Who Fired that Shot, at Once the Truth Declare: The Objective Reasonableness Test and the Role of the Use of Force Continuum in Assessing Use of Force Incidents

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Abstract
This thesis considers the constitutional questions surrounding the use of force by police officers. When an officer uses force in the line of duty s/he can claim qualified immunity against a lawsuit, as an officer is using force in his or her capacity as a government agent. At the same time, the 4th Amendment protects individuals against unreasonable searches and seizures. The use of force is a seizure of one's body. Thus there is an inherent constitutional tension when officers use force – should they be protected as agents of the state or should they be punished for violating individual rights? This thesis considers the two different “objective reasonableness” tests that guide courts in determining qualified immunity or 4th Amendment violations. Moreover, it argues that the “objective reasonableness” test is an appropriate test for making this inquiry and it should not be replaced with a proportionality standard, as some have argued. It also considers the role that officers have played in American society and why a use of force continuum is an appropriate training tool that allows officers to carry out their duty as defenders of peace and to stay within the legal safeguards.

Keywords
4th Amendment, Use of Force, Use of Force Continuum, Objective Reasonableness, Qualified Immunity, Police, Constitutional Law, Political Science, Social Sciences, Rogers Smith, Smith, Rogers

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Who Fired that Shot, at Once the Truth Declare: The Objective Reasonableness Test and the Role of the Use of Force Continuum in Assessing Use of Force Incidents

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Senior Honors Thesis in Political Science
University of Pennsylvania
Spring 2016
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# Table of Contents

Abstract ........................................................................................................................................... 1

Introduction .................................................................................................................................... 2

Historical and Legal Context ........................................................................................................ 5
  Constitutional Status Quo ............................................................................................................. 5
  Brief History of Law Enforcement in the United States .......................................................... 8
  Restriction and Regulation of Law Enforcement in the United States ................................ 11
  Legal Restrictions on the Use of Force by Officers .............................................................. 13
  Qualified Immunity .................................................................................................................... 18

Law Enforcement ........................................................................................................................ 25
  Citizen-Officer Interaction ......................................................................................................... 25
  Use of Force Continuum ........................................................................................................... 27
  Amendment Based Training and JBR .................................................................................... 35

Objective Reasonableness ........................................................................................................... 42
  Qua Objective Reasonableness ................................................................................................. 42
  Objective Reasonableness in Action ....................................................................................... 46
  Proportionality Standard: An Alternative .............................................................................. 48
  Objective Reasonableness: A Superior Standard ..................................................................... 51

Conclusion .................................................................................................................................... 54

Appendix ....................................................................................................................................... 55
  Tables ......................................................................................................................................... 55
  Figures ....................................................................................................................................... 57
  Cases ......................................................................................................................................... 63

Bibliography ................................................................................................................................ 64
Abstract

This thesis considers the constitutional questions surrounding the use of force by police officers. When an officer uses force in the line of duty s/he can claim qualified immunity against a lawsuit, as an officer is using force in his or her capacity as a government agent. At the same time, the 4th Amendment protects individuals against unreasonable searches and seizures. The use of force is a seizure of one’s body. Thus there is an inherent constitutional tension when officers use force – should they be protected as agents of the state or should they be punished for violating individual rights? This thesis considers the two different “objective reasonableness” tests that guide courts in determining qualified immunity or 4th Amendment violations. Moreover, it argues that the “objective reasonableness” test is an appropriate test for making this inquiry and it should not be replaced with a proportionality standard, as some have argued. It also considers the role that officers have played in American society and why a use of force continuum is an appropriate training tool that allows officers to carry out their duty as defenders of peace and to stay within the legal safeguards.
Introduction

On October 3rd, 1974, Memphis Police Officers Elton Hymon and Leslie Wright responded to a call regarding a potential burglary in an otherwise quiet neighborhood. When they arrived at the home of the caller, the caller informed the officers that she heard glass shattering next door and believed someone was currently inside her neighbor’s home. The officers circled the house looking for signs of entry. As Officer Hymon reached the back, he saw a hooded figure escape the back door and sprint towards the adjacent lot. The night was dark and Officer Hymon could not see the suspect clearly without aid of a flashlight. Perhaps this also explains why 15 year old Edward Garner ran directly into a six-foot high chain link fence. Officer Hymon declared his presence with, “police, halt!” just as Garner began to scale the fence. Fearing that if Garner made it to the other side he would evade arrest, Officer Garner, in full compliance with Tennessee state law and training from the Memphis police department, drew his 38-caliber handgun and shot Garner in the back of the head. Garner crumpled at the base of the fence. On his person were $10 and an empty purse. Garner clung to life during the ambulance ride, but died on the operating room table at a local Memphis hospital.¹

Every day across the United States more than 1 million men and women strap on a bullet proof vest, lace their boots tight, and pin a law enforcement badge to their chest. This puts the job of law enforcement officer as one of the top 20 most common jobs in the US.² However, the role of police in society goes beyond just an occupation. Officers are expected to ensure peace and enforce the rule of law. Yet, officers have come under fire in recent years for claims of

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excessive use of force. Some point back to earlier decades to demonstrate a pattern of abuse of power by those who ostensibly are, “public servants.”

When officers abuse their power and use force in a manner that exceeds (or purportedly exceeds) what is necessary, it is the role of the courts to detangle the mess. Courts have the unenviable task of weighing effective law enforcement against individual freedoms. In the case of Officer Hymon and Edward Garner the court would find itself wrestling with just this question – how to balance police action and individual rights. As we will see, the Supreme Court ultimately settled this question by offering an “objective reasonableness” test. This test called for an officer’s action to be evaluated by what a reasonable officer in the same context would have done. Some scholars find this test too deferential to officers, calling for a reevaluation of the constitutional standard.

However, before there can be a constitutional inquiry, there must be a use of force incident. What happens when an officer and a suspect interact can mean life or death for both parties. It certainly will determine if an officer will be found at fault for abuse of power. Since it is the job of officers to navigate these difficult and occasionally deadly situations, it is appropriate to assess the training that officers receive. Though there is no one standard police training method, many precincts, especially after the Supreme Court formulated the “objective reasonableness” test, have adopted a use of force continuum training method. The use of force continuum is a training module that guides officers to use force commiserate with the force used and threat posed by the suspect in question. Some criticize this method as being too formulaic and offer their own training methods – known as “amendment based training” or the “Just be Reasonable” method – as alternatives.
Here I argue that the “objective reasonableness” test, alongside a properly formulated use of force continuum, form an effective method for preparing officers and holding them accountable for their actions. Officers who are trained under a continuum model will have a clear understanding of what force is appropriate in what situation. Use of force continuum training is not mutually exclusive with Amendment based training. Both can be used to prepare officers for the field. The “objective reasonableness” test grants officers appropriate discretion in policing while still permitting harsh punishment for those who overstep their bounds.
Historical and Legal Context

Constitutional Status Quo

Let’s return to Officer Hymon and Edward Garner. Officer Hymon’s use of deadly force was permitted by state law. Tennessee statute stated that if, “after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.”3 In questioning, Officer Hymon admitted that he could see Garner’s hands and he believed Garner to be unarmed. Edward Garner’s father disagreed that the actions that led to his son’s death should be permitted and brought a wrongful death suit against Officer Hymon and the Memphis Police Department.

The ensuing legal battle would reach its way to the highest court in the land, where a divided Supreme Court would ultimately hold such a statute and police training to be unconstitutional. However, more than 30 years later, it seems that little has changed. Dontre Hamilton, Eric Garner, John Crawford, and Michael Brown – all four were unarmed young black Americans killed by law enforcement during a six month window in 2014; just like Edward Garner. Clearly there is some disconnect between the Court’s ruling and the reality of use of force by law enforcement.

Justice White, writing the majority opinion, affirmed the appellate court’s determination that the use of force is a seizure. Moreover, it is a seizure of the highest order.4 The 4th Amendment is clear, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”5 As deadly force is a “seizure” that cannot be undone, the state must have an overwhelming interest that can outweigh

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4 Garner, 481.
5 Full text
the individual’s right. White looked at the Tennessee statute and its particular application to Garner and determined that the state’s interest in preventing burglary does not outweigh Garner’s life. Importantly, Officer Hymon had no reason to believe that Garner was a threat to himself, the officer, or society. This is a fact that Officer Hymon readily acknowledged at the time of the incident and later questionings.6

White went beyond this question and considered the common law tradition of the use of force. Use of force was, at the time of the framing of the Constitution, a more socially acceptable and widely used law enforcement tool than today. At that time statutory felonies were few and most were capital offenses, so killing a fleeing suspect was little more than accelerating punishment. White noted the context in which law enforcement is done today is greatly different and our understanding of how much the common law ought to hold should change as well. At tie time the 4th Amendment was drafted, handguns were unheard of, so it was unlikely that there would be an instance where an officer would kill and unarmed suspect who was fleeing the scene of a petty theft.7

Justice Sandra Day O’Connor wrote a dissent. O’Connor pointed back to the decision in Terry v. Ohio which noted that, “police conduct necessitates swift action predicated upon the on-the-spot observations of the officer.”8 She considered the facts of the Garner case, laying out a brief for Officer Hymon’s actions. First, when Officer Hymon arrived on the scene the caller told him that “they” were next door – Hymon had reason to believe that there were multiple suspects committing the burglary. Also, though Officer Hymon testified that he saw nothing in Garner’s right hand, Garner’s left hand was hidden from view. Finally, when Officer Hymon demanded Garner “halt”, Garner sprang to action and attempted to climb the chain link fence. Hymon’s

7 Ibid., 483.
instinct and spur of the moment determination as an officer were to prevent the suspect from fleeing the scene. O’Connor goes on to assert that we cannot assess Hymon’s actions with the benefit of hindsight. An officer in the moment would understand that home invasion burglary is an extremely serious offense because it is often accompanied by more serious crimes, such as rape and assault. Moreover, if a suspect is not apprehended at the scene of the crime, he is almost guaranteed to evade arrest and remain at large. Justice O’Connor explains that the Tennessee legislature understood that to be true when they crafted the statute that permitted Hymon to shoot Garner. The legislature determined that there is a compelling public interest in apprehending suspects.

Though O’Connor’s logic did not win over the court, some of her thoughts were reflected in the majority opinion in *Graham v. Connor*. *Graham v. Connor* came 4 years after *Tennessee v. Garner* and is still good law today. Briefly, the facts of the case surround an interaction between two men and the Charlotte City Police Department. One of the two men, Graham, was suffering from an insulin withdrawal. During questioning and detention by the police he suffered multiple injuries, including those related to his withdrawal. Graham filed suit. On appeal, the court applied a Due Process standard to assess Graham’s claim. The Supreme Court granted cert to rule on what standard (Due Process, Common Law, 4th Amendment Seizure, etc.) ought to be used to assess claims of the use of excessive force by law enforcement officials. The majority looked to O’Connor’s dissent in *Garner* as well as White’s majority opinion, and opined that all claims of the use of excessive force by law enforcement officials – deadly or not – in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are properly analyzed under

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9 Ibid citing dissent.
10 *Graham v. Connor* 490 U.S. 386.
the 4th Amendment's "objective reasonableness" standard. This standard calls for courts to not consider what hindsight dictates was the appropriate response, but what an ordinary officer in the same context would have done. In this thesis, I argue that “objective reasonableness” is an effective standard for assessing violations of 4th Amendment rights, and that a properly formulated use of force continuum provides officers with appropriate guidelines on how and when to use force. This both reflects how incidents play out in the field and respects individual rights.

