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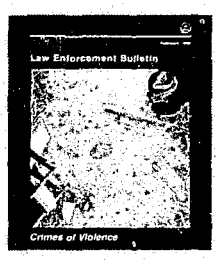

Cover: *By improving their ability to analyze violent crime scenes, investigators will be better equipped to apprehend the offender. See article p. 1. Front and back cover photographs copyright Frank Siteman Studios.*

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Constitutional Constraints on the Use of Force

By
JOHN C. HALL, J.D.

The most tangible expression of governmental authority is the power to deprive an individual of "life, liberty, or property." Law enforcement officers and agencies are the visible expression of that power. Therefore, in the bicentennial year of the Federal Bill of Rights, it is appropriate to remind ourselves that those provisions were added to the Constitution in 1791 for the express purpose of constraining governmental power. Originally intended to restrict only Federal power, many of the same restraints have since been applied to the States through the Due Process Clause of the 14th amendment.

Shortly after the adoption of the 14th amendment in 1868, Congress enacted Title 42, U.S. Code, Section 1983. Today, Section 1983 provides a means by which an individual can seek a civil remedy in either State or Federal court against any law enforcement officer who deprives that person of a constitutionally protected right while acting under color of law. If the alleged violation results from a policy, practice, or custom of a governmental entity, this entity may also be sued.

Excessive force claims account for many of the lawsuits brought against law enforcement officers and agencies each year under Section 1983. These claims arise within three major contexts: 1) Arrests or other seizures of criminal suspects, 2) post-arrest/pre-trial detention, and 3) post-conviction confinement.

The Supreme Court has rejected the notion that a "single generic" standard governs all uses of force by law enforcement officers. Accordingly, in any case alleging excessive force by law enforcement officials, it is first necessary to identify "...the specific constitutional right allegedly infringed by the challenged application of force," and then to

assess the claim "...by reference to the specific constitutional standard which governs that right...."[1]

This article identifies the different Federal constitutional provisions that govern the use of force. It briefly describes the standards applicable to each and then examines cases that describe or illustrate how the different standards apply. Before doing so, however, it is important to note one requirement that appears to be common to all of them.

"...in overcoming resistance, it is necessary to tailor the use of force to the degree of resistance encountered...."

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THE "SIGNIFICANT INJURY" REQUIREMENT

Many courts, as a means of screening excessive force claims, have imposed the requirement that plaintiffs allege and prove that some "significant injury" resulted from the alleged constitutional violation. Following the premise that "[N]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers..."[2] violates the Constitution, these courts emphasize the need to ensure that constitutional claims are not trivialized. Accordingly, claims of excessive force are generally dealt with summarily by the courts when the plaintiffs allege only negligible physical injury or psychological distress.

For example, in *Wisniewski* v. *Kennard*,[3] the plaintiff alleged that the arresting officer placed a gun barrel in his mouth and threatened to blow his head off. He claimed that he was frightened and suffered bad dreams as a result. The court rejected the claim as not alleging a significant injury. Similarly, in *Mouille* v. *City of Live Oak*,[4] the court held that "...'transient distress' caused by an arresting officer's actions cannot constitute a significant injury...."

THE USE OF FORCE IN ARRESTS OR OTHER SEIZURES OF SUSPECTS

The text of the fourth amendment explicitly encompasses "seizures" of persons. Thus, when a seizure occurs, the fourth amendment provides the appropriate standard for measuring its lawfulness.

However, when does a seizure occur? In *Tennessee* v. *Garner*, the Supreme Court wrote that "[W]henever an officer restrains the freedom of a person to walk away, he has seized that person."[5] More recently, and more specifically, in *Brower* v. *County of Inyo*, the Court held that a seizure occurs "...only when there is a governmental termination of freedom of movement through means intentionally applied."[6]

Not only must there be an actual termination of freedom of movement, but such termination must be the result of intentional government action with respect to both the result and the means by which it is accomplished. In *Garner*, a seizure occurred when a police officer shot and killed a fleeing burglary suspect; in *Brower*, the seizure occurred when a fleeing suspect crashed the car he was driving into a police roadblock.

