How Much Force Is Acceptable?

(How much force may a law enforcement officer use on a person?)

by Michael A. Brave

The Most Simplistic Answer:

"A law enforcement officer may use that amount of force upon a person that the law allows. A law enforcement officer may not use more force upon a person than the law allows."

Accurately assessing how much force our legal system allows an officer to use is a more complicated question.

Law enforcement officers use force upon people for numerous reasons. Depending on the particular circumstances of an incident, an officer may use force to detain a person, to arrest a person, to prevent a person/detainee from escaping, for self-defense, for defense of others, for defense of property, to prevent a person from injuring himself, to prevent a person from destroying evidence, to quell a riot, etc. However, the essential basic purpose for an officer's use of force is to gain control of a person and to stop any threatening action by that person.

There are many (appropriate and inappropriate) "*standards*" currently existing in the law enforcement and criminal justice communities that profess to dictate how much force an officer may justifiably use. Because of all of these often conflicting standards, it may seem confusing to determine whether an officer's use of force in a particular incident is in fact "justified" or "acceptable."

To expand upon the simplistic definition, in order for a law enforcement officer's use of force, upon a person, to be acceptable the officer's force upon the person must:

1. Be acceptable under the United States Constitutional and Statutory law.

2. Be acceptable under any applicable state constitutional and statutory law if that state law is more restrictive than federal law.

3. Be acceptable under any applicable department policies, procedures, and training.

4. Be in compliance with applicable equipment manufacturers' guidelines.

United States Federal Constitutional Parameters of Law Enforcement Force

Basic U.S. Constitutional Use-of-Force Concepts:

To gain a greater understanding of U.S. Constitutional use-of-force standards, first some basic precepts:

1. An officer's use of force upon a person will be measured against the standards found in the 4th, 5th, 8th, and 14th Amendments to the U.S. Constitution. There are three (3) distinct standards that may apply to an officer's use of force upon a person. [(1) 8th Amendment – "cruel and unusual punishment" standard, (2) 5th/14th Amendment – "shock the conscience" standard, and (3) the 4th Amendment – "objective reasonableness" standard.]

2. The 8thAmendment standard (the officer may not use force that rises to the level of "cruel and unusual punishment") allows an officer to use more force than the 5th/14th Amendment standard (the officer's force must not "shock the conscience"). The 5th/14th Amendment standard allows an officer to use more force than the 4th Amendment standard (where the officer's force must be objective reasonable).

   This escalation in permissible force occurs as our legal system's checks and balances upon an officer's use of force increases. Meaning, there are far more legal checks and balances protecting a person who has gone all the way through the legal system, has received a fair trial, and has been convicted beyond a reasonable doubt, then on a person who has merely been detained by an officer for a brief investigation – where no one has checked, or provided oversight, of the officer's actions. Thus, the more checks and balances the more force an officer is allowed to use (within the specific standards).

2. The U.S. Constitutional protections against excessive force[1] are intended to protect the force recipient against the misuse of power by the officer. "[T]he Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful conduct."[2]

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1. "Excessive force" is defined (herein) as any force that goes beyond that amount of force that the law allows.

2. Brower v. County of Inyo, et al, 489 U.S. 593, 596, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989); see also, Milstead v. Kibler, 243 F.3d 157 (4th Cir. 2001).

3. "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[3]

4. The reasonableness or an officer's use of force is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[4]

Which U.S. Constitutional Standard Applies:

An officer's use of force upon a person will be measured against the standards found in the 4th, 5th, 8th, and 14th Amendments to the U.S. Constitution (please see attached time line and chart). One method of determining which Amendment applies to any use of force upon a person by a law enforcement officer is to answer the following questions (in order of sequence):

1. Is the person who the officer used force upon convicted[5] of a crime and incarcerated by the government at the time the force was used?

   If the answer to this question is "yes," then, the officer's use of force will (usually) be properly measured against the "cruel and unusual punishment" standard of the 8th Amendment to the U.S. Constitution[6].

