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POINT OF LAW

Factors to Consider Before Using Force to Effect an Arrest

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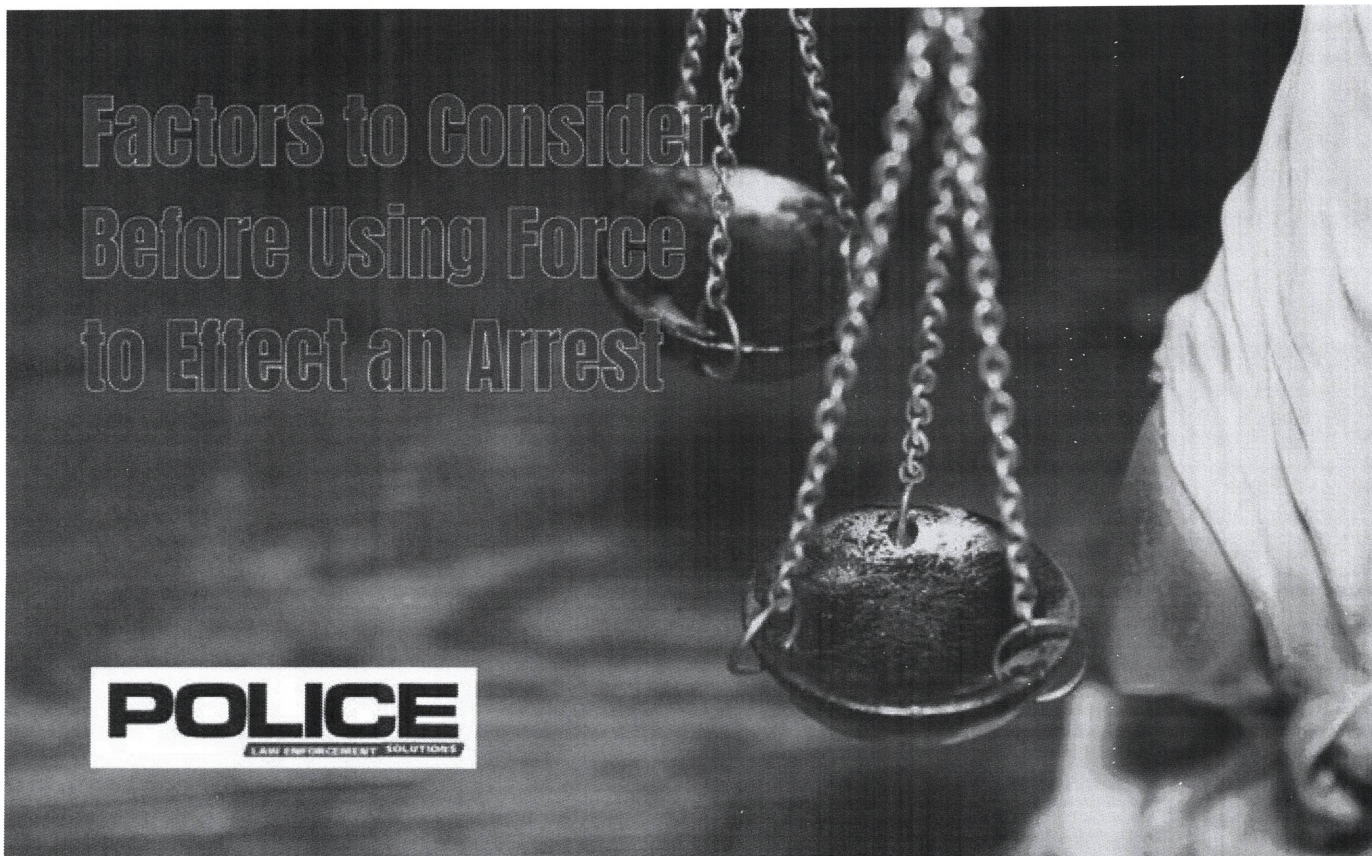


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The excessive use of force by a small number of police officers has become a lightning rod for criticism of the police, spurring movements to defund, reduce, and hamstring police agencies throughout the United States. The unprofessional and illegal actions of a small minority of police officers have been broadcast throughout social media platforms and the news media tarnishing the badges of hundreds of thousands of professional peace officers.

For decades, the courts have recognized the balancing act that police officers must accomplish when making split-second decisions on whether to use force and what force to use. Through my experience as an attorney, a judge, and a police officer, I'd like to offer you some insight into the law and present a simpler, more-effective approach to decision-making when faced with making use-of-force decisions.