In *Garner*, the Supreme Court relied solely upon the fourth amendment to assess a police officer's use of deadly force to prevent the escape of a felony suspect, specifically declining to look to any other constitutional standard. Four years later, in *Graham* v. *Connor*,[7] the Court held that since the fourth amendment specifically encompasses police seizures of persons, it is impermissible to look elsewhere when a seizure occurs:

> "Today we make explicit what was implicit in *Garner's* analysis, and hold that all claims that law enforcement officers have used excessive force—deadly or

not—in the course of an arrest, investigatory stop or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment."[8]

The Fourth Amendment Standard—Objective Reasonableness

Once the determination has been made that all of the elements are present to constitute a fourth amendment seizure, the appropriateness of the force used to accomplish that seizure must be assessed in the context of the "reasonableness" standard. Such a determination "...requires a careful balancing of the 'nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[9]

The objective nature of the standard was clearly set forth in *Graham*, where the Court emphatically rejected the consideration of such subjective factors as the officer's state of mind in assessing the propriety of a use of force. The Court emphasized that the inquiry is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstance confronting them, without regard to their underlying intent or motivation."[10]

Any assessment of the use of force in the context of a fourth amendment seizure must begin with the recognition that a seizure is, by definition, a forcible governmental action, involving either a person's compliance with a show of authority or with the actual imposition of force by law enforcement officers. The Supreme Court has written that "[O]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[11]

Viewed From The Officer's Perspective

One of the most meaningful elements in assessing the reasonableness of an officer's use of force in effecting a seizure is the Court's admonition that an officer's decision to use force be viewed "...from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight...."[12] The Court also recognized 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."[13]

> ***"...the appropriateness of the force used to accomplish [a] seizure must be assessed in the context of the 'reasonableness' standard."***

The significance of this point is illustrated in *Sherrod* v. *Berry*,[14] where an officer shot and killed a robbery suspect who made a quick movement with his hand into his coat, apparently disregarding the officer's repeated commands to put his hands up. Subsequently, it was determined that the suspect was not armed. In reversing a jury verdict against the officer, the appellate court held that the trial court erred in permitting the introduction of evidence concerning the fact that the suspect was unarmed:

> "When a jury measures the objective reasonableness of an officer's action, it must stand in *his* shoes and judge the reasonableness of his actions based upon the information he possessed and the judgment he exercised in responding to that situation."[15]

The Court remanded the case with instructions that the officer's actions be assessed without reference to information that could not have been known to him at the time he fired the shot.

The Spectrum of Force Options

In effecting a seizure, law enforcement officers draw from a reservoir of options, ranging from simple displays of authority, to the application of various levels of nondeadly force, to the use of deadly force itself. The appropriate choice in each case is dictated by the facts, and those facts—as well as an officer's choice of an option—are subject to close scrutiny.

Relevant Factors in Assessing Reasonableness

In evaluating an officer's use of force under the fourth amendment standard, the Supreme Court has instructed that the following specific factors be considered:

1) The severity of the crime at issue;

2) Whether the suspect poses an immediate threat to the safety of the officers or others, and

3) Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[16]

These factors encompass the three general circumstances in which officers must make judgments regarding the use of force in the context of fourth amendment seizures: 1) To defend themselves and others, 2) to overcome resistance or enforce compliance, and 3) to prevent escape. Law enforcement officers should note that the severity of the crime is a factor that can affect each of these circumstances.

The defense of others

There is no constitutional provision, statute, or case decision that questions the use of force by law enforcement officers when such force is necessary to protect themselves or others from present threats to their lives and safety. As noted above, one of the factors listed by the Supreme Court to determine the appropriateness of force is whether the suspect poses an immediate threat.

Nevertheless, challenges may still be made to the officers' perceptions that a threat existed, or to their judgment as to the appropriate type and level of force to counter it. While the evidence that such a threat exists must rise to the level of probable cause, it is not higher.[17] Moreover, as the Court noted in *Graham*, the facts must be viewed from the perspective of the officer on the scene and not from facts or perspectives that develop later.

