); Phelps v. Coy, 286 F.3d 295, 300 (6th Cir. 2002) (holding the Fourth Amendment applicable to claims of arrestee arising while in the custody of arresting officers); Fontana v. Haskin, 262 F.3d 871, 878, 879 (9th Cir. 2001); Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) ("We think the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer.").

[41] *See Stephens*, 509 F. Supp. 2d at 1109 (noting ambiguity within the circuit on the point "beyond which the Fourth Amendment ceases to apply"). *See also* Rosa v. City of Fort Myers, 2007 WL 3012650, at *12, *14 (M.D. Fla. Oct. 12, 2007).

[42] Vinyard v. Wilson, 311 F.3d 1340, 1347 (11th Cir. 2002).

[43] Cottrell v. Caldwell, 85 F.3d 1480, 1492 (11th Cir. 1996) (analyzing claim that arrestee was subject to excessive force in terms of the Fourteenth Amendment).

Eleventh Circuit has similarly applied different standards to excessive force claims based on conduct occurring during the fingerprinting and booking process.[44]

In many cases excessive force claims brought under the Fourth Amendment will be joined with a claim for failure to provide medical treatment. In other words, if the police use a Taser, or their firearms, or generally subject a person to force, the plaintiff will often claim not only that excessive force was used, but also that the police then failed to call for an ambulance or otherwise failed to properly provide for medical treatment. Most circuits treat these additional claims of failure to provide medical treatment as arising under the Fourteenth Amendment, applying a standard of subjective deliberate indifference akin to that applied with respect to convicted prisoners under the Eighth Amendment.[45]

However, in a relatively new development, there are now at least two circuits that have indicated the standard to apply in such situations is not the deliberate indifference standard. Decisions out of the Sixth and Seventh Circuits, *Sides v. City of Champaign*[46] and *Boone v. Spurgess*,[47] favor an objective reasonableness standard over

[44] *Compare* Redd v. Conway, 160 Fed. App'x 858, 861 (11th Cir. 2005) (applying Fourteenth Amendment substantive due process analysis to claims of excessive force during arrest and booking process) *and* Hicks v. Moore, 422 F.3d 1246 (11th Cir. 2005). In *Hicks*, the defendants did not argue otherwise, so the court assumed the plaintiff was still being "seized" during fingerprinting process. *Hicks*, 422 F.3d at 1254 n.7.

[45] *See, e.g.*, Barrie v. Grand County, 119 F.3d 862, 868-69 (10th Cir. 1997); Weyant v. Okst, 101 F.3d 845, 856 (2d Cir. 1996) ("[T]he official custodian of a pretrial detainee may be found liable for violating the detainee's due process rights if the official denied treatment needed to remedy a serious medical condition and did so because of his deliberate indifference to that need."); Manarite v. City of Springfield, 957 F.2d 953, 956 (1st Cir. 1992).

[46] 496 F.3d 820 (7th Cir. 2007).

[47] 385 F.3d 923 (6th Cir. 2004).

the deliberate indifference standard as more appropriate in claims of failure to attend to medical needs during the course of a Fourth Amendment seizure.

In *Sides*, the plaintiff, detained in a parking lot for public indecency, alleged the officers involved acted with deliberate indifference toward his complaints of heatstroke. The Seventh Circuit Court of Appeals, however, couched his claim in terms of the Fourth Amendment, finding it was a matter that arose in the course of the seizure and should therefore be governed by an objective reasonableness standard.[48] The Sixth Circuit concluded essentially the same thing in *Boone*, although it reserved decision on the matter because the plaintiff's claim failed under both the objective reasonableness and deliberate indifference standards.[49]

D. Accidental or Unintentional Termination of Movement

The last category in use-of-force jurisprudence involves claims brought by individuals who were neither in custody nor seized, as was the case in *County of Sacramento v. Lewis*.[50] These types of claims frequently arise in the high-speed pursuit context, where the suspect or police run into an innocent person. These incidents are not "seizures" because they are not a termination of movement by means intentionally applied.[51] Instead, they involve acciden-

[48] *Sides*, 496 F.3d at 827-28.

[49] *See Boone*, 385 F.3d at 934 ("[T]here seems to be no logical distinction between excessive force claims and denial of medical care claims when determining the applicability of the Fourth Amendment.").

[50] 523 U.S. 833 (1998).

[51] *Lewis*, 523 U.S. at 843-44.

tal or unintentional termination of movement.