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3. Graham v. Conner, 490 U.S. 386, 396, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989). Quoted in Saucier v. Katz, 531 U.S. 991, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

4. Graham, 490 U.S., at 396-97.

5. The critical event is "conviction," not "sentencing." The 8th Amendment standard begins to apply upon a person's "conviction," regardless as to whether the person has been "sentenced."

6. Remember, the first ten (10) amendments (the "Bill of Rights") to the U.S. Constitution directly ONLY apply to actions (and inactions) of federal government officers. However, the use-of-force standards found in the first ten amendments apply to non-federal (state, county, local, other) officers via the Incorporation Doctrine of the 14th Amendment to the U.S. Constitution. However, the "*standard*" is the same for both federal and non-federal officers.

   As an example: If a federal officer uses force in seizing a person, then that federal officer's force will be measured against the objective reasonableness standard of the 4th Amendment. Meaning, if the federal officer used excessive force while seizing the person, then the federal officer violated the person's 4th Amendment right to be free from unreasonable seizures.

   However, if a non-federal officer used excessive force while seizing a person, then the non-federal officer will have violated the person's 14th Amendment right, under the Due Process Clause. And, the directly applied 4th Amendment standard (federal officer), and the indirectly applied 4th Amendment standard (non-federal officer) applied to the officer via the Incorporation Doctrine of the 14th Amendment are identical standards of care — meaning, both officers are required to not use more force upon the person than is objectively reasonable. The final standard is the same, the

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If the answer to this question is “no,” then, go to the next question.

2. Is the person who the officer used force upon a pre-trial detainee?

   If the answer is “yes,” then, the officer’s use of force will (usually) be properly measured against the “shock the conscience” standard of the 5th, and/or 14th, Amendment to the U.S. Constitution.

   If the answer to this question is “no,” then, go to the next question.

3. Did the officer intentionally apply force to the person, or did the person submit to the officer’s authority? Or, has the officer’s force upon the person amounted to a “seizure” of that person – as that term is defined as a “seizure” under the 4th Amendment to the U.S. Constitution.[7]

   If the answer is “yes,” then, the officer’s use of force will be properly measured against the “objective reasonableness” standard of the 4th Amendment to the U.S. Constitution.

   If the answer is “no,” then, no seizure occurred, and the officer’s use of force will be properly measured against the “shock the conscience” standard of the 5th, and/or 14th, Amendment to the U.S. Constitution – this standard is identical to the standard that applies to pre-trial detainees.

   Thus, the questions are:

1. Is the person convicted and incarcerated?
2. Is the person a pre-trial detainee?
3. Is the person “seized” under the 4th Amendment?

Introduction to the U.S. Constitutional Standards:

Over the years the Federal Constitutional limits of a law enforcement officer's use of force have varied as courts' definitions have matured and become more detailed. As the law has developed, an officer's ability to use force has come under greater scrutiny. This enhanced scrutiny was (in part) caused by individuals having greater access to attorneys, the courts, and recovery under the various applicable Federal Civil Rights Acts, and by enhanced political pressures due to intense media coverage, special interest groups, and public disobedience in response to use-of-force incidents (riots).

6.(...continued)
Constitutional Amendment that is violated is different.

7. A “seizure” occurs when there is a “ ... governmental termination of freedom of movement through means intentionally applied.” Brower, 489 U.S. at 597, 109 S.Ct. at 1381.

Today's Federal Use-of-Force Standards:

For practical purposes, under the U.S. Constitution there are essentially two basic legal standards for judging an officer's use of force. The first (and most restrictive) standard of **"objective reasonableness"** only applies to the use of force upon a "seized free person[8]." The second (and more lenient) standard of **"shock the conscience"** (of the court) applies to "non-seized free persons," pre-trial detainees, and (a very closely related and similar standard applies to) people who are convicted and incarcerated. In other words the second standard applies to any use of force, by an officer, that is not directed at a "seized free person." I will not bore you with all of the underlying foundations for these two standards, but let's explore exactly what these standards mean.

Prelude to Using Force:

Before exploring the various aspects of the two standards we must first examine the underlying foundational requirements to an officer's use of force.