It is in the nature of law enforcement that most decisions to use physical force are reactive; in other words, the initiative rests with the suspect who decides whether and when to commence a threat against an officer. For that reason, the probable cause standard is critically important.

Perceiving the probability of a threat and formulating a response to it takes time and automatically places the officer at a disadvantage. In some cases, an officer may be in a position to offset this disadvantage through the use of distance, cover, or diversionary techniques. If an officer was required by law to delay a response until the threat became a certainty, the risks would be dramatically greater. For that reason, the reasonableness formula does not impose a higher standard than "probable cause" to believe that a person poses a threat and that a particular response is justified.

Overcoming resistance

Resistance to the lawful authority of law enforcement officers to effect a seizure may be active or passive. Active resistance occurs when the suspect is using or threatening the use of some force to thwart the officer's efforts; passive resistance occurs when the suspect simply refuses to comply with the officer's commands.

Active resistance poses a serious concern because it confronts an officer with more than the relatively simple challenge of compelling compliance with authority. A person actively resisting a police officer engages in physical acts and movements that constantly place the officer at risk. Even if the suspect is not believed to be armed at the moment, the officer's weapon is potentially accessible. Accordingly, an unarmed suspect may be moments away from becoming an armed one, and the number of officers killed and wounded each year with their own firearms attests to the danger of exposure to an actively resisting suspect.

As a general rule, in overcoming resistance, it is necessary to tailor the use of force to the degree of resistance encountered, or in other words, to escalate the level of force as the suspect's actions dictate. However, there are circumstances where to do so would dramatically increase the risks to the officers and others. If a suspect's background and reputation forwarn officers of the likelihood of violent resistance, preemptive use of force to gain control may be necessary, and therefore, reasonable.

The case of *Dean* v. *City of Worcester*[18] provides an example. Officers had a warrant to arrest a man known to them to be violent, and to have threatened violent resistance to any attempts to take him into custody. Going to the place where they had reason to believe the suspect was located, the police observed a man matching the general description. They immediately approached the suspect, seized him, threw him to the ground, and handcuffed him. It was later determined that he was not the suspect after all.

In a subsequent lawsuit against the officers and the city, the plaintiff alleged, among other things, that the force used against him was excessive in view of the fact that he offered no resistance. The Federal appellate court disagreed, noting first that "[A]s the officers reasonably believed that Dean was the escaped felon Burbo, they were 'entitled to do what the law would have allowed them to do if [Dean] had in fact been [Burbo]...[and that] in the circumstances known to the officers, particularly Burbo's threat to shoot any police officer who attempted to apprehend him, it was entirely reasonable to anticipate that Burbo, given the opportunity, would resist arrest with deadly force."[19]

Passive resistance to a seizure presents an entirely different set of problems to law enforcement officers. Whereas active resistance provides a reasonably clear reference point for assessing the need to use force, passive resistance generally produces ambiguity and frustration. It is important to recall that the fourth amendment does not preclude the use of force to effect a seizure, only the "unreasonable" use of force, and that the authority to seize a person carries with it the right to use some degree of physical coercion or threat thereof to effect it. Thus, coercive techniques, including those which inflict pain or discomfort, are appropriate, when necessary, to compel compliance.

Preventing escape

Inherent in any seizure is the notion that the suspect will not be allowed to escape custody. The law enforcement officer's obligation is to ensure that only acceptable levels of force are used to preclude that event.

When an officer's actions serve the dual purpose of protection and prevention of escape, questions relating to the appropriate level of force are strongly influenced by the issue of the officer's safety. However, the legal issues are different when the sole purpose for the use of force is to prevent escape of a suspect, and there is no immediate threat to the safety of the officer or others. Most challenges to a police officer's use of force to prevent escape involve the use of deadly force.

What is Deadly Force?

Courts do not view every use of force that results in death as deadly force. This can be important in defending officers whose actions resulted in the death of a suspect under circumstances that would not have constitutionally justified the use of deadly force to prevent escape.