**Brief History of Law Enforcement in the United States**

From 1830-1850, America saw the birth of its modern police system. Centrally controlled and operated precincts popped up along major cities in the Northeast, followed by New Orleans, Atlanta, and finally the West Coast. Prior to this time, social order was enforced by gangs of “watchmen” who were little more than local neighborhood watches save municipal authority. However, the expansion of American cities brought about crime and disorder that demanded a more powerful police force. Since this time, the police have operated as the proverbial “long arm of the law”, ensuring order and peace.

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1 A seizure is a government termination of movement through a means intentionally applied. A seizure in this context does not necessitate that an officer physically restrain a suspect. If an officer demands that a suspect, “stop in the name of the law,” and the suspect stops – the suspect is seized. Of course, physical restraint of a suspect certainly constitutes a seizure. Importantly, a seizure also occurs when a suspect’s movement is terminated by some weapon used by an officer – be that TASER, pepper spray, or a service pistol.  

12 Graham, 498.  

This stems out of the recognition that the state (and thus agents of the state) has a certain monopoly on violence. This idea was advanced by Max Weber in his “Politics as Vocation”.14 There Weber posits that the state is best conceived as a “human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.”15 Importantly, Weber does not assert the state is the only actor who uses violence (a suggestion that can be easily countered by turning on the 5 o’clock news). Rather, the state is the only actor who is recognized as having the legitimacy to use violence. This legitimacy can only be maintained so long as the authority is recognized.

A common argument is that individuals recognize the state as having the authority to govern the individual’s activities. The individual cedes their right to use violence freely for security that can be provided for by the state. This security-autonomy tradeoff is a hallmark of understanding legitimacy at the local citizen-state level as well as the international state-state level.16 Legitimacy in our context is the right of legal authorities to exercise power, prescribe behavior, and enforce laws.17 The recognition and justification of police power and influence involves the belief that the police have a “just, fair and valid basis of legal authority.”18 Police and their citizen peers are then in a constant state of balanced tension.

Problems arise when police, acting as agents of the state, abuse (or are perceived to have abused) their power. Police misuse of force undermines the authority of the state because this is effectively breeching the tradeoff of security for autonomy, upsetting the balanced tension.

Public trust in police is vital for successful maintenance of security. The most direct way to

15 Ibid., 34.
18 Papachristos, Andrew V. “Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders.” Journal of Criminal Law and Criminology 102, no. 2 (Spring 2012): 397-440, 418.
erode public trust is for the police to cause harm to innocent citizens. Consider the public backlash against police in the midst of the 1960s in the midst of civil rights abuses. Or again in the ‘90s following Rodney King, Abner Louima, and Amadou Diallo.

Certainly there are some bad actors within police departments that spark this public outcry, but it is not fair to shoulder the blame entirely on officers. Whether warranted or not, the American public simply disagrees with much use of force. One 1997 survey found that the preponderance of Americans approve of the police, save in the area of use of force incidents.\textsuperscript{19} Interestingly, a follow up 1999 study found that three quarters of all Americans who were involved in a use of force incident perceived the use of force by the officer(s) to have been excessive.\textsuperscript{20} A 2004 study attempted to understand this perception problem by presenting citizens with a variety of different videos on police encounters. The researchers found that study group largely indicated they expected officers to follow jurisdictional and procedural guidelines when approaching suspects and unruly citizens, but at the same time, the participants recognized that there are certain unpredictable situations that call for an officer to use his or her judgment and experience.\textsuperscript{21} Put differently, Americans want officers to behave “by the book” but also recognize that officers should be permitted officers to use “street smarts” to enforce the law.

This is certainly an opinion that is not lost on officers, who themselves are citizens. Indeed, recognition that there are certain quasi-extra-judicial measures that officers commonly use is revealed in the responses of a 2000 survey. This survey sought to address how officers viewed their role. A preponderance of officers reported that they, “believed that officers should be permitted to use \textit{more} force than the law currently permits” and they find it “acceptable to

\textsuperscript{20} Ibid., 8.
sometimes use more force than the law permits.” Clearly officers do not believe the law is flexible enough to allow them to complete their job. Unfortunately, this can manifest itself in excessive use of force.

The problem that lies at the heart of the question is the dichotomy of excessive force and public perception. While the public may recognize that officers are occasionally forced to use means that break their own directives, when this happens, officers are perceived to be less accountable and therefore less legitimate.

**Restriction and Regulation of Law Enforcement in United States**

The earliest restriction on the use of force by agents of the state (be that watchmen or police) was common law. Specifically, as is true for much of early American common law jurisprudence, English common law guided American courts in criminal justice matters. With respect to the use of force and the common law, Blackstone writes, “Where an officer in the execution of his office … kills a person that assaults or resists him. If an officer … attempts to take a man charged with a felony, and is resisted, and in the endeavor to take him kills him. In all these cases there must be an apparent necessity … otherwise, without such absolute necessity it is not justifiable.” The first sentence clearly relates to the common law understanding of self-defense. The second relates to the fleeing felon rule. The final sentence noted that the use of force must be a matter of necessity. This common law understanding was applied, in one form or another, by the states until 1868. In ’68, Congress ratified the Fourteenth Amendment,

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22 Kuhns and Knutsson *Global Perspective* 13.
24 Patrick and Hall. *In Defense* 4.
adopting its due process clause. Though there may have been little procedural changes in local law enforcement practice, the Amendment did bring the restriction of use of force incidents into the federal jurisdiction.\textsuperscript{25}

The history of regulation of police practice in the United States can be divided into three major periods.\textsuperscript{26} The first was a lengthy period of non-regulation. During the nascent years of the modern police force there was almost no external pressure or controls. The role of the police, as distinct from the roving bands of watchmen, was still poorly defined.\textsuperscript{27} During this period the police enforced public control with violence and brutality. This manifest itself in the police response to strikes and labor movements. Officers frequently silenced protest and forced strikers back to their work assignments. One author documents police interaction with strikers as a “whole-sale clubbing of strikers.”\textsuperscript{28} As police violence came to be the expected norm, there was almost no protest. Since there was no public discourse against these policing practices, officers were free to continue. Police brutality was simply accepted as a facet of life.\textsuperscript{29} Of course, calling these policing practices “brutal” is to impose our own sensibilities on the era.

It was not until the early years of the twentieth century that the Progressives were able to push for some degree of reform. This led to an era of self-regulation. Precincts across the nation were under pressure from the public. Many officers refused to wear symbols of their office when they were not on shift for fear of retaliatory attacks.\textsuperscript{30} In response to pressure from Progressives, many police chiefs adopted a policy of “professionalism.” A major aspect of this internal policing reform came from strengthening departmental policies on training and use of force.

\textsuperscript{25} More clearly established 3 years later with the 1871 passage of 42 U.S.C. § 1983
\textsuperscript{29} Ibid., 12.
\textsuperscript{30} Alpert and Dunham, Understanding Police, 5.
There were new education requirements for officers in positions of leadership within the department. The advent of new technology such as the police car, radio, and telephone enabled departments to more closely supervise and regulate officers. This era of self-regulation came to a close during the civil unrest of the ‘60s. Extreme and well documented police brutality demonstrated that even progressive minded, well intentioned police chiefs were unable to control their officers. At the same time, crime rates exploded, leading to a situation where public trust in officers fell to a nadir.

This heralded in the era of external regulation. The public along with Congress and the Judiciary scrutinized and restricted police activities. In particular the Courts found success in restraining and reforming police activity.

**Legal Restrictions on the Use of Force by Officers**

Though I had noted that prior to the period of external regulation police officers were free to operate without outside pressure than today, officers have always been bound by federal, state and local law. Chief among statutes that regulate the actions of officer is 42 U.S.C. § 1983. This federal statute, established in the 1871, follows and closely relates to the Fourteenth Amendment. 42 U.S.C § 1983 (“Section 1983”) declares that, pursuant to the power of Congress

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32 Which reads, “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”
to enforce the Fourteenth Amendment, “every person” may seek damages against any agent of the state who deprives a person of their Fourteenth Amendment rights. 33 Section 1983 has played a very important role in shaping police practices.

Prior to Garner, where the Court more clearly shifted the question of use of force into the arena of the 4th Amendment, questions of use of force were determined by Fourteenth Amendment due process requirements, as codified in Section 1983. In, Rochin v. California34, the Supreme Court considered the admissibility of evidence that was obtained by acts that “shock the conscience”.35 The court unanimously opined that police conduct that violates this 14th Amendment balancing test is unconstitutional. Though this opinion most directly considered due process as it relates to evidence, the decision did formally restrict the actions that police could take. This due process standard ruled informally for twenty years until Johnson v. Glick.36 There the Court considered a pretrial detainee’s right to be free from excessive force from a correctional officer under Section 1983 and the 14th Amendment. The Court held that under the precedent of Rochin, “quite apart from any specific amendment of the Bill of Rights, application of undue force by law enforcement officer deprives the suspect of liberty without due process of law.”37 Importantly, the court rejected the application of 8th Amendment protection against cruel and unusual punishment. They noted that this only applies to those who have been convicted and

33 For additional readings on Section 1983 claims as it relates to other Amendments, especially the 11th, see Blum, Karen, “Section 1983: Basic Principles, Individual and Entity Liability” Suffolk University Law School (2008).
35 Specifically, the officers entered Rochin’s home on a tip that Rochin was engaged in the narcotics trade. Rochin, surprised by the officers’ presence, ran to his room and was seen consuming two pills. The officers demanded that Rochin regurgitate and produce the pills – and upon his refusal the officers proceeded to throttle Rochin’s neck and jab their fingers down this throat. Rochin was taken to a local area hospital where he was forced to take medication that induced vomiting. Ultimately, Rochin did produce the two as of yet undisolved pills. The pills were later confirmed by labs to be morphine.
36 Johnson v. Glick 481 F.2d 1028 (2d Cir. 1973).
37 Ibid., 1032.
sentenced, not pretrial detainees. 38 The court here determined that because at that time no specific amendment was thought to apply protection to state and local pretrial detainees, protection must necessarily come from the 14th Amendment. Therefore, in *Rochin* the precedent was set that a person may prove an excessive force claim under the 14th Amendment, so long as they demonstrate that the conduct “shocks the conscience.” 39 The Second Circuit court in *Glick* even offered a four part test to determine if a use of force incident rises to the *Rochin* standard. Judge Friendly wrote, “In determining whether the constitutional line has been crossed, a court must look to such factors as the need for application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm.” 40

Of course, this only served as an indirect control against officers. The first direct external control that came from the court was in *Mapp v. Ohio*. 42 This 1961 case concerning evidentiary standards established that the federal exclusionary rule also applies to the states. The exclusionary rule maintains that evidence collected or analyzed in violation of the defendant’s constitutional rights is normally inadmissible for a criminal prosecution in a court of law. This was the first major external control placed on state and local police departments in regard to the use of force. This was truly the watershed moment that led to a series of legal and constitutional challenges that culminated in *Garner* and *Graham*.