Lewis involved a police chase of two people on a motorcycle. The driver of the motorcycle tried to maneuver around a corner, but did not quite make it. The passenger flew off and was killed when he was struck by the pursuing officer's car.[52] The officer in *Lewis* did not intend to terminate that passenger's movement by running him over. As such, this was not a seizure—the Fourth Amendment objective reasonableness standard does not apply.[53]

Instead of a Fourth Amendment claim, there is a substantive due process claim that might be asserted under the Fourteenth Amendment, but the level of culpability that must be demonstrated in the context of a rapidly evolving emergency situation is a very high one. To succeed on such a claim, a plaintiff must demonstrate conduct by the officer that "shocks the conscience" of the court.[54] In *Lewis*, this would essentially require a showing that the officer acted for the sole purpose of harming the plaintiff, with no legitimate law enforcement purpose at all.[55]

Most of the case law after *Lewis* demonstrates that, where there is an emergency situation, conduct is very unlikely to rise to the level of "conscience shocking."[56] This is the case in any kind of emergency response, even if it is not a high-speed pursuit, where of-

[52] *Id.* at 837.

[53] *Id.* at 843-44.

[54] *See id.* at 846-47.

[55] *See id.* at 845-46.

[56] *See, e.g.*, Bingue v. Prunchak, 512 F.3d 1169, 1177 (9th Cir. 2008) ("[T]he *Lewis* standard of 'intent to harm' applies to all high-speed chases."); Meals v. City of Memphis, 493 F.3d 720, 730 (6th Cir. 2007) (finding no evidence that police officer intended to harm person being pursued or innocent bystanders); Dillon v. Brown County, 380 F.3d 360, 364 (8th Cir. 2004) (holding that the "intent to harm" standard is not restricted to police chases).

ficers do not have much time to deliberate. However, in certain situations that do not involve a seizure and where there is time to deliberate, conduct of a less-culpable nature may be sufficient. In these circumstances, deliberate indifference might be sufficient to shock the conscience.[57] Deliberate indifference is clearly the standard any time someone who is in custody brings a substantive due process claim.[58]

With so many different standards applying varying degrees of deference, it is very important for litigants in claims involving use of force to determine early on into which category their claims fall. The best category for plaintiffs is always going to be the Fourth Amendment objective reasonableness standard. Defendants will want to have the conscience-shocking standard applied, requiring plaintiffs to demonstrate purpose to harm or at least subjective deliberate indifference.

II. ANALYZING EXCESSIVE FORCE CASES AND IDENTIFYING SPECIFIC AREAS OF RISK

MR. RYAN: There are many recent developments in the area

[57] *See, e.g.*, McQueen v. Beecher Cmty. Schools, 433 F.3d 460, 469 (6th Cir. 2006) (deliberate indifference appropriate standard where teacher had opportunity to reflect and to deliberate before leaving several children unsupervised in the classroom); Bukowski v. City of Akron, 326 F.3d 702, 710 (6th Cir. 2003) ("[D]eliberate-indifference standard is appropriate in settings [that] provide the opportunity for reflection and unhurried judgments, but . . . a higher bar may be necessary when opportunities for reasoned deliberation are not present." (internal quotations omitted)); Butera v. District of Columbia, 235 F.3d 637, 652 (D.C. Cir. 2001) (applying deliberate indifference standard to claim stemming from planned undercover operation); Brown v. Nationsbank Corp., 188 F.3d 579, 592 (5th Cir. 1999) (applying deliberate indifference standard to claim arising from planned sting operation). The Third Circuit has articulated a third standard, somewhere in between "intent to harm" and deliberate indifference. *See, e.g.*, Phillips v. County of Allegheny, No. 062869, 2008 WL 305025, at *13 (3d Cir. Feb. 8, 2008) ("[U]nder *Sanford* [*v. Stiles*, 456 F.3d 298 (3d Cir. 2006)], three possible standards can be used to determine whether state action shocked the conscience: (1) deliberate indifference; (2) gross negligence or arbitrariness that indeed shocks the conscience; or (3) intent to cause harm.").

[58] *Lewis*, 523 U.S. at 851.

of excessive force from the perspective of law enforcement and courts alike.

A. The *Graham* Three-Part Test

One of the trends we see is the three-part test under *Graham v. Connor*,[59] which is what courts use to determine whether an officer's use of force is reasonable. We apply this *Graham* standard in law enforcement training. In using "*Graham*, many police agencies around the country are doing away with the term "use of force" completely and are adopting a "response to resistance" policy and "response to resistance" training.

The theory behind the response to resistance concept is that, in most cases a uniformed officer approaches someone, exercises legal authority, establishes command presence, gives a verbal command, and the person complies, then the interaction ends. The person is handcuffed and that is the end of it. However, what you see in many of these cases is an officer approaches someone, the person decides not to comply, and so the officer is forced to respond to the subject's resistance.

We can break down the *Graham* test simplistically: the worse a bad guy is, the more authority an officer has to use force under *Graham*. The more serious an offense is, the more force an officer may use.[60] The more of a physical threat the perpetrator poses, the

[59] 490 U.S. 386 (1989).

[60] *Graham*, 490 U.S. at 396 ("Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." (internal citation omitted)).

more force an officer may use.[61] Also, the more a perpetrator actively resists or attempts to evade arrest by flight, the more force an officer may use.