For example, in *Robinette* v. *Barnes*,[20] officers used a trained dog to locate a burglary suspect in a darkened building at night. Unfortunately, the suspect, while attempting to hide under a vehicle, left his head and neck exposed. The dog located the suspect and held onto him (by the throat) until the officers arrived. The suspect died. The appellate court found that the use of the dog to locate the suspect was reasonable and rejected the assertion that the police had used deadly force under circumstances where deadly force was not appropriate.

On the other hand, law enforcement actions that create a high probability of death are inherently viewed as the use of deadly force. For example, discharging a loaded firearm at a suspect is generally considered a use of deadly force, even if there is no intent to kill, because of the relatively high risk of death created by the infliction of a gunshot wound on the body. Likewise, firing a weapon under circumstances which create a high risk that someone will be struck may be viewed as a use of deadly force.

In *Kellen* v. *Frink*,[21] a game warden fired a shotgun at an escap-

ing van because he believed that a deer had been illegally killed and placed inside. The officer explained that he fired the shot, not for the purpose of hitting anyone, but to "mark" the van for later identification. Unfortunately, the rifled slug entered the van and fatally wounded one of the passengers. The court held that "...firing a loaded shotgun at a vehicle known to be occupied constitutes deadly force as a matter of law...[and that because there was no probable cause to believe that the deceased] was a significant threat of serious injury to others, deadly force would never be appropriate...."[22]

The *Garner* Standard

The justification for using deadly force to prevent the escape of a suspect was defined by the Supreme Court in *Tennessee* v. *Garner*.[23] The Court held that it is not permissible to use deadly force to prevent the escape of a felony suspect under all circumstances.

On the other hand, the Court explained that if an officer "...has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[24] In other words, the police must have probable cause to believe that the suspect is dangerous.

The Court offered two general criteria for assessing whether such probability exists: 1)"...if the suspect threatens the officer with a weapon..."; or 2) "...there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm...."[25] When either of these justifications exists, then deadly force is reasonable, *if necessary*, to prevent escape.

Deadly force was deemed justified to prevent the escape of a suspect in *Newcomb* v. *City of Troy*,[26] where an officer shot and seriously wounded a robbery suspect who was trying to escape from the scene of his robbery attempt. The court observed that "...the suspect was armed with a knife, and had convincingly demonstrated his willingness to wield that knife against the store clerks."[27]

Even though the suspect was armed only with a knife while the officers had firearms, this fact did not alter the court's conclusion that the suspect was dangerous. Moreover, the court rejected the contention that the suspect was unarmed merely because he had placed the weapon in his pants pocket at the time he was shot.[28]

> **"...questions relating to the appropriate level of force are strongly influenced by the issue of the officer's safety."**

The type and level of force must be tailored to its necessity. Once a particular level of force is no longer required, it must be discontinued, despite the fact that an officer's normal passions of anger, fear, or frustration may be aroused through a suspect's efforts to thwart or evade a seizure.

A case in point is *Pastre* v. *Weber*,[29] in which two officers pursued a vehicle for a traffic violation. The chase, which sometimes exceeded 100 miles per hour, was only brought to a halt when the suspect driver lost control of the vehicle and ran off the road. The occupants rolled up the windows and locked the doors, prompting the officers to break the windows with their batons. When Officer Weber physically removed Pastre from the vehicle, Pastre attempted to kick him. Officer Weber then proceeded to physically reprimand Pastre for his transgressions. As the court described these events, the officers came "face to face with plaintiff and his companions, and realized that their lives had been endangered by the horseplay of a couple of adolescent drunks; their accumulating anger...exploded."[30]

While expressing sympathy with the officer's feelings in this highly charged situation in which he might justifiably believe that his life and the lives of other innocent persons had been endangered, the court nevertheless held that the officer used excessive force:

> "The plain fact of the matter is that, under extreme provocation, Weber lost his temper and failed to use any judgment at all in applying force which, objectively, was neither necessary nor reasonable."[31]

Giving vent to normal impulses in such cases shifts the focus from the "professional" to the "personal" and runs counter to the discipline and training required of a law enforcement officer.