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38 Ibid., 1035.
39 Rochin v. California, 172.
40 Johnson v. Glick, 1033
41 See Monroe v. Pape, 365 U.S. 167 (1961) which found that lawsuits against state and local officials (including law enforcement officials) can be filed at the state level without having to exhaust state remedies.
The decisions in *Garner* and *Graham* rest on a number of constitutionally established definitions. One of the most important is the definition of seizure, as it relates to the seizure of a person. The Court has defined the seizure of a person as, “a governmental termination of freedom of movement through a means intentionally applied.”\(^{43}\) This definition has several important components when considering use of force incidents. “Governmental action” should be understood as the actions taken by officers on the scene, as officers are agents of the state. “Intentional termination of freedom of movement” ties to *Garner*, where the Court established that “whenever an officer restrains the freedom of a person to walk away, he has seized that person.”\(^{44}\) Interestingly and importantly, this standard does not mean that anytime force is used an officer has committed a seizure – a seizure only occurs if a person is actually restrained from leaving. The use of force alone is not a seizure. “Intended person” has a checkered constitutional history. On one hand we have a case where an innocent bystander, a child, was shot and killed.\(^{45}\) This is not a seizure since the boy was not the intended person. On the other hand, in *Keller v. Frink* it was determined that a seizure had occurred when a game warden shot at an occupied and fleeing vehicle because he wanted to “mark” the vehicle for later identification.\(^{46}\) There are certainly differences in the two cases, but we must understand that “means intentionally applied” does not only concern what the officer intended to do. We must also consider the outcome of the officer’s actions (else, the game warden would not have committed a seizure, since he asserts that he did not intend to shoot the passenger). “Means intentionally applied” seems to have a close relationship with intended person and may help alleviates some of the obfuscation the intended person definition. *Cameron v. City of Pontiac* established that “intended means” are

\(^{44}\) Tennessee v. Garner, 475.
\(^{45}\) Landol-Rivera v. Cruz Cosme, 906 F.2d 791.
those means that actually incapacitated and “seized” the person, used either directly or indirectly by an officer with the purpose of incapacitation.\(^4^7\) It seems that the difference in the boy and the game warden are that the game warden intended to incapacitate the suspect’s vehicle. He meant to impede the suspect’s ability to flee. As a foreseeable consequence of his action, the suspect was shot. In the case of the boy, the boy was neither the direct or indirect intended target, nor were the means applied against him. His death was regrettable but unintentional collateral damage.

Another important definition is that of deadly force. Deadly force was defined in *Miller v. Clark County* to be “force [that] presents more than a remote possibility of death in the circumstance under which it was used… mere possibilities and capabilities do not add up to reasonable probability.”\(^4^8\) This combined with the Court’s justification for the use of deadly force when there is probable cause to believe that there is an imminent threat of serious physical harm,\(^4^9\) means that the threat of serious physical harm justifies the use of force that creates a significant risk of death.\(^5^0\) This definition of deadly force ties nicely to the use of force continuum model. A continuum model instructs officers to meet resistance with an equivalent level of force. If and only if a suspect resists with the threat of deadly force is an officer permitted to respond with deadly force. The use of force continuum meets the criteria established by the court for the use of deadly force. More importantly, it guides the court in cases where deadly force was used. Was the force in response to an equal threat, thus compatible with the continuum? Or did the officer reject his/her training and escalate? Either way, the Court will have an easier time applying and justifying its standards.

\(^{4^7}\) Cameron v. City of Pontiac 813 F.2d 782 (1987).
\(^{4^8}\) Miller v. Clark County 340 F. 3d 959 (2003).
\(^{4^9}\) See Garner.
Certainly the most important definition for our argument is objective reasonableness. While this standard will be assessed later, it is important that we address how the Court understands objective reasonableness. *Graham* (citing *Bell v. Wolfish*) notes that this standard is “not capable of precise definition or mechanical application.” Rather this standard was crafted to give officers a certain flexibility. This reflects a proper understanding of how seizure works in other 4th Amendment applications. The court notes, “[the 4th Amendment] is not violated by an arrest based on probable cause, even though the wrong person is arrested… not by the mistaken execution of valid search warrant on the wrong premises… with respect to a claim of excessive force the same standard of reasonableness at the moment applies.”\(^5\) The reasonableness standard does not offer any sort of bright line rule to govern officer-suspect interactions. The standard does not even suggest a minimum or maximum standard; it simply offers a binary of whether the action of the officer would be judged to be reasonable by a reasonable officer in the same situation. Consider *US v. Martinez-Fuente*, where the officers used a more invasive means of search than was necessary – the Court maintained that the more invasive means were still reasonable under the 4th amendment seizure.\(^5\) Similarly, the objective reasonableness standard which governs seizures of the person simply calls for reasonableness, not minimum invasiveness.

*Qualified Immunity*

Complicating the literature surrounding objective reasonableness as it relates to use of force is the objective reasonableness test in the doctrine of qualified immunity. The doctrine of qualified immunity was developed as a defense to the passage of U.S.C. § 1983 ("Section

\(^5\) Ibid., 396.
1983”). Under U.S.C § 1983, state and local officers can be sued for actions taken that deprived a private citizen of his or her individual rights. Similarly, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* extends this liability so that to federal agents can be held accountable for their actions. Qualified Immunity is a defense that precludes individuals from seeking damages against a government agent unless that agent has violated “clearly established” constitutional rights. In most cases concerning use of force, law enforcement officials will evoke qualified immunity in the hope of obtaining a summary judgment and not have their actions stand the scrutiny of trial. When a police officer is sued, generally, the plaintiff must prove that not only did the officer violate his or her rights, but also that these rights was clearly established at the time of the offense or else qualified immunity may be successfully invoked.

Section 1983 has an interesting legislative history. Following the Civil War was a period of violence committed against the now emancipated black Americans at the hands of hate organizations. The most widely known of these groups, the Ku Klux Klan, acted with relative impunity from local authorities. The 42nd Congress believed that if left unchecked, the Klan would only continue the violence. States were not to be trusted. Federal relief might be the only remedy that black Americans could expect. Congress responded with what was colloquially

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53 Recall that Section 1983 reads, “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”


55 Who likely themselves were members of or affiliated with the Klan; see Chalmers, David Mark. *Hooded Americanism: The History of the Ku Klux Klan*. Durham: Duke University Press, 1987.
known as the “Ku Klux Klan Act”\textsuperscript{56}, an Act with the express purpose of rebalancing the scales of justice against state governments. The Ku Klux Klan Act is most appropriately understood, then, to be an Act that unabashedly defends individual civil rights. Though this act did not pass whole cloth, sections were enacted – namely what became codified as 42 U.S.C (s) 1983.\textsuperscript{57} In this way private citizens in the Reconstruction South could hold state and municipal officials accountable to the law. This Act was not intended to create a substantive right. Rather, it offered a procedural mechanism for defending Constitutional Rights. Interestingly, this legislative history seemed to have had little impact in the application of Section 1983 claims less than one-hundred years later.

The earliest modern tests of Section 1983’s qualified immunity provisions came in 1975 with \textit{Wood v. Strickland}\textsuperscript{58}. In a case involving the authority of school officials, the Court defined the circumstances in which Section 1983 qualified immunity would \textit{not} be applicable. The majority opined that qualified immunity should not be granted in instances where an agent, “knew or reasonably should have known that the action he [or she] took within his [or her] sphere of official responsibility would violate the constitutional right of the plaintiff, or if he [or she] took the action with malicious intention to cause a deprivation of constitutional rights or other injury”\textsuperscript{59} This decision seemed to imply that an agent of the state could assume qualified immunity would be granted unless he or she acted with malicious intent or recognized his or her actions to be unlawful. The Court effectively implemented a “good faith” test of qualified immunity.\textsuperscript{60} This certainly moved away from the original intent of the law as drafted by the 42\textsuperscript{nd} Congress, and it failed to provide what little protection that it still suggested. In reality, several

\textsuperscript{57} Ibid., 750.
\textsuperscript{58} Wood v. Strickland 420 U.S. 308.
\textsuperscript{59} Ibid., 334.
\textsuperscript{60} See Gomez v. Toledo 446 U.S. 635, where the court explicitly stated that in order to deny a qualified immunity judgment, it must be proved that the officer acted in “bad faith”
courts were unwilling to grant a qualified immunity judgment without a trial – they believed this implicit “good faith” was too subjective.\textsuperscript{61} \textsuperscript{62}

The question of qualified immunity and good faith actions of government officers came to a head in \textit{Harlow v. Fitzgerald}.\textsuperscript{63} The problem with the good faith standard, as illustrated above, is that the inherent subjective elements of making a good faith determination undermine the purpose of the doctrine – to shield officers from frivolous suit. Qualified Immunity recognizes that individuals should be able to seek redress for constitutional rights violations. These violations are particularly egregious when one considers that they were caused by government agents. The Court reasons this, noting, “[in] situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees”.\textsuperscript{64}

At the same time, there is a wide societal interest in ensuring that government is both efficient


\textsuperscript{62} Of course, qualified immunity of police officers does not only apply exclusively to use of deadly force or even just use of force incidents. The question of qualified immunity of police officers extends to all forms of 4th amendment seizure. See “Fourth Amendment — Qualified Immunity — Third Circuit Holds That Police Officer's Good Faith Reliance on Legal Advice Creates a Presumption of Reasonableness. — Kelly V. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010)”. 2011. Harvard Law Review 124 (8). 2083–90; here the author offers the case of \textit{Kelly v. Borough of Carlisle} as an example of qualified immunity brought to its unfortunately common extreme. In this case a passenger, “Z”, during a routine traffic stop surreptitiously recorded an officer with a handheld camera. The officer saw this and confiscated the camera. After consulting with the assistant district attorney and concluding that “Z” violated the PA wiretapping law, “Z” was arrested. “Z” sued under Section 1983 and his case made it to the Third Circuit. The Third Circuit found that the officer should be granted qualified immunity because there simply existed “insufficient case law.” This demonstrates a whole host of plaintiffs who are losers in current qualified immunity legislation. “Kelly was neither committing nor about to commit a crime. A police officer nonetheless arrested him, and he went to jail. Because the arrest was made without probable cause, it violated Kelly’s Fourth Amendment right. Moreover, the law was clearly established in the relevant jurisdiction that the officer’s basis for arresting Kelly did not constitute probable cause. Thus, a reasonable officer would have known that he was violating Kelly’s rights. Yet, solely because a prosecutor confirmed the police officer's inaccurate interpretation of the law, Kelly (and similarly situated civil rights plaintiffs) will now be required to produce evidence to rebut the judicially mandated inference that the police officer's violation of his clearly established constitutional right was objectively reasonable. This presumption is unlikely to increase legal consultation; instead, it will allow courts to relieve law enforcement officers of their responsibility to exercise independent professional judgment and will decrease the likelihood that constitutional violations will be redressed.” This is certainly an issue about the trans-substantive nature of the 4th Amendment. A discussion of this problem and potential solution is discussed at length in Bellin, Jeffre, "Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World" (2011).\textit{Faculty Publications}. Paper 1248.

\textsuperscript{63} Harlow, 811.

\textsuperscript{64} Ibid., 806.
and effective. The Harlow Court weighed these interests and overwhelmingly sided with the government. Rather than uphold the Wood standard, which stated when qualified immunity should not be granted, Harlow addressed when it should be applied. According to the Court, qualified immunity should be granted unless “[the] defendant official knew or reasonably should have known that the [official] action he took ... would violate the [plaintiff’s] constitutional rights ... or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.”65 This completely removed the subjective inquiry into what a reasonable agent would have known. Instead, courts simply had to determine what this particular agent reasonably should have known.66 This clearly enunciated the second objective reasonableness standard that governs use of force incidents – the objective reasonableness qualified immunity test.