The *Graham* test, which is the foundation for all use of force decision-making, has not been drilled into law enforcement officers. Now, we advise police officers to think about the *Graham* test. I have conducted some agency audits, and I still see some agencies using the "malicious and sadistic" test,[62] not the *Graham* three-part test,[63] which is really what officers need to consider, particularly when they are arresting someone.

B. Use of Force Continuum

If you are presented with a use-of-force case and you look at policy and training issues, you will see that police departments all over the country have some kind of force continuum.[64] Some are shaped like a wheel called a "situational force model." The original ones were built more like a ladder.[65] Departments have moved away

[61] *Id.* ("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.").

[62] One of the factors a court examines in determining the constitutionality of a particular use of force is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

[63] *See* John J. Ryan, *Use of Force: Deadly/Non-Deadly*, 764 PRACTISING LAW INST. 239, 249 (2007) (summarizing that under *Graham*, a court examines three factors when determining if an officer's use of deadly force was reasonable: "(1) the severity of the offense suspect; (2) whether the suspect posed an immediate threat to the officer or others; and (3) whether the suspect was actively resisting or attempting to evade arrest by flight.").

[64] *See* Ryan P. Hatch, Note, *Coming Together to Resolve Police Misconduct: The Emergence of Mediation as a New Solution*, 21 OHIO ST. J. ON DISP. RESOL. 447, 478 (2006) ("[I]n training police officers, most police departments employ some type of "use of force continuum").

[65] The use of force continuum

> often takes the form of a pyramid or ladder[] that represents a "fluid and

from this because they say it creates officer misunderstanding.[66]

For example, if an officer were to pull up and see a bank robber pointing a gun at someone, does the officer have to establish command presence and begin giving verbal commands, trying soft empty-hand control first, then using chemical spray? No. In some cases, the officer will come in and it will be objectively reasonable to use the highest level of force right from the outset. To explain this to officers, we say: as the subject's resistance levels go up, as the seriousness of the crime goes up, as the active resistance goes up, so does the officer's ability to use force at a higher degree.

All of the model policies out there, the latest and greatest studies, are classifying the Taser, an electronic control device, with chemical sprays as a very low level use of force. The Police Executive Research Forum just published a study putting the Taser at that

> flexible police guide" for officers to use in the field when confronted with a situation requiring force. At the first, or lowest level of the typical use of force continuum is the mere presence of an officer, which includes body language, demeanor, and identification of authority. The second level of force involves verbal communication – giving a direct order, questioning, or persuasion – when the individual is argumentative or verbally resistant. The third level of force involves an officer using physical contact, or "soft-hands techniques," which includes directional contact or escorting an individual. In the fourth level of force, the police officer uses physical control by means of takedown maneuvers, use of pressure points, or other physical defensive tactics to gain compliance of a physically resistive individual. The fifth level of force is classified as serious physical control, whereby the use of impact or intermediate weapons, or both, focused blows or kicks, or chemical irritants are authorized. The sixth, and final, level on the use of force continuum is the use of deadly force which encompasses "any force that is readily capable of causing death or serious bodily injury."

Id. at 478-79.

[66] *See generally* Paul W. Brown, *The Continuum of Force in Community Supervision*, 58 FED. PROBATION 31, 32 (1994) (stating that a use of force continuum is "flexible and relative. Such flexibility may seem confusing in something that is supposed to serve the officer as a guide to the proper use of force.").

low level use of force.[67] This becomes an issue to consider in use-of-force cases.

C. Handcuffing

Next, we will look at cases involving a low level use of force, such as a handcuffing case where there is an allegation the handcuffs were too tight. Oftentimes, these cases have the potential for big money outcomes.

In *Gousse v. City of Los Angeles*,[68] the plaintiff, Dr. Gousse, a neurosurgeon, flew to California from Miami, landed at LAX, and rented a car at Budget Rental Car. He was driving slightly slower than the traffic, which drew the attention of a pair of police officers.[69] The officers, used their mobile data terminal to run the license plate of the car, which came back as stolen. Unbeknownst to the doctor and the officers, Budget Rental Car reported the car stolen when it was returned late.[70]

These officers performed what they call a high-risk traffic stop. They screamed at Gousse, "Get out of the car!" and he screamed back at them, "What have I done?" and the temperatures flared up and the officers handcuffed him tightly. Gousse tried to tell

[67] *See* James M. Cronin & Joshua A. Ederheimer, *Conducted Energy Devices: Development of Standards for Consistency and Guidance*, U.S. DEP'T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS. & POLICE EXECUT. RESEARCH FORUM (2006), *available at* http://www.policeforum.org/upload/CED-Guidelines_414547688_2152007092436.pdf. *See also* Shaun H. Kedir, Note, *Stunning Trends in Shocking Crimes: A Comprehensive Analysis of Taser Weapons*, 20 J.L. & HEALTH 357, 364 (2007) ("Overall, the majority of law enforcement agencies in the United States place Tasers in the mid-range of the use-of-force continuum scale.").

[68] No. B174896, 2007 WL 1056706, at *1 (Cal. Ct. App. Apr. 10, 2007).