THE USE OF FORCE DURING POST-ARREST/PRE-TRIAL DETENTION

The Due Process Clause, found in both the 5th and 14th amendments, establishes limitations on the power of government to deprive any person of "life, liberty or property." Undefined in the Constitution, but held to embody both procedural and substantive rights, due process has provided a flexible instrument in the hands of creative judges confronted with various allegations of government misconduct. Consequently, it has been cited frequently as a constitutional basis for alleging excessive use of force in a wide range of law enforcement activities.

Since the Supreme Court has now rejected the use of a "generalized" due process standard when a more specific constitutional provision is available, the due process standard is clearly not the appropriate standard for assessing the use of force during governmental seizures of persons. Likewise, as will be discussed below, due process is not the appropriate standard for assessing the use of force in cases dealing with convicted prisoners, because of the specificity of the eighth amendment. However, courts continue to consider due process the appropriate standard in cases in which excessive force allegations arise during pre-trial detentions, i.e., following the completion of a seizure but before conviction and imprisonment.[32]

Distinguishing Seizures From Pre-trial Detentions

There is some confusion as to when, following an arrest, the fourth amendment protections end and those under due process begin. For example, in *Henson* v. *Thezan*,[33] the plaintiff alleged that after he was arrested for home invasion, rape, child molestation, and attempted murder, he was pushed down a flight of stairs, beaten in the police car on the way to the station, threatened with death, and then beaten at the station until he admitted to his crimes. In assessing the constitutionality of the force used, the court applied the fourth amendment because the arrestee had not yet appeared before a judicial officer.

> ***"...courts continue to consider due process the appropriate standard in cases in which excessive force allegations arise during pre-trial detentions...."***

Similarly, a Federal court of appeals court concluded that the fourth amendment standard "...probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer."[34] However, a Federal district court assumed that "plaintiff's confinement to the detention cell at the police station changed his status from an arrestee to that of a pre-trial detainee."[35] The issue is not merely academic because, as will be seen, a court's decision to apply either the fourth amendment or due process standard to assess a particular use of force can lead to significantly different results.

The "Due Process" Standard

In the context of use of force, the most frequently quoted description of the due process standard is that of Justice Frankfurter in the 1952 case of *Rochin* v. *California*,[36] in which he stated that due process prohibits governmental actions that "shock the conscience." Under that formulation, the due process standard has generally been construed to incorporate subjective factors, such as the intent or motivation of the government actor. In use of force cases, the question usually turns on whether the type and degree of force used was designed to "punish" an individual rather than to accomplish some legitimate law enforcement goal, such as maintaining or restoring control.

Undoubtedly, the most influential case since *Rochin* regarding the due process clause as a standard for assessing use of force claims is *Johnson* v. *Glick*,[37] decided by the U.S. Court of Appeals for the Second Circuit in 1973. The case involved a claim by a pre-trial detainee that he had been subjected to excessive force during his detention. The *Glick* decision was based upon the premise that "...constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment, or...of the Fourth."[38]

Using Justice Frankfurter's "shock the conscience" test as a basis, the court devised the following

formula for assessing use of force claims under the Due Process Clause:

> "[1] the need for the application of force, [2] the relationship between the need and the amount of force that was used, [3] the extent of injury inflicted; and [4] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[39]

A Federal court of appeals explained that a use of force would violate due process if the force was "...1) imposed with an expressed intent to punish or 2) not related to a legitimate non-punitive governmental objective, in which case an intent to punish may be inferred."[40]

The assessment of use of force claims under due process necessarily focuses on the state of mind or motivation of the officer and is fundamentally different from the "objective reasonableness" standard of the fourth amendment. The ultimate effect of the distinction between the "objective" and "subjective" standards remains to be seen. Obviously, in some cases, the same conclusion may be supported by either analysis.