The problem with the Harlow decision is that not all constitutional rights are so clearly established to meet the rigor of the totally objective Harlow standard. The solution to this came in Anderson v. Creighton.67 Here the court recognized that the Harlow test was not being applied as directed by the court. Rather than considering what the officer thought, courts had balanced government interests against individual rights by “generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.”68 The focus of the court had been on the action and not the

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66 There was a slight though significant shift in the Harlow standard in 1986. See Malley v. Briggs 106 S.Ct. 1092. Malley shifted the inquiry from one which tasks the court with determining if a reasonable officer would have known his actions violated an existing right to one that asks if a reasonable officer would know his actions to have caused the violation of rights. The shift was one from knowledge of fact focused inquiry to knowledge of action inquiry. This move to action focused inquiry would become more clear just a year later with Anderson v. Creighton 483 U.S. 635.
67 Anderson v. Creighton 483 U.S. 635
68 Harlow, 817-18.
subjective knowledge of the officer. Recognizing this, the court formalized this test and noted that in order to determine qualified immunity; the objective reasonableness assessment must include an “examination of the information possessed by the officials”. Though this certainly turned on Harlow by requiring a more intensive fact-finding test, the court maintained that this was imperative to protect officers who took action that they mistakenly (but objectively reasonably) believed to be lawful.69 70

From 1982-1989, the Court wrestled with developing two distinct and interrelated objective reasonableness standards.71 In technical terms there are fundamental ideological differences that were discussed above. Qualified Immunity Objective Reasonableness calls for an inquiry into what an officer reasonably should have known, 4th Amendment Objective Reasonableness calls for an inquiry into what a reasonable officer would have done. That said, it is understandably likely that both inquiries be found in the same case. In fact, Graham cited Anderson, noting that the degree of force used may be relevant in assessing qualified immunity claims.72 Unfortunately, these two inquiries are often combined into one assessment.73

In Saucier v. Katz74 the Court considered what is an admittedly weak excessive force claim.75 Saucier claimed qualified immunity as a defense. The Ninth Circuit denied the summary judgment. The Supreme Court reversed, insisting that the inquiry into objective

69 Anderson, 490.
70 See Heien v. North Carolina 135 S.Ct. 530. Here the Court maintained that it is reasonable for officers to make reasonable mistakes of law.
71 Of qualified immunity and 4th Amendment.
72 Graham, 397.
73 See Roy v. Inhabitants of City of Lewiston 42 F.3d 691 (1st Cir); Sigman v. Town of Chapel Hill 161 F.3d 782 (4th); Dickerson v. McClellan 101 F.3d 1151 (6th); Nelson v. Country of Wright 162 F.3d 820 (8th).
75 The petitioner, Donald Saucier, serving in official capacity as a military police officer, saw Elliot Katz approach a fence carrying some unidentified object. The fence separated Katz from Vice President Gore, who was giving a public address. As Vice President Gore began his speech, Katz began to unfold the object, which happened to be a protest banner. Saucier rushed to Katz and grabbed him from behind. Other officers arrived and Katz was taken to a police van and, according to Katz, was forcibly shoved in the van – the substance of the excessive force claim.
reasonableness of Saucier’s actions under the 4th Amendment and objective reasonableness of his understanding of the law must be separate and distinct. The Court stated,

If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed…. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer’s mistake as to what the law allows is reasonable, however, the officer is entitled to the immunity defense.76

Certainly there is a technical distinction between these two inquiries—judging what the facts of a situation are and judging what the law permits in such situations. However, the implication of this distinction is baffling. The Court effectively ruled that there are instances where, when considering all the evidence of what a reasonable office would believe, an officer could conduct him/herself unreasonably, but still be “let off” by qualified immunity if s/he reasonably believed in mistaken facts. When applied to Saucier, to be sure, the distinction makes sense. Katz’s claim was frivolous and it makes sense to apply summary judgment of qualified immunity. Even the use of deadly force that was proven to be an objectively unreasonable action can still be protected by qualified immunity. The status quo necessitates that there have been some appreciably similar fact pattern already tried in order to definitively prevent summary judgment.

76 Katz, 540.
Law Enforcement

Citizen-Officer Interaction

Now that we have established a theoretical framework that undergirds the citizen-officer relationship, it is appropriate to discuss how citizen-officer interactions actually play out. The reality is that in the vast majority of interactions between officers and citizens, officers do not use force. Geoffrey Alpert and Roger Dunham considered data released from the Miami-Dade Sheriff’s office. The researchers were particularly interested in developing a model or way of understanding typical police-suspect interactions. Alpert and Dunham posit that the general population (and some earlier researchers) fundamentally misunderstood police-suspect interaction. They think of the use of force by police or the active resistance of an officer as a discreet instance within the larger context of the specific police-suspect interaction. This understanding does not consider that the action of one party is directly in response to the action of the other party. The suggestion seems obvious, but the literature is bereft of studies that consider the systematic escalation of force by one party in response to the actions of the other party.

This idea was first advanced by Richard Sykes and Richard Brent in their seminal work on officer-suspect interactions considering the Miami-Dade data. These researchers argued that, “police civilian interaction consists of a series of dyadic interactions occurring within a larger process of dyad formation and dissolution.” In 2002, researcher William Terrill built on this dyadic argument by reviewing the Miami-Dade data. He writes, “Applying force at the

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77 Alpert and Dunham, *Understanding Police*. The data from the Miami-Dade Sheriff's office has been used by a number of researchers to model police-suspect interactions and use of force incidents. The Miami-Dade sheriff data is considered to be some of the most comprehensive over a continuous period of several decades.

78 Ibid., 65-80.


80 Alpert and Dunham, *Understanding Police*, 87.
outset is not assurance that additional force will not be used. It may be that the initial police force prompted the suspect to resist, thereby requiring additional force on the officer’s part. It may also be the case that officers simply continued to use force in an attempt to maintain control of the situation. Nonetheless, the findings indicate that the use of some degree of force at the outset eventually results in force being used again.”

The following year Alpert and Dunham considered how this dyadic escalation of force can be modeled. Below are two tables they produced. Consider Appendix “Table 1.” This table considers the actions that the suspect takes in response to police presence. A preponderance of the time the suspect’s first response is non-violent. Suspects cooperated in 54% of interactions and issued verbal non-compliance in 23% of cases. This shifts if the interaction proceeds to a second iteration of action. In the second iteration non-resistant cooperation plummets to only 10% while defensive resistance and active resistance rise to 36% and 18% respectively. Aggression and non-compliance rises in every subsequent interaction and plateaus around the 5th iteration.

Now let’s consider Appendix “Table 2.” This table reports the actions of the officer in each iteration of officer-suspect interaction. Overwhelmingly, the first action that the officer takes is a verbal directive. The second iteration tends to see officers issue a strong verbal order and demand for compliance. Further, this second iteration is the first time we see appreciable uses of violent force in the form of defensive combat. For interactions that continue to a third iteration of action, the probability of use of violent force by the officer increases. From this work we can conclude that most officer-suspect interactions in this dataset begin with a verbal

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82 Alpert and Dunham, Understanding Police, 89.
83 Ibid., 90.
“negotiation” phase. In this phase officers issue directives to the suspect who often either complies or issues verbal non-compliance. If the suspect does not comply, the interaction is brought into a second iteration where the officer issues a strong verbal order. This often signals the break-down of the possibility of successful negotiation and the beginning of a phase of low level resistance. This resistance will either end when the suspect complies or flees the scene; the interaction enters the final phase. This phase is characterized by heightened use of force. Officers may use intermediate weapons.

While I do not suggest this table provides conclusive evidence how officers across the states behave in officer-suspect interactions, the data from the model likely provide a good foundation for approaching discussion. Importantly, officers do not come to interactions weapons drawn, suspects comply more often than they escalate, and deadly force is rarely used.84 In fact, only 1.5% of all officer-citizen interactions result in the officer using any degree of force above verbal directives.85

**Use of Force Continuum**

Indeed it seems that these levels of officer-suspect interaction were taken into consideration when developing use of force continuum models. Each precinct establishes its own training models and organizational policies. This creates a situation where, nationally, there is no

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84 Interestingly, this three tiered escalation of force is reflected in the first chapter of James McElvain’s 2009 work. (McElvain, James P. Police Shootings and Citizen Behavior. El Paso: LFB Scholarly Pub., 2009.) There McElvain describes the various levels in a narrative that progresses from verbal interaction to a “placing and use of hands to apply force and control methods” to the final “use of chemical agents, impact weapons, [or] conducted energy devices” McElvain contends that the officer will often win out because resistance from a citizen will always be met with equal or greater levels of force until compliance.

one use of force continuum. There are hundreds. However, the vast majority of continuum models contain similar levels. A meta-analysis of continuum models used during the ‘90s found that most continuum models begin, at their lowest tier or section, with mere officer presence. At this lower end of the continuum, just above officer presence is verbal commands. This parallels the findings of Alpert and Dunham that most officers being their interaction with the public through verbal directives. Following this are weaponless tactics including grapples and holds designed to able the officer to control the suspect. Towards the upper end of the continuum are chemical agents and impact weapons. Finally, deadly force is the top tier of force usage.\textsuperscript{86}

These continuum models often fall in one of two categories – linear models or circular models.\textsuperscript{87} The linear model (an example of which is illustrated in Appendix “Figure A”) directs an officer to match the suspect’s level of resistance. Equally important, the officer is instructed to deescalate as the suspect becomes more compliant / less resistant. Use of force escalates in the above described pattern through presence, verbal commands, weaponless control techniques, chemical and impact weapons, to deadly force. The circular model (an example of which is illustrated in Appendix “Figure B”) positions the officer at the center of the circle. Depending on the totality of circumstance, the officer is directed to follow the appropriate “spoke.” This model does not differ from the linear model in suggesting equal or slightly greater force in response to the degree of resistance, but it does eschew some of the complaints about the efficacy and applicability of the linear model.\textsuperscript{88} Alpert and Dunham conclude that based on their analysis of

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\item \textsuperscript{88} Ibid., 48.
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the data and the response of the officer to the resistance of the suspect, continuum models are largely followed by officers.\textsuperscript{89}

Opponents of use of force continuum training models raise a number of challenges. One major criticism of the continuum is that by their nature, continua are easily misinterpreted. Use of force continua in particular are often taught with visual representations of stair step, ladders, on an upward sloping X-Y graph, skyward arrows, barometers, among others.\textsuperscript{90} Even if use of force continua ostensibly teach escalation and de-escalation, these visual representations only trend in one direction – towards the application of more and more force. That is only a problem with the method of teaching the continuum, not the continuum itself. Moreover, more modern continuum models do not employ those types of linear progressions, but rather favor a situational approach, more appropriately taught with a circular or wheel model. Regardless, these problems can be overcome simply by changing the graphic that is used to teach the use of force continuum.\textsuperscript{91}

Another challenge to the use of force continuum is that it can shift the inquiry away from that of objective reasonableness to just what is prescribed by the continuum. Michael Ciminelli uses \textit{Glenn v. Washington County}\textsuperscript{92} to illustrate this point. In that case officers responded to a 911 call from a family requesting assistance to subdue their emotionally disturbed son.\textsuperscript{93} The mother informed the 911 operator that she believed her son to be suicidal, having stated he “is not leaving till the cops kill him … there are hunting rifles in the house [but] he can’t get to [the