[69] *Id.* at *2.

[70] *Id.* at *2, 24.

them there is rental car paperwork in the glove box, but they did not listen. The officers called Budget Rental's 1-800 number in the middle of the night, and tried to find out the car's status. Dr. Gousse was handcuffed and brought to the police station for a period of time.

Eventually, he returns to Florida, has some tests run on his arm, and discovers that he has permanent nerve damage running down his arm to the extent that the doctor who examined him reports him to Medical Licensing Board. He cannot practice unsupervised neurosurgery ever again.[71] What is this one handcuffing case worth? The first time around, the jury came back with a verdict of $33 million; $18 million against Budget, and $15 million against the police agency. The judge vacated the jury's ruling on damages and determined that the jury's award to the Gousses "shock[ed] the conscience."[72] I guess Dr. Gousse is more of a lecturer than he is a surgeon.

How are police officers trained in this area? One of the things they are taught is, as soon as they get control of a situation and handcuff someone, the ratchet mechanism that controls how handcuffs lock will continually get tighter and tighter. If you lean on your handcuffs while sitting in the back seat of a police car, they are going to tighten up on you. Handcuffs work on a ratchet, and they only go in one direction—tighter.[73] However, every single set of handcuffs that is made has a little pinhole in the side. If you ever looked at a

[71] *Id.* at *3-5, 14.

[72] *Gousse*, 2007 WL 1056706 at *11.

[73] *See* U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE STANDARD FOR METALLIC HANDCUFFS §5.6.2 (1982), *available at* http://www.eeel.nist.gov/oles/Publications/NIJ%20Standard%200307-01.pdf.

handcuff key, there is a little needle on one end to double lock the handcuffs so as to prevent them from ratcheting tighter. Officers all over the country are trained to check for proper fit and double lock the handcuffs as soon as the situation is controlled.[74] If they are not doing that, police departments run into these potential problems where the handcuffs tighten up.

I come from Providence, Rhode Island, a small city geographically, where you could transport somebody to the police station in three or four minutes from anywhere in the city. In rural Nevada, you may have to transport someone in the back of a police car for thirty to forty minutes while the handcuffs tighten up and that can be far more serious.

D. Vulnerable Persons

Disabled persons present another issue that comes up a lot in the low levels of force context. This includes persons with a legal disability, but even someone who has some kind of injury. Try to put your hands together behind your back and keep them there for a long period of time and see how you feel.[75]

[74] Ryan, *supra* note 63, at 252. Entities that have sound policy, which is enforced, and proper training with respect to handcuffs are nearly impenetrable from a loss based on a constitutional violation through handcuffing. *Id.*

[75] *Compare* Kopec v. Tate, 361 F.3d 772, 774, 777-78 (3d Cir. 2004) (finding excessive use of force where plaintiff-detainee was handcuffed too tightly behind his back for ten minutes, causing permanent nerve damage), *with* Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002). In *Burchett*, officers detained an arrestee for three hours in a hot car with rolled-up windows. Despite the handcuffs being so tight that the detainee's hands became numb and blue, the court found that the force was not excessive because an officer removed the handcuffs immediately upon the detainee's request. *Burchett*, 310 F.3d at 944-45. *See also* Robles v. Prince George's County, 302 F.3d 262, 269-70 (4th Cir. 2002). The *Robles* court found a violation of due process where officers tied the detainee to a pole in a dark parking lot with three pairs of handcuffs, neither enhancing public nor officer safety, nor helping to

One notable case comes out of Massachusetts: *Aceto v. Kachajian*.[76] In *Aceto*, an officer goes to arrest a woman with a minor warrant and she says, "Look, I hurt my shoulder playing hockey. I am seeing a doctor, there is no way I can get my hands behind my back," and the arresting officer uses something we hope we see in most cases, something called common sense. The arresting officers handcuffs this woman in the front and brings her to the station.[77]

However, this does not always happen, as evidenced in this case. Different officers transported Aceto from the station to the jail. A new officer then says, "Ma'am, put your hands behind your back." She said, "I told the other officer I got this shoulder injury from playing hockey. He handcuffed me in the front. Do you think you can do the same? In fact, it is daytime. My office is open. You can even call my doctor." The officer then responds, "Ma'am, department policy and training, all persons shall be handcuffed behind their back." So he handcuffs her behind the back and causes further injury.[78] This is typical of the types of cases we see with people who are disabled or injured.

We also see an awful lot of elderly cases in our business. It is amazing to me what can occur in these types of cases. I just read a case in the newspaper about a woman from Utah, seventy years old, who let her lawn turn brown. There was a local ordinance that said you have to keep your lawn green. The woman let it turn brown and

secure the detainee's presence at trial.

[76] 240 F. Supp. 2d 121 (D. Mass. 2003).

[77] *Aceto*, 240 F. Supp. at 123.