1. **An officer must have lawful authority.** There are usually many ways for an officer to gain authority. The foundations of authority are primarily found in state law. In the vast majority of use-of-force incidents an officer's authority does not come into question. However, there have been many cases where an officer "thought" that he had authority when in reality he did not and the resulting consequences were disastrous. Even when an officer does not have "lawful authority" he will still have the same right to act as a normal person. Meaning, an officer, even without authority, will still have the right to self-defense, defense of others, defense of property, etc., just as any other person. However, in some jurisdictions an officer acting as a normal person (without actual officer authority), may have a duty to retreat, may have a duty to refrain from initiating, or reinitiating, a confrontation, and the officer's availability of "citizen's arrest" authority may be substantially limited.

2. **An officer must have a lawful objective for taking action.** Any time an officer uses his governmental authority to bring a person under control the officer MUST have a "lawful objective" for taking the action.

    a. Lawful objectives may include: detention, frisk, arrest, involuntary mental commitment, self defense, defense of others, defense of property, preventing escape, quelling a riot, and others.

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8. A "free person" is defined herein as any person who is not convicted and incarcerated, nor is the person a pre-trial detainee, at the time of the officer's use of force. The term "person" is used, instead of "citizen," because the applicable use of force standards, and their enforcement counterparts, apply to all persons within the U.S. and its' territories, and not just to "citizens."

b. "Contempt of Cop" or a person's disrespectful attitude toward an officer is not a "lawful" reason for using force.[9]

3. **An officer need not retreat from a known threat.** The officer may "choose" to retreat in order to de-escalate a situation, to gain a better tactical advantage, or to wait for assistance/backup. However, the officer need not retreat simply because he is faced with a threat that will almost certainly require the officer to use force upon the threatening person.

The 4th Amendment's "Objective Reasonableness" Standard:

In 1989, the United States Supreme Court decided the case of Graham v. Conner. The Graham case made clear that the standard for an officer's use of force upon a "seized" -- "free person" was whether the officer's force was "objectively reasonable" under the Fourth Amendment (to the U.S. Constitution).

"Objectively Reasonable Force" - under the Fourth Amendment to the U.S. Constitution. The objective reasonableness standard applies when an officer "seizes" a "free person." This test does not apply if the person the officer is interacting with is an "unseized free person," a pretrial detainee, or an incarcerated person after conviction.

Under the objective reasonableness standard an officer may use that amount of force that is "objectively reasonable."[10] So what are the parameters of "objective reasonableness?"

1. **"Balancing Test"** - The 4th Amendment's "objective reasonableness" test is a balancing test between a person's right to privacy and physical integrity weighed against the government's legitimate interests in taking action against the person. Put another way, the more heinous the person's activities and/or threat level, the more force that an officer may justifiably use. As an example:

Officer's Objective Reasonable Seizure	***Level of Seizure/Search Against Person***
- Reasonable suspicion person related to crime	Terry Detention
- Reasonable suspicion of weapon/threat	Terry Frisk (limited search)
- Probable cause person committed crime	Arrest

9. "[T]he use of any force by officers simply because a suspect is argumentative, contentions or vituperative is not to be condoned." Bauer v. Norris, 713 F.2d 408, 412 (8th Cir. 1983), *quoting* Agee v. Hickman, 490 F.2d 210, 212 (8th Cir.) *cert. denied*, 417 U.S. 972 (1974).

10. " ... [T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application ..." Graham, 490 U.S., at 396, *citing* Bell v. Wolfish, 441 U.S. 520, at 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

2. **"Objective" v. "Subjective"** - "Subjective" refers to what the officer "believes" (or the officer's intent). "Objective" refers to what others would logically believe, or conclude. An officer's use of force will not be judged by what "HE" believes to be acceptable, rather the question is would a reasonably prudent and well trained officer believe that what the officer did was acceptable?

    a. **The Officer's INTENT is Irrelevant** - Since the standard is an "objective" one, the officer's "subjective" intent is irrelevant. In other words, the officer's underlying motivation is not relevant to the analysis. The question is whether the officer's use of force is OBJECTIVELY appropriate (not subjectively).

    b. Do not confuse what an officer "believes" with what an officer "knows." What an officer "knows" is critical in determining the appropriateness of an officer's force. What an officer "believes" (or intends) is not relevant.