\textsuperscript{89} Alpert and Dunham, \textit{Understanding Police}, 39.
\textsuperscript{91} Not to mention that if an officer truly believes that the graphic representation means that s/he should only escalate, and never deescalate, then there may be some other underlying comprehension issues with this officer or teaching problems within the precinct.
\textsuperscript{92} Glenn v. Washington County 673 F.3d 864 (2014).
\textsuperscript{93} Ciminelli, Michael L. "Legal Implications of Use-of-Force Continuums in Police Training." 2014.
rifles].” When officers arrived on scene the son left the house and stood in the driveway facing the officers. The officers attempted to reason with the son and issued verbal directives to no avail. At this point the officers decided to fire several non-lethal beanbag rounds at the son to incapacitate him and command his compliance. The son responded by rushing back to the house, at which points officers feared he would harm his family and they opted to open fire, killing the son. Charges of excessive force were brought against the officers. Initially the charges were resolved with successful Section 1983 summary judgment in favor of the officers. The appellate court reversed the decision and remanded the trial to the district level, noting that the officer’s decision to fire beanbag rounds is what provoked the son to return to the home. This action may have constituted excessive action. Ciminelli notes that the court focused on the use of force continuum. The court observed that, “Washington County’s use of force continuum identifies five levels of resistance, ranging from least to most resistant: verbal, static, active, ominous and lethal. Applying Washington County’s definitions to the facts viewed in the light most favorable to Glenn, [the son’s actions] falls under the “static” resistance category, where the suspect “refuses to comply with commands . . . [and] has a weapon but does not threaten to use it.” According to Washington County guidelines, officers can employ various types of force in response to static resistance, including takedown methods, electrical stun devices and pepper spray. Use of less-than-lethal munitions, however, is unauthorized unless a suspect exhibits “ominous” or “active” resistance, which entails “pulling away from a deputy’s grasp, attempting to escape, resisting or countering physical control,” or “demonstrating the willingness

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94 Glenn, 867.
95 Perhaps this is not an appropriate label; beanbag rounds are not designed to kill but have caused death on numerous occasions (see here and here) thus most use of force continuum or general police policy directives reserve beanbags for use in situations of heightened danger. See Ashcroft, John and Hart, Sarah, “Impact Munitions Use: Types, Targets, Effects” U.S. Department of Justice Office of Justice Programs (2004).
96 Glenn, 867.
97 Ibid., 876.
to engage in combat by verbal challenges, threats, aggressive behavior, or assault.”

Accordingly, when viewing the facts in the light most favorable to the plaintiff, the defendants’ own guidelines would characterize [the son’s] conduct as less than active resistance, not warranting use of a beanbag [round].” The problem with this reasoning, according to Ciminelli, is that it totally eschews an inquiry into the reasonableness of the officers’ actions. The analysis seemed to hinge on the, “arbitrary placement of the subject’s actions and the force used on the agency’s continuum, rather than an analysis of the totality of the circumstances.”

Ciminelli’s challenge is warranted. Reconsider the facts of the case. Should the officers have fired their weapons, killing the son? Let’s recall that the 4th Amendment only allows for this seizure of the highest degree when a suspect poses a grave threat to society. The court in Glenn seems to think that the officer erred when they fired their beanbags, provoking the son to flee to the house. Effectively, the officers created a situation where they then had to use lethal force against the son. Less lethal incapacitative options existed at the time the beanbags were fired. Officers might have used a TASER or pepper spray, at which point the son could have been restrained. Ciminelli challenges the court here – simply looking at the continuum and not the totality of the circumstance ignores the clear directive from the Supreme Court. The officers here may not have believed they could come within range to use a TASER or pepper spray. Or, that using those methods would not be sufficient to eliminate the threat. Mechanical application

98 Ibid., 875.
99 Ibid., 875-78.
100 The opposite claim has been made in courts. In Mohney v. Hageter (US District Court, W.D. Pennsylvania) 2013 U.S. Dist. LEXIS 12098 (Lexis citation); January 30, 2013 – not filed in F.Supp. 2d) the plaintiff argued that the use of a TASER was excessive because, pursuant to the Pennsylvania State Police ‘use of force’ continuum, the officers should have used OC spray/pressure point control, strikes or kicks, or an impact weapon such as a baton, to gain compliance.” The court rejected this argument. The court properly noted that the source of the plaintiff’s rights was not the state’s police procedure manual, but the Constitution. Thus the ultimate question is not if the officer followed his procedural guidelines, but if he acted objectively reasonably.
102 Ibid., 32.
of the use of force continuum of Washington County just isn’t reasonable. Ciminelli seems to contend that the officers acted appropriately – that the totality of circumstances dictated the firing of a beanbag round. But regardless of the outcome of the trial, the simple fact that the court addressed the use of force continuum while discussing reasonableness is to Ciminelli a problem. If the court had reached a verdict based solely on the “arbitrary placement of the subject’s actions … on the agency’s continuum”\(^{103}\)

I would be inclined to agree there is a significant problem. Rather, this is an appellate court reversing the summary judgment and application of qualified immunity. The court appropriately notes that the actions the officers took exceeded their training. This does not mean that there was an excessive use of force, but it does raise suspicion. It is appropriate, then, to launch a formal inquiry into the reasonableness of the officers’ actions through trial. At trial the officers must be able to articulate their thought process and justify, legally, the actions that were taken. Herein lies a strength of the use of force continuum. When juries are instructed that use of force incidents should be resolved by an objective reasonableness standard, they are simply told that the objective reasonableness standard means they must consider what any reasonable officer would have thought/acted on in the same context.\(^{104}\) A use of force continuum allows an officer to explain to the lay juror how officers are taught to behave in the field in a succinct, and often visual, way. Thus the continuum can serve officers and jurors by creating some common ground, rather than leaving jurors to decide what “reasonable” in the context of law enforcement means.\(^{105} \text{106}\)

\(^{103}\) Ibid., 33.
\(^{105}\) Ibid., 22.
\(^{106}\) Opponents of the use of force continuum Charles Joyner and Chad Basile write, “Upon seeing the ladder analogy of use-of-force options, citizens unfamiliar with law enforcement expect an officer to climb the ladder one rung at a time until the suspect complies. It is sometimes difficult to explain to the public the need to advance to the
While discussing *Glenn*, Ciminelli further notes that the court addressed the fact the son was emotionally disturbed. In justifying their decision, the court writes that this fact was “a factor to which the officers should have assigned greater weight”\(^\text{107}\) Ciminelli goes on to argue that a use of force continuum model does not give officers proper discretion to handle cases where officers must interact with the mentally ill. This is an especially pertinent observation when one considers that police interactions with the mentally ill vastly outweigh their distribution in the general population.\(^\text{108}\)

On its face, this is a compelling argument for a weakness of the use of force continuum. The continuum dictates officers behave a certain way in response to a suspect’s actions. The problem is that the behavior of some mentally ill may not reasonably warrant the response suggested by the continuum.\(^\text{109}\) In order to tackle this issue I suggest we return to the facts in *Glenn* and consider a hypothetical. In case A we have the same fact pattern as in *Glenn*, but we know that the son is mentally disturbed. In case B let’s suppose that rather than the son, the suspect was a guest in the family home who turned violent over some argument (a distinction I make so that it is clear that there is some reason for him issuing the threats). In both A and B we have a suspect outside a family home engaging the police, holding a knife. The suspect in both cases has issued threats but is not currently in a position to carry them out. Should the officers behave differently in cases A and B?

\(^{107}\) Ciminelli citing Glenn v. Washington County, 876.
Consider a different hypothetical. In this case an officer responds to a call about an individual causing a disturbance in a side street. The officer arrives on scene and sees a suspect yelling and swinging a broken bottle. Does it make a difference if the individual is mentally disturbed? It is true that mental illness could manifest itself in aggressive action.\(^\text{110}\) It also may be true that a mentally ill individual who behaves aggressively, like the son, could issue threats that he or she does not mean to act on, but this is not something that an officer cannot be expected to know. The use of force continuum guides an officer to respond to a suspect’s demonstrated verbal and physical aggression. In both this hypothetical and the above hypotheticals of reconsidering Glenn, officers likely cannot make any significant difference in their action, regardless of their knowledge of the suspect’s mental state. The role of the officer in the field during a use of force incident is to protect society and enforce the law. Mandating that an officer abandon his/her training when the suspect is mentally ill heightens the risk that one or both parties can be injured. Moreover, treating the suspects the same does not violate their 4\(^{\text{th}}\) Amendment right. The 4\(^{\text{th}}\) Amendment objective reasonableness inquiry is not one that considers the intent of the “victim” of use of force seizures. Rather, it is one that considers what the actor, a reasonable officer, would think.

This is not to say that the courts should treat the mentally ill the same as other offenders. Courts are obliged to consider what is best for society and the individual when sentencing. Courts are uniquely situated to issue lenient punishment or suggest treatment. Officers do not have the luxury of leniency. The mentally ill certainly pose a unique challenge for officers and society writ large. But, when confronted by a threatening or uncooperative individual, a properly structured use of force continuum should dictate the reasonable officer’s conduct.

Amendment Based Training and JBR

In response to the above criticisms and others, several police departments have moved away from using a use of force continuum training model. Two major (often interlinked) models are the Just Be Reasonable (“JBR”) model and Amendment Based Training. Amendment Based Training considers the legal developments in Garner and Graham. Proponents note that the focus of these cases is on the “totality of circumstances” and the “objective reasonableness” of the officers’ actions. The reasoning, then, is that the focus of police training should not be on forcing officers to respond mechanically to a suspect’s actions, but to act reasonably in the field in regards to the controlling Court decisions. In teaching Tennessee v. Garner, officers are given a series of considerations to weigh when determining the appropriate level of force. The Garner court stated, “if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” This is broken down into three components: probable cause, the use of deadly force to prevent escape, and the issuance of a warning. Officers are taught that if they cannot articulate probable cause, they should never consider advancing to the use of deadly force. Moreover, before they use deadly force they should attempt to issue a warning if it is feasible and appropriate. It is feasible if “An officer first should consider whether the suspect is aware that the police are trying to apprehend him, such that he has knowledge that

\[111\] Proponents of Amendment based training are quick to point to Scott v. Harris 127 S.Ct. 1769 (2007) which held that, “Garner did not establish a magical on/off switch that triggers rigid preconditions whenever and officer’s actions constitute deadly force” Thus, it is appropriate to offer a number of considerations while recognizing that not all conditions can or should be given weight in the specific use of force incident.

he should stop.”113 It is appropriate if “an officer reasonably believes, based on the suspect’s prior conduct, that such a warning would not cause the suspect to surrender, but rather would provoke the suspect to engage in violent and life-threatening behavior, or to increase his or her efforts to flee, then a warning is not feasible.”114

When teaching *Graham v. Connor*, trainers turn to the court’s insistence that, “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight [should be weighed].”115 Again, this is broken into three teaching considerations: threat assessment, determination of active resistance, and severity of the crime. These six teaching tools become the corner stone of amendment based training.116 Officers are trained in both traditional classroom setting as well as individual scenario assessment on how to apply these considerations in the field.

What is important to note is that this amendment based training is not mutually exclusive with the use of force continuum. John Klein writes,

“The majority of recruits know police force only through the false heroes of television shows and motion pictures. For those recruits, perhaps a force continuum will suffice in the kindergarten stage of police training, but it must be quickly supplanted as they learn law, conflict resolution skills, arrest control techniques and defensive tactics. A modern use of force training curriculum must reach far beyond traditional classroom lectures with visual models of stair steps, continua and wheels. We expect officers to be advanced beyond a

114 Ibid., 657.
115 *Graham v. Connor*, 394.
stimulus/response force decision making model by the time that they hit the streets. Then we demand an even higher level of discernment, discretion and sophistication in force decisions from our veteran officers. A trainer must ask at what point the rudimentary teaching tool of the continuum [loses] all relevance.”