[78] *Id.*

this police officer knocked her on the front door. The woman did not want to give her name for the ticket because not only could she not afford the water, but she could not afford the ticket either. The officer ended up tossing this seventy-year-old woman down on the ground on her front stairs while trying to handcuff her.[79] We see a lot of these types of cases with the elderly.

There are some times when law enforcement does have to arrest an elderly person. One of the examples I use is under our mandatory arrest law for domestic violence.[80] What happens is that an officer will say, "Ma'am," or "Sir, turn around and put your hands behind your back." "Officer, I am eighty-six. Is that really necessary?" Then the officer responds, "Yes sir, sorry, department policy and training." Or the officer says, "Ma'am, you got to move your hands a little closer together because the chain is only this long." And the person will respond, "That is the best I can do. I am eighty-six." Then follows, "Let me help." I call these the wishbone cases because of their brittle bones. [81]

In sum, what you are looking for if you get one of these cases is to see if there is any discretion built into the department and policy and training on handcuffing. There should be some discretion built in

[79] Ted McDonough, *Hits & Misses*, SALT LAKE CITY WEEKLY, July 12, 2007, at 8.

[80] *See* Bonnie Brandl & Tess Meuer, *Domestic Abuse in Later Life*, 8 ELDER L.J. 297, 314 (2000) stating:

> Most states have either a domestic violence mandatory arrest or pro-arrest law. An arrest is mandated if specific behavior occurs between persons in a certain relationship as defined by law. Some states have a pro-arrest law stating that the officer may arrest if certain conditions exist, but does not mandate an arrest in all circumstances.

[81] *See, e.g.*, Palmer v. Sanderson, 9 F.3d 1433, 1434-36 (9th Cir. 1993) (holding as excessive the handcuffing of a sixty-seven-year-old man tightly enough to cause pain and bruising lasting for several weeks).

both for people with disabilities and those with vulnerabilities like the elderly.[82]

III. PAIN COMPLIANCE AND PEPPER SPRAY

Pain compliance is another area where we see a lot of police officer training. For example, many police officers are trained to not use pepper spray as a pain-compliance technique. Law enforcement recognizing that even if the person complies, once you use pepper spray, you cannot stop the pain, so it is not a true pain-compliance technique. We have seen some courts talk about this. In fact, *Headwaters Forest Defense v. County of Humboldt*[83] addressed this very issue. This was the pepper spray case where the police officers applied the pepper spray directly to the eyeballs of the protestors with Q-tips.[84]

Pain compliance is a very specific type of police tactic. For example, and I hope you will appreciate the humor in this, we are trained in these pressure point control tactics. The tactic I like best is, if you grab somebody real good under the nose and put some pressure there, they will do about anything you ask them to do. I tell officers all over the country, "It works great on my fifteen and seventeen-year-old sons." Then I tell them, "As soon as I let go of their noses, what happens to the pain? It's gone. But when I spray those two kids with pepper spray . . . ." Do not try that one in front of a jury—it

[82] "[O]fficers should be given some discretion on handcuffing, particularly when officers are dealing with vulnerable classes such as and the elderly, those with disabilities and those arrestees who indicate that they have a pre-existing injury." Ryan, *supra* note 63, at 252.

[83] 276 F.3d 1125, 1130 (9th Cir. 2002).

[84] *Id.* at 1128-29.

does not work very well.

Both plaintiffs' and defendants' attorneys should be aware of what is going on with pepper spray because you may get some of these types of cases.[85] We are starting to see some cases with what law enforcement and courts are referring to the "hydraulic needle effect."[86] Many officers have not been advised against getting right up in somebody's eye and hitting them with pepper spray. When pepper spray comes out under pressure and you are too close to somebody's eye, it rips through an eyeball like a needle. It is not the pepper spray that causes the damage. The pepper spray is propelled out of its canister under pressure and comes out in a stream.[87] More agencies use the product commonly known as the stream, as opposed to the fog, because it carries for a distance.

A. Best Practices

First you want to try to get a can of the spray and see what the manufacturer says as far as distance. I saw a manufacturer the other day with a new label that said, "Do not spray from closer than 15 feet." This is a total waste of time from those kinds of distances, but that is how pepper spray manufacturers are trying to protect them-

[85] *See, e.g.*, Martinez v. New Mexico Dep't of Pub. Safety, 47 Fed. App'x. 513, 515, 517 (10th Cir. 2002) (granting qualified immunity to an officer who used pepper spray to subdue a recalcitrant arrestee). *See also* Vinyard v. Wilson, 311 F.3d 1340, 1343-44, 1348-49 (11th Cir. 2002) (holding an officer's repeated use of pepper spray to the detainee's face as excessive).

[86] *See* Ryan, *supra* note 63, at 267 ("The hydraulic needle effect occurs when a law enforcement officer holds the can of pepper-spray too close to someone's eyes. . . . [S]erious eye injury may occur if the can is held close to the eye (generally under three feet) and the stream hits the eye directly." *Id.*

[87] *See generally* Dwayne Orrick, *Practical Pepper Spray Training*, LAW & ORDER, Apr. 2004, at 100.

selves from liability.