        1) Example: An officer knows that the person confronting him is 6'5" tall, has just used PCP, is a martial arts expert, may have several concealed weapons, and has just brutally attacked another officer without provocation. All of these factors are "relevant" because they comprise what the officer "knows." The officer may be very angry with this man because the man has just attacked a fellow officer. This anger is "irrelevant" to the analysis because it is the officer's "subjective" intent, and NOT "objective" facts.

    c. "Reasonably prudent and well-trained officer" means that the officer MUST know the law - whether he does or not. It is assumed that a reasonably prudent and well-trained officer will know the acceptable, and unacceptable, limits of the law. So, if an officer unknowingly violates the legal limits of his authority, this use of force will be determined to be "unreasonable."

3. **Under the "Totality of the Circumstances"** - An officer's use of force will be judged upon the "totality of the circumstances" as known by the officer at the moment the force is used.

    a. Information learned AFTER the officer uses the force is irrelevant to assessing the appropriateness of the officer's use of force.

    b. Any background information that the officer knows may be included in the totality of the circumstances.

        1) Example: If an officer knows that a certain individual is known to be a physical threat to officers, and this same man is a martial arts expert, the officer can take this information into account when determining how much force he may use.

4. **NOT to be Judged in HINDSIGHT** - Officers must often make split-second judgments in tense, uncertain, and rapidly evolving situations. Is it fair to the officer, or appropriate, to judge an officer in the quiet sanctuary of a judge's courtroom? No.

    a. Example of this principle: In a use-of-force incident, an officer may have only seconds to make a life or death decision on how much force to use. Those criticizing the officer's use of force may have months, or even years, to criticize the officer's force decision. Also, the critics may have access to information and evidence that the officer did not know.

    b. Example: An officer is walking through a park late at night. In the dark shadows an officer sees a dark figure pointing a gun at the officer. The officer draws his gun and shoots, killing the dark attacker. In the incident aftermath, it is determined that the gun was a toy and the dark figure was 13 years old. While the incident had tragic consequences, the officer's use of force based upon the facts known to him at the moment of the shooting was appropriate.

    c. Reasonableness is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[11]

5. **Even Use of Force Without Injury Can Be "Excessive" Force** - The mere fact that a force recipient does not sustain a significant injury does not, by itself, defeat an excessive force claim.[12] A jury could properly find that an officer's use of pain compliance techniques before a suspect posed any immediate threat to the arresting officers was excessive force.[13]

6. **An Officer MAY NOT Assume the Negative (If Time and Circumstances Permit)** - An officer may not assume, and react upon, the negative about a person if the officer has the time and circumstances to do otherwise.

    a. Example: An officer is chasing a person with three (3) felony warrants.[14] If the officer does not know what the warrants are for, the officer may not use this information to justify the use of an escalated level of force. The warrants could be for felony bad checks or fraud (non-violence related crimes) - where this knowledge would not justify an escalated level of force. Or, the felonies may be for aggravated assault of an officer - where an escalated level of force would be

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11. Graham, 490 U.S., at 396-97.

12. Gray v. Spillman, 925 F.2d 90 (4th Cir. 1991)

13. Barlow v. Ground, 943 F.2d 1132 (9th Cir. 1991)

14. Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148, 115 S.Ct. 1097, 130 L.Ed.2d 1065 (1995)

justified. If the officer did not know what the warrants were for and then attempted to justify an escalation in force based upon the warrants, then the officer would be "assuming the negative." Thus, if the officer does NOT know what the warrants are for then the officer may not "assume the negative" (if time and circumstances permit) and the courts will not permit an officer's escalation in the use of force.

b. Example: Very late at night an officer is trying to awaken a man sitting on a park bench. The man bolts upward with what the officer reasonably perceives as a knife in his hand. The officer intentionally strikes the man on the head with his (the officer's) flashlight. Later, the officer learns that the knife was actually a large (dull, non-sharpened) shiny comb. Here, the officer "assumed the negative." But, the time and circumstances did not allow the officer to assume otherwise.