Klein goes on to posit that the continuum does not appropriately allow officers to escalate and de-escalate as the officer-suspect interaction naturally evolves. Klein and other Amendment based training advocates evidence this claim by considering the science behind decision making processes. They rely on the research of Colonel John Boyd and his “Boyd Loop” or “Observe, Orient, Decide, and Act” process. Boyd contends that when faced with a threatening situation the brain phases through a dynamic, sequential, decision making process. The steps, Observe, Orient, Decide, and Act (“OODA”) are defined in the following manner.

The first step is observation, where the individual becomes aware of his or her surroundings. In police and military circles, one’s ability to make these observations is often called “situational awareness.” The second step is orientation. In this phase the individual synthesizes the facts gathered during the observation period with other knowledge and a mental image of the full situation is formed. The third phase is the decision making phase, where officers determine what action to take and move quickly to the final phase – action. The first two steps, observe and orient, occur as quickly as human reaction time. However, in high stress life threatening situations officers may not be able to easily able to transition to the decision and action phase.

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118 Ibid., 5-9.
This has been documented time and time again in both law enforcement and military – officers and soldiers appear to be frozen, stuck, and totally indecisive.\textsuperscript{121}

Boyd argues that during times of high stress, individuals are not able to readily respond to novel situations. They are stuck in a loop, “Boyd’s loop” of observation and orientation.\textsuperscript{122} This is because in these split second decision making processes, the brain does not attempt to create a plan of action, rather, it looks for a similar pattern that it has already been exposed to and applies that pattern.\textsuperscript{123} Therefore, the purpose of training, especially for police officers, should be to expose officers to as many novel, high pressure, situations as possible.\textsuperscript{124}

This is a cornerstone of amendment based training – realistic training simulations. Significant research supports the notion that police officers are better able to make decisions, and make better decisions, when they have been trained with these scenarios.\textsuperscript{125} What amendment based training does is debrief officer after every scenario – ensuring that they are able to articulate the legal reasonableness of their actions based on the aforementioned six training principles.\textsuperscript{126} With this new method, some claim that the use of force continuum model is outdated. The continuum delays the decision making because the officer would need to “walk up” the various levels. Further, this type of decision making is counterintuitive since our brains are not wired to make that kind of decision, at least not under the circumstances that officers face daily.

\textsuperscript{121} Ibid., 15.
\textsuperscript{123} Klein and Wallentine “A Rational Foundation” 10.
\textsuperscript{124} Ibid.
\textsuperscript{125} Wollert and Norris, “Stress” 27.
\textsuperscript{126} Klein and Wallentine. “A Rational Foundation” 30. See Appendix “Figure C” for a sample of the FLETC post-incident scenario debriefing form that trainees must complete.
What this argument fails to recognize is that the continuum allows officers to enter at the level that that is appropriate.\textsuperscript{127} An officer will respond to a pattern of aggression that was already presented in continuum training. Certainly, a continua should not be the sole governing policy, but it is an effective training tool, especially for new recruits. It is also useful for veterans as they can incorporate new “patterns” into the continuum. The real problem with this kind of argument against the force continuum is that it is not an argument against the continuum at all – it is an argument for better police training. As discussed, amendment based training is first a recognition that officers must behave reasonably (including considerations of the context and threat that faces them), and second, a training method that gives officers the experience necessary so that they might not freeze up in the field. One could argue that this is little more than unstructured continuum training with scenario testing. The use of force continuum is not mutually exclusive with amendment based training, and officers will only stand to benefit. To argue against teaching a continuum is to argue against giving recruits an incredibly valuable tool in pattern recognition.

In precincts that employ a continuum standard, officers are taught that the use of force must be reasonable in that totality of circumstances. More specifically, the totality of circumstance is assessed as it relates to some use of force continuum model (be that model a ladder, circle, pyramid, etc.) Here officers are guided by general categories of action to take in response to the totality of circumstances unfolding before them. However, in a precinct that uses a JBR standard, officers learn more generally how to make a decision to use force and what factors should guide that decision making process. Similar to the Amendment based training,

Consider, however, the Florida Department of Law Enforcement, which went from a continuum standard to a JBR standard in 2009. There the standard “Response to Resistance Matrix (a force continuum) was substituted by a series of force guidelines. The guidelines simply set boundaries that officers should not breech, but offer no guidance as to how officers ought to act. Inherently, the JBR standard gives officers more flexibility and discretion. The problem with JBR training is that this policy fails when there is a bad actor. Regardless of the department or training method, there may be a bad actor in the police department. When a bad actor is in a department that trains officers using a continuum model, there is a clear concrete guideline to reference. JBR seems to open precincts to suit under section 1983 more readily. However, the problem lies not just with bad actors. Officers who make good faith attempt to follow the law and ensure peace may open themselves to punishment in JBR precincts. Without clear training guidelines, officers are at mercy of the jurors who may not understand the intricacies of police work. The continuum serves both the public by holding officers accountable, but also officers.

JBR advocates seem to believe that decision making guidelines proposed by continuum standards delay the decision making process. In a profession that is rife with life or death situations where split second decision making is the only luxury provided these officers, it is foolish if not dangerous to mandate that officers should have to go through mental gymnastics.

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128 Fridell, Ijames, and Berkow, “Taking the Strawman,” 2.
129 One of the most often cited statistics in discussions regarding officer-suspect interactions that a combative suspect can cover 21 feet in the time it takes the average officer to draw his or her service revolver. This is the foundation for the “Tuller Drill” or “21 Foot, Edged Weapon Defense” exercise where officers are trained to defend themselves against an armed attacker. This type of training became widespread thanks in large part to the dissemination of Tuller’s 1983 police training video, “How Close is Too Close”. This idea, again, entered the public consciousness when the popular Discovery television show, “Mythbusters”, took the Tuller Drill to task. There they found this “myth” “plausible.” In a series of tests a trained officer was able to successfully shot a charging attacker just as he reached the officer from a distance of 20 feet. When the attacker began his charge at 19 feet or less, the
This could not be farther from the truth. There is no reason to believe that there is some linear relationship between the level of structure of guidance in decision making and the speed which a decision is made in the field. This can be better understood if we accept that use of force continuum do not require officers begin at the lowest level of force and work their way up. This is a false dilemma that many opponents of continuum read in. Officers in continuum precincts are trained to assess the situation in the moment (just as officers in JBR precincts) and then guide their action by the appropriate level within the continuum. They do not need to “climb the ladder” as some suggest.

This understanding further supports use of force continuum advocacy. Proponents of JBR may suggest that the Court’s insistence on not using minimal standards is what makes JBR superior to continuum. The continuum, they argue, requires the officer to use the minimum of force and slowly climb up a ladder, or flow around some circle, until appropriate force is used. This is foolish considering the nature of officer-suspect interactions. As long as an officer is reasonable (the Court’s own standard), then the objective reasonableness standard is met. The problem with this line of argument is that it does not understand that officers using a continuum model will enter the continuum at whatever point is necessary given the totality of circumstances. Just as an officer in JBR will assess the threat posed by the suspect and respond accordingly, an officer using the continuum will assess the threat and then apply this to the continuum. Neither JBR nor continuum has an obvious advantage, but neither is inferior in this regard.

130 Terrill. Police Coercion.
Objective Reasonableness

Qua Objective Reasonableness

In 1992, the Sixth Circuit reassessed the Objective Reasonableness standard and offered an interpretation that has been cited by several lower courts and other Circuits since. In a case that contained elements of both Tennessee v. Garner and Graham v. Connor, the court concluded, “we must avoid substitution of our personal notions of proper police procedure for the instantaneous decisions of the office at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes reasonable actions may seem quite different to someone facing a possible assailant than to someone analyzing the question at the leisure of time.”

The same year that the court laid out the Objective Reasonableness standard in Graham, they issued a ruling on police training. The case City of Canton v. Harris considered whether municipalities could be held liable for failure to train officers. A woman who suffered emotional and physical trauma as a result of her arrest sought to hold the City of Canton liable under Section 1983. The Court found that a municipality may be held liable under Section 1983 only in certain limited circumstances when there were constitutional violations that resulted from a failure to train employees. In regard to police officers specifically, the circumstances in which the municipality may be held accountable for failure to train is limited to situations where “failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”

134 Ibid., 1203.
This decision lays out three criteria for liability under a failure to train claim. First, there must be a constitutional violation. Next, there must have been some degree of inadequate training. Finally, there must be a causal connection between these two factors. Barring any one of these circumstances, the municipality may be immune from Section 1983 claims. This decision has interesting ramifications for our discussion of use of force training. For the purposes of the argument I will eschew discussion of the first criterion, simply conceding that in cases of clearly excessive force, there is a constitutional violation. The second criterion is more interesting. Section 1983 demands that each defendant must have, through his or her own action, violated the defendant’s constitutional rights in order to be held accountable. Thus, supervisors cannot be held accountable for the actions of their charges, a form of vicarious liability.\(^{135}\) In order to prove the liability of a supervisor, it must be shown that the actions of the supervisor’s subordinate deprived the plaintiff of his or her Constitutional rights and that the defendant clearly directed the subordinate to take the actions that deprived these rights.\(^{136}\) In the case of use of force incidents, the plaintiff must prove that there was some departmental policy (or lack thereof) that caused the constitutional violation. The obvious problem is that seemingly any injury or Constitutional violation caused by an officer could have been prevented with more training. The Court recognized this, noting “Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program

\(^{135}\) See \textit{Ashcroft V. Iqbal} 556 U.S. 662, here the Court found that the plaintiff needed to plead and prove that the supervisors acted with discriminatory purpose in order to substantiate a claim of supervisory liability; \textit{Starr} 652 F. 3d; \textit{Menotti v City of Seattle}, “supervisory liability is imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional deprivations of which the complaint is made or for conduct that showed a reckless or callous indifference to the rights of others”

or the legal basis for holding the city liable.”  

On its face this sets an almost impossibly high bar for claimants who wish to challenge precinct policy. This was a decision that the Court made intentionally, lest the courts be bogged down with, “an endless exercise of second guessing municipal employee training programs… an exercise we believe the Federal courts are ill-suited to undertake.”

The discussion of officer training is complicated when one considers the type of training. Consider the 2008 case Kalma v. City of Socorro. In this case the court noted that the police department lacked a use of force training model. This lack of model, compounded with other training and procedural factors, precluded the court from dismissing charges of excessive use of force. The court writes, “At the time of the incident at issue, the city had a formal, written policy permitting its officers to use a chokehold to restrain a suspect. The city did not, however, have a use of force continuum policy such that officers were required to employ a step-by-step approach to eliminate resistance or violence. As a result, the city’s formal policy condoned the use of a chokehold without first considering whether lesser responses would be preferred.”

What is interesting is in that same case, the court granted the officers individual immunity for following the procedure laid forth by their precinct. The municipality was still

137 City of Canton, 391.
138 Ibid., 390-1.
139 First field training of officers occurred in 1972 in San Jose. There a program was implemented that selected seasoned veterans (who became Field Training Officers or FTOs) to train new recruits and recently commissioned officers. Not only did the FTOs offer “on the street” training to the new officers, the FTOs had discretion to block a recruit from commission for failure to perform in the street. The San Jose department hoped that this program would help weed out potentially troublesome officers and facilitate the transition out of the training academy. The San Jose program became a model for other departments. A 1985 survey reported that of the agencies who implemented a field training program, 57.4% admitted that their program was copied directly from the San Jose model, or copied with minor modifications. As a testament to the success of these programs in insuring proper police conduct 20.8% of agencies that implemented a field training program following the recommendation in the late 60s saw a significant drop in the frequency of complaints against the department for improper use of force. McCampbell, Michael S. Field Training for Police Officers: The State of the Art. Washington, D.C.: U.S. Dept. of Justice, National Institute of Justice, 1987.
140 Kalma v. City of Socorro 2008 WL 954165 (Westlaw Citation).
141 Ibid.
found at fault for improper procedure. Courts consider an officers training and the protocols that dictate their behavior when considering use of force claims.