B. Over-spraying

Another common pepper spray issue is "over-spraying," where pepper spray is used in closed ventilation systems, and crowded, closed areas.[88] An officer from South Carolina told me how she was guarding a prisoner at the local hospital emergency room and the prisoner started acting up. The prisoner was not cuffed because doctors were trying to treat him, so she sprayed the prisoner with pepper spray. They had to evacuate a whole wing of the hospital. The chemicals can get sucked into a ventilation system and people throughout a building could feel it. Again, this is not a good tool to use in certain circumstances.

It is also becoming more prevalent for agencies to carry both pepper spray and Tasers. These agencies have been advised that the two can co-exist, but must be used with precaution.[89] Many types of pepper spray are propelled by alcohol, and Tasers, when used, create a spark. You can figure out the result: combustion. There have been times when somebody has been sprayed with pepper spray with no effect, so the officers use their Tasers. The result can be frightening and there are examples of this happening, so agencies must be very careful to ensure they do not have combustible pepper spray.

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[88] Ryan, *supra* note 63, at 267 ("This can be a particular problem in places like hospitals and schools. Additionally, if dealing with a crowded enclosed area, persons who are unfamiliar with the effects of pepper-spray may become panicked when they began having difficulty breathing.").

[89] *See, e.g.*, Gillson v. City of Sparks, No. 03:06-CV-00325-LRH-RAM, 2007 WL 839252, at *1 (D. Nev. Mar. 19, 2007). An arrestee died after allegedly being sprayed with pepper spray and stunned by a Taser gun ten to fifteen times. *Id.*

IV. TASERS

The Taser is a useful law enforcement tool, but one which, if not used correctly, can cause serious injury. Misuse is one of the issues that arises with Tasers. *Torres v. City of Madera*[90] is, by most accounts, the worst of these cases.

After arriving in response to a "loud party," police arrested twenty-two-year-old Everardo Torres after he refused to give his name, because, he claimed, it was not his house. The officers placed him in the back seat of their car and although Torres complained the handcuffs were too tight, none of the officers checked on the fit or double locked him.[91] The officers probably did not have a good reason to arrest him, but did so anyway, and left him in the car for a long period of time. At some point, Torres began kicking the door and window of the police car.[92] As the watch commander at the scene came around the car and opened the squad car she reached for her Taser and told the other officers that she was going to use it to get the young man to stop.[93]

Contrary to the advice of Taser International, the Madera Police Department made a conscious decision that their officers were going to wear the Taser on their strong side, the same side the officers carried their gun. The officer reached down, but mistakenly

[90] No. CIVFF02-6385AWILJO, CV F 03-5999, 2005 WL 1683736, at *1 (E.D. Cal. July 11, 2005).

[91] Torres v. City of Madera, Nos. Civ F 02-6385 AWI LJO, CV F 03-5999, 2006 WL 3257491, at *1 (E.D. Cal. Nov. 9, 2006).

[92] *Torres*, 2005 WL 1683736, at *24.

[93] *Id.*

grabbed her gun, and shot and killed Torres.[94] Surprisingly, there are many similar cases around the country even though officers know the difference between the Taser and their guns.[95] In fact, the same thing happened a year earlier in Sacramento, California and seven weeks later in Rochester, Minnesota.[96]

Taser International explains that officers have muscle memory control, and reach down to grab the first thing they can get their hands on.[97] Surprisingly, there are still many agencies whose officers carry the Taser on their strong side. From a police policy and training standpoint, or law enforcement training policy, there is no excuse for that. Again, many of the situations occur in the heat of the moment, and this "muscle memory control" triggers quick deployment. As a result, there have been a number of these cases.

The Taser is used two different types of ways. The first, and probably most efficient way from the use-of-force standpoint, is that it shoots out two probes which are connected by a wire.[98] The wire delivers 50,000 volts to the body, which sounds like a lot, but the amperage is very low. When the two probes hit the body, they create a neuro-muscular disruption, causing muscles to contract.[99] Essen-

[94] *Id.*

[95] *See, e.g.*, Henry v. Purnell, 501 F.3d 374, 376 (4th Cir. 2007) ("While attempting to use a Taser . . . [the officer] mistakenly drew his firearm.").

[96] *Torres*, 2005 WL 1683736, at *1; Atak v. Siem, No. Civ. 04-2720DSDSRN, 2005 WL 2105545, at *1 (D. Minn. Aug. 31, 2005).

[97] Press Release, Taser Int'l, Taser Tech. – Changing the World and Protecting Lives (2007), *available at* http://taser.com/company/pressroom/Documents/TASER%20Intl%20Press%20Kit%2012%2019%2007.pdf.