7. **An Officer's Use of Force Does NOT Have to be the "Least Intrusive" Option Available** - An officer does not have to use the absolute least amount of force available. The officer need only select a level of force that is within the RANGE of the "objectively reasonable" force options[15] available.

8. **An Officer's Use of Force Will Be Judged At the MOMENT The Force Is Used** - That which happens after an officer uses force is irrelevant in determining whether the officer's use of force was acceptable.[16]

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15. *See generally* Graham v. Conner, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983); Tauke v. Stine, 120 F.3d 1363 (8th Cir. 1997); Warren v. Las Vegas, 111 F.3d 139 (9th Cir. 1997); Elliott v. Leavitt, 99 F.3d 640 (4th Cir. 1996); Salim v. Proulx, 93 F.3d 86 (2nd Cir. 1996); Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995); Schultz v. Long, 44 F.3d 643 (8th Cir. 1995); Roy v. Lewiston, 42 F.3d 691 (1st Cir. 1994); Schultz v. Long, 44 F.3d 643 (8th Cir. 1995); Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994); Menuel v. City of Atlanta, 25 F.3d 990 (11th Cir. 1994); Bella v. Chamberlain, 24 F.3d 1251 (10 Cir. N.M. 1994); Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994); Scott v. Hendrich, 994 F.2d 1338 (9th Cir. 1992); Cole v. Bone, 993 F.2d 1328 (8th Cir. 1993); Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993); Collins v. Nagle, 892 F.2d 489 (6th Cir. 1989); Dyer v. Sheldon, 829 F.Supp. 1134 (D.Neb. 1993); and Powell v. Fournet, 846 F.Supp. 1443 (D.Colo. 1994).

16. *See generally* Napier v. Town of Windham, 187 F.3d 177 (1st Cir. 1999) - "Absent additional authority, we cannot agree that the [officer's] pre-confrontation actions should deprive their later conduct in response to Napier's action of its reasonableness;" Mettler v. Whitledge, 165 F.3d 1197 (8th Cir. 1999) - " ... no seizure occurred before the shooting began. That being so, we need not address whether the deputies' [prior] conduct constituted an unreasonable seizure;" Salim v. Proulx, 93 F.3d 86 (2nd Cir. 1996) - An officer's actions "leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force;" Roy v. Lewiston, 42 F.3d 691 (1st Cir. 1994) - Officers are not required to "keep their distance" in the face of a man armed with knives; Menuel v. City of Atlanta, 25 F.3d 990 (11th Cir. 1994); Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994) - " ... Plakas charged [the police officer] with the poker raised. It is from this point on that we judge the

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a. Example: An officer shoots a suspect. The officer's use of force is to be judged acceptable, or unacceptable, at the PRECISE MOMENT the officer pulls the trigger.

b. **The OUTCOME is Irrelevant** - Since an officer's use of force is judged at the "moment" the force is used, the "outcome" of the use of force is irrelevant (under this analysis).

1) Example: An officer is justified in putting a suspect in an arm restraint. In the process the person sustains a severe shoulder injury - actually an aggravation of a prior injury. The officer did not know of the prior injury, or that the person was more susceptible to injury then the average person. Since the officer's use of the arm restraint was appropriate at the "moment" it was applied then the injured shoulder - the "outcome" - is irrelevant.

9. **Under Graham - Whether the Officer's Use of Force is Deadly or Non-Deadly Is Irrelevant** - under the Fourth Amendment objective reasonableness analysis.[17]

10. **An Officer's Use of Force Against a Fleeing Person** - The United States Supreme Court in Tennessee v. Garner stated "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not

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16.(...continued)
reasonableness of the use of deadly force ... We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct;"Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993); Carter v. Buscher, 973 F.2d 1328 (7th Cir. 1992) - " ... pre-seizure [law enforcement] conduct is not subject to Fourth Amendment scrutiny;" Fraire v. Arlington, 957 F.2d 1268 (5th Cir. 1992); Greenridge v. Ruffin, 927 F.2d 789 (4th Cir. 1991) - The events that occurred before the officer opened the car door and identified herself to the vehicle's passengers are not probative of the reasonableness of the officer's decision to fire the shot - the events are not relevant; Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988); Ford v. Childers, 855 F.2d 1271 (7th Cir. 1988); James v. Chester, 852 F.Supp. 1288 (D.So.Carol. 1994); and Powell v. Fournet, 846 F.Supp. 1443 (D.Colo. 1994).