In *Davis v. Gryniewicz, III*, the defendant, an officer accused of excessive force under the 4th, attempted to exclude evidence regarding the ‘force continuum’. The Plaintiff insisted that the force continuum is appropriate “evidence … relevant to determining whether [the officer] acted reasonably under the circumstances.” The court agreed with the plaintiff and admitted the evidence with the following guidance. “Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Here, evidence of the types of force available to law enforcement officers and their training on the subject is relevant to the *Graham* reasonableness inquiry. Specifically, such information is likely to assist the jury in determining how a reasonable officer might have acted in the situation at issue. The Constitution does not require a police officer to use the least harmful type of force available; only that the force actually used be objectively reasonable in light of the threat to officers and others. Nevertheless, the force continuum and testimony about the types of force that officers are trained to use, are instructive to a jury’s understanding of what is a reasonable response.”

Importantly, the court is not arguing that a use of force continuum is necessary, or that, “an officers compliance with, or violation of departmental policy is conclusive as to whether or not the suspect’s 4th Amendment rights were violated” but, “in considering whether an officers actions are ‘objectively reasonable’, all of the facts and circumstances confronting the office may be considered.”

142 *Davis*, 2013 U.S. Dist. LEXIS 72307 (Lexis Citation).
143 Ibid., 8.
144 Ibid., 9-10.
145 King v Taylor 694 F.3d 650 (2012).
I argue that this decision should point precincts towards a use of force continuum model. The use of force continuum model, structured with the needs of the precinct and municipal in mind, but following a national standard, could solve issues posed by *City of Canton*. A use of force continuum model, properly formulated, would significantly reduce the likelihood that a claimant could demonstrate improper training in use of force incidents. More importantly, if a claimant is able to demonstrate that the particular use of force continuum is inadequate, then the precinct could take immediate concrete measures to retrain the officer and reformat the continuum. Understanding that *City of Canton* would preclude most claims of inadequate training from reaching the courts, combined with this imperative to train and implement use of force continuum, would give gravity to those cases that do make it to court. A precinct that truly is ignorant of the right of those it is sworn to protect should be punished.

**Objective Reasonableness in Action**

Let’s consider *People v. Atkinson*\(^{146}\) to understand how an objective reasonableness inquiry plays out. New York courts issued a warrant for the arrest of Kaseen Atkinson for violation of the terms of his parole. Atkinson, previously convicted for trafficking drugs and possession of an illegal firearm, was suspected of again engaging in drug trade. Officers found Atkinson riding in a friend’s vehicle and attempted to arrest him. Atkinson resisted arrest and would not speak with the officers. One officer forcibly placed Atkinson on the ground and pinned him there while a second officer attempted to restrain him. Atkinson fought against the officers. The officers were unsure of Atkinson’s intentions and believed that he might be hiding a weapon, so they TASED

him. While Atkinson was being TASED, an officer saw a small baggie containing white powder in Atkinson’s mouth. The officers ordered Atkinson to spit out the baggie, threatening to TASE him again. Atkinson was TASED a second time, yet he still refused to drop the baggie. Both officers simultaneously TASED Atkinson a third time, apparently unaware of each other’s intentions. Atkinson finally dropped the baggie, which contained cocaine. Immediately after, the officers found a second baggie of cocaine in his pants and an unregistered firearm in the vehicle.147

Atkinson’s defense moved to suppress the cocaine obtained from his mouth during the excessive TASING, but the court denied the motion. Atkinson was convicted of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the fourth degree. Atkinson appealed. The appellate court found that the local court erred in refusing to suppress the cocaine seized from his mouth. After a lengthy suppression hearing the motion was denied and Atkinson appealed again. The defense claimed the evidence was the result of the officer’s use of excessive force and thus ought to be impermissible under 4th Amendment protections.

The court did not find the use of force to be unreasonable. Though the officers unsuccessfully petitioned for Section 1983 immunity, they were not found guilty of violating the 4th. According to the court, the objective reasonableness standard of the 4th amendment requires considering the “totality of the circumstances” to determine what level of force is permissible.148 The court noted the engagement “was a highly charged situation, where [the] defendant refused to comply with any orders.”149 The officers were aware of Atkinson’s criminal record and that he had "absconded from parole and was allegedly trafficking drugs.” Atkinson was actively and

147 Ibid.
148 People v. Atkinson citing Graham.
149 People.
violently resisting arrest. Additionally, the officers saw what they believed to be, and what was, narcotics in Atkinson's mouth. Finally, the entire incident occurred in less than one minute. The court also considered Atkinson’s safety as ingesting cocaine would likely have deleterious effects on his health. The totality of these circumstances led the court to believe a reasonable officer at the time would have acted similarly, or at least would not find the actions objectionable.

**Proportionality Standard – An Alternative**

Vicki C. Jackson offers an alternative to 4th Amendment Objective Reasonableness. In her 2015 work “Constitutional Law in the Age of Proportionality,” she argues for the reassessment of US constitutional law in favor of a proportionality standard.\(^{150}\) In order to make her argument about proportionality standards, Jackson considers how these standards are used in other nations, specifically Canada and Israel. A proportionality standard, Jackson explains, is a “general principle of constitutional law… [that] requires government intrusions on freedoms be justified, that greater intrusions have stronger justifications, and that punishments reflect the relative severity of the offense.”\(^{151}\) In general, proportionality standards provide guidance for officials and courts to set boundaries to some otherwise authorized government actions. This is not a totally foreign concept within the American judicial system. Eighth Amendment jurisprudence as well as levels of scrutiny doctrines embody the idea that harms by the government should be justified by “loftier standards.”\(^{152}\)


\(^{151}\) Ibid 2680

\(^{152}\) Jackson writes, “Proportionality as a principle is embodied in a number of current areas of U.S. constitutional law: for example, in Eighth Amendment “cruel and unusual punishments” and “excessive fines” case law; as a limit
The Canadian proportionality standard is one of the most comprehensive and successful standards, and thus is used as a reference point for how an American proportionality standard could function. In the Canadian context, the proportionality inquiry begins with a review of the scope of the right that is in question. How is that right protected and by what statute or constitutional protection? Next the court considers the authority of the action that violated said right. This is a three-step inquiry which assesses the (a) rationality; (b) minimal impairment; and (c) proportionality of the action. On its face this may seem like a balance test – the weighing of individual rights against some societal or governmental interest. However, a balance test, even by its name alone, views the government interest and individual right as things that can be measured against one another. There may be instances where a government interest outweighs a right, simply for its sheer importance. A proportionality test does not hold governmental interests equal to individual rights from the start. This is the idea behind “proportionality as such”, an Israeli term that has been co-opted by the Canadian system. “Proportionality as such” begins from a perspective that individual rights are sacrosanct and the government has the burden of justification of the intrusion. In this way a proportionality standard tips the scales of justice in favor of the individual. Courts applying proportionality standards must next ask whether the intrusions on these extremely valuable, though not quite absolute, rights are proportional to the benefits provided by achievement of the government interests at stake in a particular area of law.

imposed by the Due Process Clause on the award of punitive damages; and in Takings Clause cases requiring “rough proportionality” between conditions on zoning variances and the benefits of the variance to the property owner. In each of these areas, the principle of proportionality imposes some limit on otherwise authorized government action, a limit connected to a sense of fairness to individuals or a desire to prevent government abuse of power. Proportionality is centrally concerned with how, in a “democratic society, . . . respect for the dignity of all men is central,” reflected in “our Nation’s [longstanding] belief in the ‘individuality and the dignity of the human being.’”

153 Jackson, “Proportionality” 3099.
155 Jackson, “Proportionality” 3101.
and policy. Only if the magnitude of the intrusion on rights is less than the benefits provided (including harms avoided) can a law or policy survive proportionality review.

Jackson addresses the applicability of the proportionality standard to 4th Amendment use of force jurisprudence by considering *Atwater v. City of Lago Vista.*\(^{156}\) Here the courts considered the arrest of a young mother (*Atwater*) for a non-jailable traffic offense. Following a verbal altercation, officers refused Atwater’s request to turn her children over to her neighbor’s care. Atwater was arrested and brought to the police station. There she was promptly released with a $50 fine, though her vehicle was impounded.\(^{157}\) Atwater sued, claiming that the officers’ conduct was gratuitous and humiliating. The case was brought to the Supreme Court, where the majority opinion noted that, “‘if we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail.’”\(^{158}\) Unfortunately for Atwater, this is not how the Court functions in appellate cases. The role of the Supreme Court in reviewing *Atwater* was not to fact-find. That is the role of the lower courts. The Supreme Court granted cert to determine if the 4th Amendment limits an officer’s ability to arrest an individual without warrant for a minor offense. In a split decision the Court found that yes, generally speaking, officers can effect warrantless arrests for minor offenses.

Jackson sees this decision as an illustration of the failure of the American court system. As a young mother of two and a member of the community of Lago Vista, Atwater would have little incentive to flee the scene. Immediate arrest with the threat of incarceration seems excessive. The officers should certainly have allowed Atwater to turn her children over to the care of her neighbor before they enacted any arrest. However, they should not have arrested Atwater in the first place. Jackson contends that had the Court followed a proportionality review

\(^{157}\) Ibid., 320.
\(^{158}\) Ibid., 322.
of the case (as in the Canadian system) they would have first considered whether Atwater’s interests lie within the scope of the 4th Amendment (they do). Next they would have determined if the officer’s actions were rational and minimally impairing. Certainly they were not: persons are not ordinarily arrested for non-jailable traffic offenses. There is little doubt that Atwater upset the officers with her words, and the officers effected the arrest as a demonstration of their control. Finally, on a proportionality approach the court would consider “proportionality as such,” allowing the government (in this case the officers) to try to justify their seizure of Atwater. If their only rationale was that she was rude to them, clearly their infringement on her liberties was not proportional to the government’s interests. But the Court’s reliance on a reasonableness standard reached a different result.

Effectively, Jackson argues that 4th Amendment Objective Reasonableness standard does not reflect the spirit of “Constitutional Justice.” If you consider the text of the 4th amendment, a premium is placed on the feeling of security and safety of the individual. Atwater and her children were done a great disservice by the officers. Jackson’s argument for a proportionality standard is indeed compelling. It seems that if the court were to adopt a proportionality standard fashioned in the way that Jackson describes, there would be a disincentive for officers to use excessive force.