[98] *Id.* The maximum distance a Taser reaches when shot ranges from fifteen to thirty-five feet, at more than 160 feet per second. *Id.*

[99] *Id.*

tially, the target drops from where they are standing and is rendered helpless. The original thought was the Taser worked all the time as long as both probes were attached to the body, but many officers have reported instances where the Taser did not work well at all. Other officers report that they used the Taser, even deploying it a number of different times, but the person was able to continue the activity the officer was trying to stop.[100] There may be defects with the Taser itself, but at this point there is not enough research to determine exactly what happens in these instances.

There have also been reports across the country that Taser use has resulted in a number of deaths. According to Amnesty International's latest report, there have been more than 250 police events where a Taser was used and someone died within twenty-four hours.[101] In twelve of those cases, the medical examiners cited the Taser as a contributing factor, but not the actual cause of death.[102] In one instance, however, a medical examiner in Cook County, Illinois did find a Taser to be the cause of death when it was deployed for fifty-seven seconds straight—well beyond the recommended use period.[103] However, the medical examiner later retracted that finding.

[100] *See* Staff Report, *Teen is Shot by Police Officers*, KY. POST, Dec. 3, 2007, at A2 (reporting the shooting of a teen because of the mechanical failure of a Taser); Pat Schneider, *$1.5M Claim Filed in Killing by Cop*, CAPITAL TIMES (Madison, Wis.), Aug. 11, 2006, at B3 (reporting a man fatally was shot after Taser failed); Gary Haber & Chris Echegaray, *Police Shooting Leaves Man Dead*, TAMPA TRIB., Feb. 26, 2005, at 1 (reporting a suspect was shot and killed when a Taser failed to subdue).

[101] Press Release, Amnesty Int'l, Statement to the U.S. Justice Dep't Inquiry Into Deaths in Custody (Sept. 27, 2007), *available at* http://www.amnesty.org (search "U.S. Department of Justice").

[102] *Id.*

[103] David Heinzmann & John Chase, *Medical Examiner Ties Death to Officer's Taser*, CHI. TRIB., July 30, 2005, at Metro 19.

Currently, there are many similar cases coming through the system, including two in Gwinnett County Georgia and one in both LaGrange, Georgia and Florida, but it will be difficult for the plaintiffs to prevail. The National Institute of Justice recently conducted a study of more than 1,000 Taser uses in 170 departments.[104] The results indicate the Taser is a safe and effective tool in most cases.[105] Obviously, this does not mean the current cases may be decided otherwise, but as of right now the opposition to the Taser does not have a high degree of support. Plus, in many of these cases we have seen Taser join forces with the police agencies and have brought an unbelievable amount of resources to the table to fight the claims.

The second way the Taser is used is what they call the "push stun mode" or "drive stun mode." This method is used as a pain compliance technique, as opposed to causing muscle contraction. With this technique, the officer takes the darts off of the Taser so the probes are not shot into to the body. Instead, the officer holds the Taser without the probes right against the person's skin and applies pressure, which sends an electrical impulse through the body, causing pain. This method is more likely to bruise the body than the actual probes, usually because the person tends to move around when there is a burning sensation. A bruise consisting of double red dots is a good indication that the Taser was used in "push stun mode" as opposed to probe mode.

[104] Press Release, Wake Forest Univ. Baptist Med. Ctr., Nationwide Independent Taser Study Results Suggest Devices are Safe (Oct. 8, 2007), a*vailable at* http://www1.wfubmc.edu/news/NewsArticle.htm?/Articleid=2165.

[105] *Id.*

A. Secondary Impact Claims

Tasers also increasingly present "secondary impact claims."[106] Often, particularly when a Taser is used in probe mode, the person's muscles contract, causing that person to collapse.[107]

There was one training method which allowed use of the Taser in all instances when the suspect was running away. This causes a major problem because there is a difference between someone trying to run away on a football field and someone running down train tracks. The person running on a football field, when shot from behind, lands on soft grass. But, what happens when that same runner is shot from behind on train tracks? That person will collapse and slam face first into the tracks, and that may cause some dramatic injury. This must be taken into account.

Apparently, agencies are becoming more cognizant of the injuries that "secondary impact" can cause. For instance, some agencies are now instructing officers to consider the seriousness of the offense in conjunction with the need to stop flight before deploying the Taser.[108] In an interesting case from Washington, an agency was called in response to a suicidal man threatening to jump off a bridge. One of the officers decided it might be a good idea to try to "Tase" the man to get him off. Apparently, the Taser failed and the man leapt to his death.[109]

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[106] *See* Ryan, *supra* note 63, at 258.

[107] *See, e.g.*, Parker v. City of South Portland, No. 06-129-P-S, 2007 WL 1468658, at *3. (D. Me. May 18, 2007).

[108] *See e.g.*, Amnesty Int'l, *supra* note 101 (noting the importance of balancing the dangers of the use of force against the threat the situation poses).