Some courts have found an officer's pre-seizure conduct to be relevant, see, Abraham v. Rasso, 183 F.3d 279 (3rd Cir. 1999); and Allen v. Muskogee, 119 F.3d 837 (10th Cir. 1997).

17. Graham v. Conner, 490 U.S. 386, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989)

seize an unarmed, non-dangerous suspect by shooting him dead."[18] Thus the Garner case includes the following principles:

a. Deadly force may NOT be used against a fleeing misdemeanant.

b. Deadly force may NOT be used against a fleeing felon when the felony is not a violent felony.

c. Garner requirements - in order for an officer (under Garner) to use deadly force against a fleeing felon:
   1) **Deadly Force Defense Standard** - The suspect must **threaten the officer with a weapon** (to protect officers or others from immediate danger of death or serious physical injury)[19] OR

   2) **Fleeing Felon (3 part) Test**:
      a) the officer must have **probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm**;

      b) The use of deadly force is **NECESSARY** to prevent the suspect's escape; AND

      c) The officer must give some **WARNING** of the imminent use of deadly force - if feasible.

11. **A Person Has A Right to Use Self-Defense Against An Officer's Excessive Force** - A person has the right to use reasonable force only in self-defense against an officer who is using excessive force during a lawful arrest.[20] Striking a police officer who was using excessive force while attempting to arrest another

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18. Tennessee v. Garner, 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694, 1701 (1985)

19. *See generally* Wood v. City of Lakeland (FL), 203 F.3d 1288 (11th Cir. 2000) - a mentally disturbed man with a sharp-edged box cutter; Pena v. Leombruni, 200 F.3d 1031 (7th Cir. 1999) - a man acting strange - with a concrete slab; Mettler v. Whitledge, 165 F.3d 1197 (8th Cir. 1999) - a man shot a police dog; Sigman v. Town of Chapel Hill, 161 F.3d 782 (4th Cir. 1998) - a man with a knife; Colston v. Barnhart, 130 F.3d 96 (5th Cir. 1997) - during a minor traffic stop, an unarmed man (the passenger) knocked two (2) officers to the groung and moved in the direction of a police vehicle where a shotgun was located; Montoute v. Carr, 114 F.3d 181 (11th Cir. 1997) - a man carrying a shotgun while running from police officer was perceived by the court as a "*present threat*" rather than a "fleeing person;" Elliott v. Leavitt, 99 F.3d 640 (4th Cir. 1996) - a handcuffed, but armed, suspect; Salim v. Proulx, 93 F.3d 86 (2nd Cir. 1996) - a juvenile grabbed for officer's gun; Reynolds v. County of San Diego, 84 F.3d 1162 (9th Cir. 1996) - a man with a knife; Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995) - a man with a handgun; and Roy v. Lewiston, 42 F.3d 691 (1st Cir. 1994) - intoxicated man with two (2) steak knives.

20. State v. Wright, 310 Or. 430, 799 P.2d 642 (1990), *aff'g*, 100 Or. App. 22, 784 P.2d 445 (1989)

was only justified to save the other from death or serious bodily injury. The state had abolished the right to resist an unlawful arrest, but retained a limited right of self-defense against excessive force amounting to a threat of serious injury.[21]

12. **The "Reasonableness" Inquiry** - The reasonableness of an officer's use of force is, in part, based upon the totality of the circumstances as known by the officer at the moment the force is used. The following five (5) questions are the basic reasonableness determining factors. However, keep in mind that since the standard is the "totality of the circumstances," the five (5) questions are not the ONLY questions (other aspects of the incident could be considered). Also, the following question have been placed in a specific order of priority.[22]

    a. **Imminent Threat to Officers and/or Others** - Is the person an imminent threat of injury to the officer and/or others? The greater the level of the threat the greater the level of the force that may be used.[23]

        1) **PPCT's[24] Force Continuum** - assists the officer's decision making and after-incident report articulation with the relationship between the threat level presented by the person and the use-of-force response level performed by the officer.