Law enforcement encounters with subjects can be non-threatening at the outset but can quickly deteriorate into volatile and dangerous situations based on the severity of the arrestable offense and the suspect's demeanor, cultural values, age, state of mind, impairment, and past experiences with police. So police chiefs and judges understand that in certain situations the use of force to effect an arrest may be necessary. But problems arise when the use of force or the degree of force used is unreasonable, making it "excessive."

BLURRED LINES

Most officers are familiar with the use-of-force continuum. The word "continuum" is important because it means spectrum or range. The use-of-force continuum is a set of policies or protocols that allow officers to use verbal and physical deterrents under specific circumstances. The basic idea is that officers should use the least amount of physical force required to negotiate a situation.

The concept of this being a "blurred lines" continuum of force is key to understanding how federal courts approach federal civil rights cases involving use of force by officers. The courts understand that most confrontations between police and suspects are not clearly

defined and set. The U.S. Supreme Court and the U.S. District Courts (which have exclusive jurisdiction to hear civil rights excessive force cases) understand that these situations are very fluid.

Thus, the use-of-force continuum allows police officers to choose the necessary amount of force based on the situation and the level of threat presented by the subject. At the highest level of threat, this includes deadly force.

The National Institute of Justice uses a five-level continuum of force model that includes:

1. **Officer Presence:** No force is necessary. The presence of the officer deters crime or defuses a situation.
2. **Verbalization:** Officers use calm, nonthreatening commands. The officer may increase volume and shorten commands to gain compliance when issuing orders like "Stop!" or "Don't move!"
3. **Empty-Hand Control:** Officers use two types of bodily force to gain control of a situation: ***soft techniques*** such as grabs, holds, and joint locks; and ***hard techniques*** such as punches and kicks.
4. **Less-Lethal Methods:** Officers use less-lethal tools to gain control of a situation. Types of less-lethal force commonly used include: ***blunt impact*** such as a baton or impact munition; ***chemical*** such as pepper spray, and ***conducted energy devices*** such as TASERS or other electric weapons.
5. **Deadly Force:** Officers use lethal weapons to gain control of a situation where a suspect poses a threat of serious bodily injury or death to the officer or another individual.

U.S. CODE

Lawsuits claiming a violation of civil rights are filed in federal courts because they allege violations of the 1964 Civil Rights Act that is codified in Title 42 of the U.S. Code. Title 42

addresses public health, social welfare, and civil rights. Section 1983 covers civil rights lawsuits. Officers and agencies can also be sued in state court for actions that do not rise to the level of civil rights violations. Additionally, police officers may face federal and state criminal charges for using excessive force.

OBJECTIVELY REASONABLE

When analyzing whether an officer's use of force was "reasonable" and thus, not "excessive force," the courts will examine the officer's actions through the eyes of what a reasonable and prudent police officer would be seeing, thinking, and doing with only the information that the officer had at the time of the event.

When reviewing the force that was used by the officer to seize and arrest a suspect, the federal courts consider two primary factors to determine whether force was necessary and reasonable or was excessive and violated the Fourth Amendment:

1. Was the use of force necessary?
2. What amount of force was reasonable under the circumstances?

In *Graham v. Connor*, 490 U.S. 386, 396-397 (1989), the Supreme Court held that use of force by police officers should be evaluated based on "objective reasonableness" and opined, "Reasonableness [of the use of force] must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight of judges sitting comfortably in their legal chambers.

The Supreme Court recognized that when reviewing an officer's use of force in Section 1983 civil rights cases, the court must consider the fact that police officers are thrust into dynamic and fluid situations that can turn on a dime. The Supreme Court publicly acknowledged this fact when the justices wrote, "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the *amount of force that is necessary* in a particular situation."

My experience leads me to the opinion that many of the highly publicized bad use of force decisions result from an absence or miscalculation as to what level of force should be

used against an actively resisting suspect. In most instances where a suspect is actively resisting arrest, a reasonably prudent police officer would agree that some level of force may be necessary to effect the arrest. The critical issue in most of the situations is a failure to use the proper level of force. Officers should use the mindset of thinking and ask themselves, "What is the least amount of force I can use to arrest and take custody of this offender?"

In *Graham v. Connor*, the Supreme Court stated the factors the court would look at to determine the reasonableness of the officer's use of force:

- * The *severity* of the crime the suspect was being arrested for.
- * Whether the suspect posed an *imminent threat* to the safety of officers and/or others.
- * Whether the suspect was *actively resisting* or just attempting to evade arrest or flee.