[109] *See* Nick Eaton, *Police Weighed Jumper's Past: Levy Known for Not Sticking to*

Unfortunately, some officers will use the Taser, like any other new law enforcement tool, more often than necessary. One training video shows three officers arresting a pretty compliant suspect. While one officer is trying to handcuff the suspect, the other two had their Taser's out. This clearly demonstrates that the officers think of this as a new toy and are really itching to try it out, because a situation like that definitely did not require them to have their Tasers' drawn. Another issue is the use of multiple deployments. All of the training and studies available discourage multiple Tasers applied to a single suspect, and repeated application of the electric current.[110] The Police Executive Research Forum's ("PERF"), most recent materials state that only one officer should deploy and activate at a time, but there are instances where officers activate their Tasers longer than they are trained.[111]

B. Abuse of the Taser by Officers

Another set of cases deals with the abuse of the Taser by officers. These cases focus on the *Graham* three-part test.[112] The *DeSalvo*[113] case out of Collinsville, Illinois, was on summary judgment for qualified immunity where an officer was accused of abusing an

Agreements, SPOKESMAN-REV. (Spokane, Wash.), Aug. 4, 2007, at 1B. *But see* Steve Lyttle, *Taser Stops Possible Suicide*, CHARLOTTE OBSERVER, Aug. 16, 2006 (page unavailable).

[110] *See, e.g.*, Training Guidelines, PERF Center on Force & Accountability, PERF Conducted Energy Device Policy and Training Guidelines for Consideration (Oct. 25, 2005), http://policeforum.org (follow "Free Doc Library" hyperlink; then follow "Use of Force" hyperlink; then follow "PERF CED Guidelines" hyperlink).

[111] *See id.*

[112] *See Graham*, 490 U.S. at 396. *See also* Ryan, *supra* note 63, at 244.

[113] DeSalvo v. City of Collinsville, No. 04-CV-0718-MJR, 2005 WL 2487829, at *1 (S.D. Ill. Oct. 7, 2005).

arrestee.[114] An officer was called to disperse a crowd and became upset when one man did not move fast enough.[115] While the officer grabbed the man by his arm, another younger man told the officer to leave the older man alone because the older man was doing nothing wrong.[116] The officer responded by handcuffing the younger man and ordered him into the back of his squad car.[117] When the officer was asked several times for the reason for the arrest, he became angered and held the probes of his Taser over the man's head for spark testing; six seconds later the officer put the probes on the man's neck and let him have it in the push-stun mode.[118] The young man continued to ask for the reason for his arrest and refused to get in the police car so the officer allegedly put the probes on his forehead this time and let him have it again.[119] The facts of these cases are amazing, but they are by no means isolated incidents.

I was in Collinsville doing a training exercise and the officer involved in *DeSalvo* approached me because he heard how I explained the case. He wanted to stress that the jury found in his favor after fifteen minutes of deliberation, despite being denied summary judgment and qualified immunity. The trial court, he explained, viewed the video of the incident and found he had not put the probes against the young man's forehead. More importantly, whether right or wrong, he was actually trained to put the probe against the neck in

[114] *Id.* at *3.
[115] *Id.* at *1.
[116] *Id.*
[117] *Id.* at *1-2.
[118] *DeSalvo*, 2005 WL 2487829 at *2.
[119] *Id.* Four other officers witnessesd the encounter and later testified that DeSalvo showed no signs of aggression or resistance. *Id.*

the "push stun mode." Apparently, this is the reason the jury came back in his favor in such a short period of time. Nonetheless, if the situation occurred the way in which the court looked at it on summary judgment, it certainly was an abuse which could never be justified.

There is an interesting video out of an Eleventh Circuit case's court file, *Draper v. Reynolds*,[120] which is shown to police officers all around the country. An officer was alone on a highway with a truck driver he pulled over. The driver failed to comply with the officer's orders to hand him his papers five times.[121] During the encounter, the driver kept walking away and coming back to the officer in a threatening and menacing manner, raising his hands as he did so.[122] After the officer's fifth request, he fired his Taser at the man who immediately collapsed.[123] Backup arrived and the man was handcuffed by another officer, who placed his knee onto the man's back further forcing the probe into his chest.[124]

The video is shown to police officers all around the country and the responses are always the same: "How much did they [the police department] pay," and "Is that officer still working there?" The answer to the first question is the police department did not pay. The Eleventh Circuit dismissed the case because the officer was alone on the highway in a tense and uncertain situation.[125] Secondly, the offi-

[120] 369 F.3d 1270 (11th Cir. 2004).

[121] The items requested were the driver's license, insurance, bill of lading, and log book. *Id.* at 1273.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 1273-74 n.5.

[125] *Draper*, 369 F.3d at 1278.

cer is still working. Most officers who view the Draper video are surprised by the Eleventh Circuit's decision, however it seems that the Eleventh Circuit views the Taser as a low-level use of force and upon viewing the tape observed a person who was non-compliant with the command presence of an officer. Other circuits would not necessarily agree.

V. CONCLUSION

Use of force is one of the high-liability areas in law enforcement. It requires continuous training and review. Officers cannot simply be trained on skill and tactics, but must also be trained on how to make proper decisions. *Graham* provides the road map for these decisions and should not be overlooked.