        2) Remember - the Officer may NOT assume the negative - if time and circumstances permit.

    b. **Actively Resisting Seizure** - If the person is actively resisting seizure then the officer may escalate his (the officer's) justified (reasonable) level of force response.

    c. **Circumstances are Tense, Uncertain, and Rapidly Evolving** - ("Officer's legitimate anxiety factor") - Some incidents take hours to resolve, while others

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21. Commonwealth v. French, 396 Pa. Super. 436, 578 A.2d 1292 (1990)

22. Note, the Graham Court (U.S. Supreme Court) did not prioritize the “totality of circumstances” factors listed by the Court. The factors were prioritized in Chew v. Gates (9th Circuit).

23. The decedent advanced toward the officers with a machete that had a 24-inch blade, the decedent raised the machete after ignoring warnings to drop it, and the decedent got within four to six feet of the officers before the decedent was shot. The court found as a matter of law that the use of deadly force was reasonable. Rhodes v. McDaniel, 945 F.2d 117 (6th Cir. 1991).

24. "PPCT" was originally an acronym for "Pressure Point Control Tactics." However, now "PPCT" is the common name for "PPCT Management Systems, Inc.," 500 South Illinois, Millstadt, Illinois 62260. PPCT is a corporation that specializes in law enforcement defensive tactics training and has over 33,000 instructors internationally.

start and are over in seconds. The more tense, uncertain, and rapidly evolving the incident the higher level of force that will be judged to be reasonable.

d. **Severity of the Crime at Issue** - The more severe the crime committed the more force that an officer may justify. Remember, an officer cannot assume the negative if time and circumstances permit.

e. **Attempting to Evade Seizure by Flight** - Is the person attempting to evade seizure by flight? [Is the person attempting to run away or escape?] If yes, then this will assist the officer in justifying an escalating level of force.

For discussion purposes, these five (5) factors can be graphically depicted. By using a 0-10 scale for each of the factors, and another for the officer's use of force, the relationship between the factors and the officer's force can be illustrated.

It is important to note that the five (5) below-listed factors are ranked in a specific order of importance. The most important factor, the factor with the greatest weight, is whether the person whom the officer is confronting is an imminent threat to officers or others. The factor with the least importance, or the least weight, is whether the person the officer is confronting is attempting to escape seizure by flight, attempting to run away. Thus, if an officer is confronted by a person who is a "10" for the first three (3) factors then there would be little doubt that the officer could use force at the "10" level (deadly force). However, if the first three (3) factors were "0" or "1," and the last two (2) factors were "10" the officer would not be allowed to use a level "10" force.

Force Factors:	None	High
Imminent Threat to Officers/Others	0---1---2---3---4---5---6---7---8---9---10	
Resisting Seizure	0---1---2---3---4---5---6---7---8---9---10	
Circum. Tense, Uncertain, Rapidly Evolving	0---1—2---3---4---5---6---7---8---9---10	
Severity of the Crime(s) at Issue	0---1---2---3---4---5---6---7---8---9---10	
Attempting to Evade Seizure by Flight	0---1---2---3---4---5---6---7---8---9---10	
Officer's Force Used:		
Level of Force Officer Used	0---1---2---3---4---5---6---7---8---9---10	

The basic principle behind the graphical scale is to allow for thought provoking discussion of use of force incidents. It is important to note that the graphical scale is not based in the law. It is merely a graphical convention for training purposes.