For example, in *Smith* v. *Holzapfel*,[41] the court applied both the fourth amendment and due process standards to a case involving the use of force to prevent the escape of pre-trial detainees. The court observed that the detainees had rendered one jailer unconscious and engaged in hand-to-hand combat with other officers attempting to prevent their escape.

Balancing the intrusion upon the rights of the detainees against the governmental interest of preventing escape, the court held the force used by the defendants was not unreasonable. The court then applied the due process standard and found that the force used "...was reasonably related to the legitimate goal of preventing escape...was not arbitrary, and was no more than was necessary to accomplish the goal."[42]

This case demonstrates that the application of different standards will not necessarily call for a different result. However, it is possible that a winning defense of "no malice" under due process could be a loser under the "objectively reasonable" standard of the fourth amendment where the officer's good intentions are not relevant.

Since many seizures lead to pretrial detention, both the fourth amendment and due process standards may be applied to different aspects of the same case. For instance, in *Brooks* v. *Pembroke City Jail*,[43] Brooks was stopped by police officers at about 4:00 a.m., following witness reports and police observations of Brooks swerving back and forth across the road on his bicycle. When it became apparent to the officers that Brooks was intoxicated, they announced their intention to see him home. He refused to go and physically resisted efforts of the officers to get him into the police car. One officer was knocked down during the scuffle. Brooks was handcuffed and transported to the police station where he was searched and locked up in a cell. Shortly thereafter, Brooks set fire to the mattress in his cell and physically resisted the efforts of the officers to put out the fire and retrieve the matches they had permitted him to retain.

Brooks filed suit against the officers and the municipality, alleging that excessive force was used against him when he was arrested, and later at the police station. He produced medical evidence to establish that he had received a black eye at some point, either during the initial encounter with the police or during the subsequent scuffle in the cell.

The trial court assessed the use of force by applying the fourth amendment standard to the encounter on the street and found that the officers' use of force to subdue Brooks was objectively reasonable. There was no factual dispute that Brooks shoved one of the officers to the pavement, and that only then was physical force used to control him. The court reasoned that if the black eye resulted from a deliberate blow struck at this stage, it would not have evidenced an excessive use of force by the police

to overcome an actively resisting person.

Assuming that when Brooks was locked up in a cell at the station he ceased being an arrestee and became a pre-trial detainee, the court concluded that the force used to enter the cell, overcome Brooks' resistance, and put out the fire was done for the legitimate governmental purpose of re-establishing control, and not for the purpose of inflicting punishment. Observing that "this is not the stuff of which constitutional claims are made," the court added that even if the blow which caused the black eye was struck during the jail cell struggle and "...even if it were done so intentionally to restore or maintain order and discipline, constitutional limits were not exceeded."[44]

THE USE OF FORCE DURING POST-CONVICTION CONFINEMENT

The explicit language of the eighth amendment prohibits the imposition of "cruel and unusual punishments." This explicit language, according to the Supreme Court, was designed to protect those convicted of crimes. In *Ingraham* v. *Wright*, the Court noted that the clause applies "...only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions."[45] Thus, the cases to which the eighth amendment standard apply are easily identified.

The Eighth Amendment Standard

In *Whitley* v. *Albers*,[46] the Supreme Court described the eighth

amendment standard for assessing the use of force in the prison context as "...whether the measure taken inflicted unnecessary and wanton pain and suffering."[47] Like the due process standard, the eighth amendment standard focuses to some degree on the subjective element of motivation. However, the standards are distinct. Due process does not permit the use of force to punish, whereas the eighth amendment prohibits only punishment which is "cruel and unusual."

In *Whitley*, the Supreme Court illustrated the manner in which the eighth amendment protection against "cruel and unusual punishments" is to be applied when assessing allegations that excessive force was used against convicted prisoners. Prison officials were confronted with a disturbance by the inmates in which one officer was assaulted and another taken hostage. During negotiations, one of the inmates claimed that an inmate had already been killed and that other deaths would follow. A threat was also made against the life of the hostage officer should the prison officials attempt to use force.