POLICIES AND PROTOCOLS

When writing and implementing use-of-force protocols, police chiefs should consider the difference between the *right* to arrest and the *need* to arrest suspects. We should be cognizant of the public's perception of police officers and the public's desire to have faith that officers are acting reasonably. The public's desire for officers to act reasonably is the same standard that the courts apply when determining if an officer's force was reasonable or excessive. The decision to use force must have been objectively reasonable to another (prudent) police officer under the same circumstances, at the time of the arrest.

In a 2018 report titled "Police Use of Force: An Examination of Modern Policing Practices," the U.S. Commission on Civil Rights noted that "while a police officer may be acting within the legal confines laid out by *Graham*, the public may perceive the officer behaving badly or illegitimately. This significant disconnect can reduce community confidence in the legitimacy of the police which ultimately reduces the efficacy of police work by making members of the community less responsive in future interactions with the police and less likely to assist officers in investigations."

Police Executive Research Foundation (PERF) also authored a report on use of force, the law, and police policy. In "Guiding Principles on Use of Force," released in 2016, PERF

wrote: "While *Graham v. Connor* established the constitutional floor for excessive use of force, many jurisdictions have chosen to move beyond these bare minimums and adopt a more exacting and detailed set of policies and training procedures such as rules on shooting at moving vehicles, rules on pursuits, and other use of force issues."

For example, in Texas a police officer has the right to arrest a traffic violator (except for speeding) if the violator refuses to sign the citation. The citation is really a promise to appear—essentially a personal bond. However, having the "right" to arrest and the "need" to arrest are not the same. As a member of the judiciary, I like to let officers know that there are other ways to handle minor misdemeanor offenders, which do not require arresting them for refusal to sign the citation.

Although an officer may have the "right" to arrest a traffic violator who refuses to sign the citation there may not be a need to do so. Having served eight years as a police officer, I understand the frustration officers experience when traffic violators and misdemeanor suspects refuse to sign citations. However, in this political climate, officers must control their emotions and ask themselves, "is this the best avenue to take over a minor offense?"

In situations where arrest is not necessary, like the traffic violator refusing to sign the citation, why not hand the violator his driver's license, let him know he is free to go, and that the court will be sending him a summons ordering him to appear? As tempting as it to use force to arrest an arrogant traffic violator or other low-level misdemeanor suspect, it would be a better decision to de-escalate the situation and let the court summons the violator to court to answer the charge.

The same analysis should be employed in police chase protocols. Most police chases begin with traffic violations and non-violent misdemeanor criminal offenses. Police chiefs and command officers must consider the high potential for grave outcomes in these chase situations, many of which end in death and catastrophic injuries to innocent civilians.

If we know the identity of a low-level criminal suspect who flees, it may be most prudent and reasonable to let them go. Save the police chases for serious felony cases involving imminent danger to officers and the public. Charges can be filed, and courts will summon these offenders to appear. Handling these minor offenses will avoid dangerous high-speed chases, high-speed crashes, and claims of excessive force. Implementing strong

police chase policies will reduce the risk of excessive force complaints and wrongful death lawsuits.

This same mindset must be applied when developing and implementing use-of-force policies. If we embrace and use the factors the Supreme Court applied in *Graham v. Connor*, we can greatly reduce the risk of injuries to officers, injuries to suspects, and avoid costly lawsuits against officers and their police departments:

- * The *severity* of the alleged crime the suspect was being arrested for.
- * Whether the suspect poses an *imminent threat* to the safety of officers and/or others.
- * Whether the suspect is *actively resisting* or just attempting to evade arrest by flight.

There is a lot to remember and analyze when officers face critical use-of-force decisions when faced with noncompliant suspects. In my humble opinion as an attorney, former prosecutor, and judge, I think the crux of the analysis that reasonable police officers should be using is as simple as this:

1. Is it reasonable to use any force or are there other options to resolve this?
2. If I must use force, what is the least amount of force that I should use to arrest this suspect?

I think a simple straightforward approach and training platform must be utilized or officers will not be able to use it in stressful situation. I do not by any means believe critical use-of-force decisions that must be made in split seconds are “easy,” but I think if we can simplify the analysis and train officers to use this two-step approach it will help achieve the goal of using minimum force to arrest suspects. If we can put our emotions aside and use objective thinking when dealing with argumentative, aggressive, or hostile suspects the outcomes will be better, and we will all benefit from this approach.

Kevin R. Madison is an attorney with 40 years of civil litigation experience and 30 years of experience as a judge and state magistrate. Madison is a former prosecutor, police officer, and police chief. He is an expert witness in cases involving police procedures, police chases, and use-of-force cases throughout the U.S.