**Objective Reasonableness: A Superior Standard**

Therein lies the problem with adopting a proportionality standard for excessive force claims under the 4th Amendment. The Court in *Atwater* noted, “a responsible 4th Amendment

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159 Jackson, “Proportionality” 3130-2.
160 Ibid., 3103.
balance is not well served by standards requiring sensitive, case-by-case determinations of
government need, lest every discretionary judgment in the field be converted into an occasion for
constitutional review.” If a proportionality standard which considers “proportionality as such”
was adopted, there would not just be a disincentive to use excessive force, there might well be a
disincentive to use force in any capacity. Removing the 4th Amendment Objective
Reasonableness test and replacing it with a standard that is preferential to individual rights over
the government places officers in a very precarious situation. Officers are tasked with enforcing
the law, and part of this enforcement is the use of force. Section 1983 allows for individuals to
sue officers if their action violates an established right – not the least of which would be the
freedom from unreasonable seizure. Without the 4th Amendment objective reasonableness test,
officers will only have their defense of qualified immunity to defend against suit. Recall that
qualified immunity has its own objective reasonableness test. However, this test is one that
requires the court to assess what a reasonable officer would have known about the right that was
violated, not how he or she would have acted. Law Enforcement officials work closely along 4th
Amendment guidelines in the execution of their job. They are aware that the 4th Amendment
prohibits unreasonable searches and seizures. They also, through their training and experience,
can be shown to know that use of force is a seizure of a person. Moving away from the Objective
Reasonableness test as established in Graham opens officers to an unprecedented level of
scrutiny.\textsuperscript{162}

Jackson raises important questions regarding the current state of the American legal
system. I do not deny that in the context of 1st Amendment rights, a proportionality standard

\textsuperscript{161} Atwater, 347.
\textsuperscript{162} Additionally, the proportionality standard calls for officers to use the minimum amount of force. As noted in
Graham, minimum invasiveness is not a requirement for the purpose of an objective reasonableness test.
would be an incredible boon for individual rights.\textsuperscript{163} However law enforcement officials are
given a certain discretion from the court for a reason – the nature of their job is such that they
may inadvertently violate rights. The Objective Reasonableness standard of the 4\textsuperscript{th} Amendment
allows courts to consider what a reasonable officer would have done in the same context. This is
the appropriate measure for assessing rights violations. If a reasonable officer would do the same
thing in context, then the action taken (which lead to the individual right intrusion) must be
permitted.

\textsuperscript{163} Especially in an age of increased surveillance.
Conclusion

The use of force by officers is a necessarily contentious fact of American life that cannot be solved by academic research alone. Since its inception, law enforcement has existed in a precarious dichotomy in the public consciousness – officers are both trusted to protect the law and feared for their potential use force to break the law. Though precincts have adopted a number of internal policies to prevent abuse of power, private citizens can always hold officers accountable for their actions via Section 1983 suits. Objective Reasonableness, as formulated by the Graham Court, is an effective standard to guide jurors in determining if an individual’s rights have been unreasonably violated. This test calls for jurors to consider if a reasonable officer in the same context would behave similarly. This is assuming, of course, that the suit survives a qualified immunity claim, which carries its own reasonableness test.

Whether it is possible to craft a perfectly comprehensive training regime or constitutional test means nothing if officers are unwilling or unable to follow these guidelines. However, this is not to say that officer training or constitutional standards have no value. Recent years have seen precincts turn away from the use of force as a training tool. This was in error. The use of force continuum will continue to help officers in the field navigate their (usually event-less) interactions with the public. Thus, precincts should take heed and incorporate this tool alongside their new amendment based training. The continuum will help the public hold officers accountable when the actions taken are objectively un-reasonable. This can help shift the balance away from distrusting the police to trusting that police are well trained to act appropriately, and trusting that the courts are well equipped to punish bad actors.
APPENDIX

Table 1


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<th>The Suspect’s Level of Resistance in Sequential order*</th>
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<tr>
<td>Verbal non-compliance</td>
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<td>Defensive resistance</td>
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<tr>
<td>Active resistance</td>
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<tr>
<td>Aggravated active resistance</td>
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<tr>
<td>Active resistance, deadly weapon</td>
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<tr>
<td>Aggravated</td>
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*The number of “active” cases declines with each action. The percentage figures refer to the number of cases that have not been resolve, either by release or by taking the suspect into custody.
Table 2

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<th>3rd</th>
<th>4th</th>
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<td>441</td>
<td>148</td>
<td>62</td>
<td>19</td>
<td>9</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Strong verbal order</td>
<td>168</td>
<td>259</td>
<td>151</td>
<td>79</td>
<td>35</td>
<td>17</td>
<td>14</td>
<td>5</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Forcibly subdued, defensive</td>
<td>47</td>
<td>185</td>
<td>267</td>
<td>237</td>
<td>156</td>
<td>80</td>
<td>41</td>
<td>14</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Forcibly subdued, offensive</td>
<td>3</td>
<td>24</td>
<td>34</td>
<td>39</td>
<td>16</td>
<td>12</td>
<td>5</td>
<td>2</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Intermediate weapon</td>
<td>13</td>
<td>22</td>
<td>31</td>
<td>29</td>
<td>23</td>
<td>12</td>
<td>11</td>
<td>3</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Deadly force</td>
<td>1</td>
<td>7</td>
<td>9</td>
<td>2</td>
<td>1</td>
<td>—</td>
<td>1</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
</tbody>
</table>

*The number of “active” cases declines with each action. The percentage figures refer to the number of cases that have not been resolve, either by release or by taking the suspect into custody.

Figure A

Linear Use of Force Continuum

Figure B

Circular Use of Force Continuum

**Figure C**

This is a sample of the FLETC post-incident report debriefing form

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**FEDERAL LAW ENFORCEMENT TRAINING CENTER**

**Use of Force Incident Report**

---

This Incident Report will be initiated and completed immediately following an exercise where a student discharged a firearm, employed intermediate weapons, or applied physical force. This report will be collected and filed the day of the incident with the exercise coordinator who will forward it to the Chief, Enforcement Operations Division (EOD), for review (FLETC Manual 91-01.A (3)).

The following exercises are exempt:

1. Simulated firing
2. Judgment shooting applications (video simulator, situational response, interactive drills)
3. Training at the instructor direction (demonstrating the use of firearms, intermediate weapons, or physical force)
4. Other exercises and/or training as determined by the FLETC Program Manager

---

**DATE**

**TIME**

**NAME**

**CLASS#**

---

**USE OF FORCE FACTORS:***

1. **WHAT WAS THE SEVERITY OF THE CRIME?**

2. **WAS THE SUBJECT AN IMMEDIATE THREAT TO THE SAFETY OF OFFICER(S)/OTHERS? HOW?**

3. **DID THE SUBJECT ACTIVELY RESIST ARREST OR SEIZURE? HOW?**

4. **DID THE SUBJECT ATTEMPT TO EVADE ARREST OR SEIZURE BY FLIGHT? HOW?**

---

**FIC-OFTS**

**1**

**REV-JUN-08**
## Officer/Subject Variables

**NUMBER OF SUBJECTS INVOLVED:**

**NUMBER OF OFFICERS INVOLVED:**

<table>
<thead>
<tr>
<th>Officer 1</th>
<th>Officer 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name:</td>
<td>Name:</td>
</tr>
<tr>
<td>Ht/Wt/Build:</td>
<td>Ht/Wt/Build:</td>
</tr>
<tr>
<td>Age:____</td>
<td>Age:____</td>
</tr>
<tr>
<td>Condition:</td>
<td>Condition:</td>
</tr>
<tr>
<td>Injuries:</td>
<td>Injuries:</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Subject 1</th>
<th>Subject 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name:</td>
<td>Name:</td>
</tr>
<tr>
<td>Ht/Wt/Build:</td>
<td>Ht/Wt/Build:</td>
</tr>
<tr>
<td>Age:____</td>
<td>Age:____</td>
</tr>
<tr>
<td>Condition:</td>
<td>Condition:</td>
</tr>
<tr>
<td>Injuries:</td>
<td>Injuries:</td>
</tr>
</tbody>
</table>

### Factors Known at the Time of the Incident

<table>
<thead>
<tr>
<th>Officer 1</th>
<th>Officer 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of Crime:</td>
<td>Type of Crime:</td>
</tr>
<tr>
<td>Weapons:</td>
<td>Weapons:</td>
</tr>
<tr>
<td>Criminal History:</td>
<td>Criminal History:</td>
</tr>
<tr>
<td>Appeared Intoxicated:</td>
<td>Appeared Intoxicated:</td>
</tr>
<tr>
<td>Mental History:</td>
<td>Mental History:</td>
</tr>
</tbody>
</table>

### Commands Given

<table>
<thead>
<tr>
<th>Officer 1</th>
<th>Officer 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>What did the officer say/do?</td>
<td>What did the officer say/do?</td>
</tr>
<tr>
<td>What did the Subject say/do?</td>
<td>What did the Subject say/do?</td>
</tr>
</tbody>
</table>

### Subject’s Response

<table>
<thead>
<tr>
<th>Officer 1</th>
<th>Officer 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>What did the officer say/do?</td>
<td>What did the officer say/do?</td>
</tr>
<tr>
<td>What did the Subject say/do?</td>
<td>What did the Subject say/do?</td>
</tr>
<tr>
<td>Other Factors</td>
<td>Check all boxes that apply</td>
</tr>
<tr>
<td>-----------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td>Pre-Assault Indicators</td>
<td>Situational Factors</td>
</tr>
<tr>
<td>Body size disparity</td>
<td>Physical exhaustion</td>
</tr>
<tr>
<td>1000 yard Stare</td>
<td>Nighttime</td>
</tr>
<tr>
<td>Target glancing</td>
<td>Winter/snow/ice</td>
</tr>
<tr>
<td>Scanning the area</td>
<td>Steep or dangerous terrain</td>
</tr>
<tr>
<td>Verbalization of harm</td>
<td>Involvement of heights</td>
</tr>
<tr>
<td>Repetitive phrases</td>
<td>Evading arrest by stealth</td>
</tr>
<tr>
<td>Sudden attack</td>
<td>Evading arrest by hiding</td>
</tr>
<tr>
<td>Known/perceived fighting ability</td>
<td>Presence of bystanders</td>
</tr>
<tr>
<td>Clenching (hands, teeth)</td>
<td>Residential area</td>
</tr>
<tr>
<td>Illigical responses</td>
<td>Commercial area</td>
</tr>
<tr>
<td>Multiple subjects</td>
<td>High crime area</td>
</tr>
<tr>
<td>Weight shifting</td>
<td>Urban area</td>
</tr>
<tr>
<td>Personal grooming behaviors</td>
<td>Rural/remote area</td>
</tr>
<tr>
<td>Removing hat, watch, etc</td>
<td>Water environment</td>
</tr>
<tr>
<td>Crossing the arms</td>
<td>Evading arrest by flight</td>
</tr>
<tr>
<td>Hands above waistline</td>
<td>Involvement of speed/vehicles</td>
</tr>
<tr>
<td>Bladed/boxer stance</td>
<td>Riot/mob</td>
</tr>
<tr>
<td>Hands in pockets</td>
<td>Engaged in protest activity</td>
</tr>
<tr>
<td>Ignoring the officer</td>
<td>Involvement of heights</td>
</tr>
<tr>
<td>Tattoos (gang)</td>
<td>Water environment</td>
</tr>
</tbody>
</table>

Remarks (Articulate facts above and any additional factors)

WITNESSES (Instructors & Students)

1.  2.  3.  4.  

FTC-OFT 8  3  REV-JUN-08
I certify that the above listed information is true and correct.

Signature of Officer ___________________________ Date of Signature ___________________________
CASES

- Dickerson v. McClellan 101 F.3d 1151.
- Duchesne v. Sugarman 566 F.2d 817.
- Gomez v. Toledo 446 U.S. 635.
- Johnson v. Glick 481 F.2d 1028 (2d Cir. 1973).
- Kalma v. City of Socorro 2008 WL 954165.
- Keller v. Frink 745 F.3d 1151.
- King v Taylor 694 F.3d 650 (2012).
- Landoll-Rivera v. Cruz Cosme, 906 F.2d 791.
- Landrum v. Moats 576 F.2d 1320.
- Roy v. Inhabitants of City of Lewiston 42 F.3d 691.
- Sigman v. Town of Chapel Hill 161 F.3d 782.


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Papachristos, Andrew V. "Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders." Journal of Criminal Law and Criminology 102, no. 2 (Spring 2012): 397–440.


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