Non-Seized Persons and Pre-Trial Detainee Force Recipients:

Anytime a law enforcement officer uses force upon a person who is not convicted and incarcerated, and who is not a "seized" -- "free person," the federal analysis will be under the 14th Amendment's due process test. The U.S. Supreme Court case providing

the frame work for the 14th Amendment test is Sacramento v. Lewis[25] where (in a high-speed pursuit case) the Court held that "***only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation***."[26]

The 14th Amendment test PRIOR to Sacramento v. Lewis was the Johnson v. Glick[27] test. This test is a "subjective" test rather than the "objective" test of the Fourth Amendment. The "subjective" test asks the following four (4) questions.

1. What was the need for the officer's use of force upon the person?

2. What was the relationship between the officer's need to use force and the amount of force that the officer used?

3. What was the extent of the injuries inflicted on the person by the officer's use of force?

4. (the "subjective" element of the test) Was the officer's use of force applied in good faith or maliciously and sadistically for the purpose of causing harm?

Convicted and Incarcerated - 8th Amendment Force Recipients:[28]

If the person is convicted and incarcerated the applicable standard is the "cruel and unusual punishment" standard of the Eighth Amendment to the United States Constitution. The "cruel and unusual punishment" standard primarily focuses on the

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25. Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)

26. See also, Medeiros v. O'Connell, 150 F.3d 164 (2nd Cir. 1998); Schaefer v. Goch, 153 F.3d 793 (7th Cir. 1998).

27. Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), *cert denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973); Fagan v. City of Vineland, 22 F.3d 1296 (2nd Cir. 1994); Temkin v. Frederick County Comm'rs., 945 F.2d 716 (4th Cir. 1991), *cert denied*, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); and Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952).

    See also Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir. 1994); Valencia v. Wiggins, 981 F.2d 1440 (5th Cir.), *cert. denied*, 113 S.Ct. 2998, 125 L.Ed.2d 691 (1993); and Fagan v. City of Vineland, 22 F.3d 1296 (2nd Cir. 1994).

28. The Eighth Amendment applies " ... only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." Ingraham v. Wright, 430 U.S. 651, 671, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).

officer's intent. In Whitley v. Albers[29] the United States Supreme Court held that only an "unnecessary and wanton infliction of pain" and "actions taken in bad faith and for no legitimate purpose" are a cruel and unusual punishment. In Hudson v. McMillian[30] the Supreme Court stated that the Whitley standard applies in both prison-riot and non-riot contexts. Hudson also held that all excessive force claims under the Eighth Amendment must show malice, sadism, and intent to cause harm. Hudson also held that the 5th Circuit's "significant injury" requirement was improper under the Eighth Amendment's "cruel and unusual punishment" analysis.[31]

Other Standards:

1. **State Law Standards** – It is important to remember that state law standards may be more restrictive than federal law. However, violation of a state law standard that is more restrictive than a federal law standard can create "state" (criminal and/or civil) liability, but, will not rise to the level of a violation of federal law.

2. **Agency Policy** – A law enforcement agency's policies and procedures may be more restrictive than either federal law, or applicable more-restrictive state law.[32]

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29. Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)

30. Hudson v. McMillian, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)

31. See also, Shackling a quarrelsome inmate to a bed for 72 hours may be actionable. Williams v. Vidor, 17 F.3d 857 (6th Cir. 1994)(*per curiam*).

32. *See generally* Claybrook v. Birchwell, 199 F.3d 350 (6th Cir. 2000) - In a 14th Amendment accidental shooting context - "even if ... the actions of the [officer's] violated departmental policy or were otherwise negligent, no rational fact finder could conclude ... that those peace enforcement operatives acted with conscience-shocking malice or sadism towards the unintended shooting victim." Claybrook, at 360; Mettler v. Whitledge, 165 F.3d 1197 (8th Cir. 1999); Warren v. Las Vegas, 111 F.3d 139 (9th Cir. 1997); Salim v. Proulx, 93 F.3d 86 (2nd Cir. 1996); Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995); Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994); Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993); Carter v. Buscher, 973 F.2d 1328 (7th Cir. 1992); Smith v. Freland, 954 F.2d 343 (6th Cir. 1992); and Greenridge v. Ruffin, 927 F.2d 789 (4th Cir. 1991).