A decision was ultimately made to use force to free the hostage and protect the nonrioting inmates. During the ensuing assault, Albers, an inmate, was shot and wounded in the left leg. He filed a lawsuit alleging a deprivation of his constitutional rights.

Applying the Eighth Amendment Standard

The Supreme Court observed that after incarceration, only "unnecessary and wanton infliction of pain" constitutes cruel and unusual punishment forbidden by the eighth amendment. Moreover, the Court observed that this general requirement should be applied with due regard for differences in the kind of conduct against which an eighth amendment objection is lodged.

When officials were confronted with the need to make and carry out decisions involving the use of force to restore order in the face of a prison disturbance, the proper question to ask was "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[48] Other relevant factors considered by the Court were: 1) The need for the application of force, 2) the relationship between the need and the amount of force used, 3) the extent of injury inflicted, 4) the extent of the threat to the safety of staff and inmates, and 5) any efforts to temper the severity of a forceful response.[49]

Applying this formulation of the standard to the facts of the case, the Court held that the prison officials' use of force did not violate the eighth amendment, and they were, therefore, entitled to a directed verdict. The Court rejected the implication that "ordinary errors of judgment" could make out an eighth amendment claim and concluded that even if errors in judgment occurred, they did not rise to the level of "wantonness" required by the eighth amendment standard.

CONCLUSION

As the foregoing discussion discloses, the applicable constitutional standard for assessing excessive force claims depends upon the context in which the claim arises. Any claim of excessive force must first identify the specific constitutional right allegedly infringed in order to determine the appropriate standard by which the issue is to be resolved.

Use of force is inherent in law enforcement, and it is no surprise that challenges are common. The law enforcement community's response to the challenges is critically important.

The existence of frivolous claims may tempt some to treat the issue as frivolous. Or, the negative impact that surrounds excessive force claims may tempt some to take an excessively cautious approach to the detriment of the officers on the street and the community. Either of these extremes is unwise and unnecessary.

In order for our constitutional system to work effectively, there must be a balance. Clearly established and legally based policies, coupled with substantive and ongoing training programs, can go a long way to avoid the use of excessive force by law enforcement officers, and in doing so, to minimize the risk of successful claims against law enforcement officials and agencies.

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Footnotes

[1]*Graham* v. *Connor*, 490 U.S. 386, at 394 (1989).

[2]*Johnson* v. *Glick*, 481 F.2d 1028, at 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973).

[3]901 F.2d 1276 (5th Cir. 1990).

[4]918 F.2d 548 (5th Cir. 1990).

[5]471 U.S. 1, at 7 (1985).

[6]486 U.S. 593, at 597 (1989).

> **"...the applicable constitutional standard for assessing excessive force claims depends upon the context in which the claim arises."**

[7]490 U.S. at 386.

[8]*Id.* at 395. For a thorough discussion of fourth amendment seizures, *see*, DiPietro, "When Do Police Encounters Become Fourth Amendment Seizures?" *FBI Law Enforcement Bulletin*, 61, January 1992, 25-32.

[9]*Id.* at 396.

[10]*Id.* at 397.

[11]*Id.* at 396.

[12]*Id.*

[13]*Id.*

[14]856 F.2d 802 (7th Cir. 1988).

[15]*Id.* at 804-805. *See also, Reese* v. *Anderson*, 926 F.2d 494 (5th Cir. 1991).

[16]490 U.S. at 396.

[17]471 U.S. at 10.

[18]924 F.2d 364 (1st Cir. 1991).

[19]*Id.* at 368. *See also, Eberle* v. *City of Anaheim*, 901 F.2d 814 (9th Cir. 1990).

[20]854 F.2d 909, at 912 (6th Cir. 1988). *See also, Chew* v. *Gates*, 744 F.Supp. 952 (C.D.Cal. 1990).

[21]745 F.Supp. 1428 (S.D.Ill. 1990). *See also, Moody* v. *Ferguson*, 732 F.Supp 627 (D.S.C. 1989). Other police activities not generally considered to be deadly force include vehicle pursuits, *Roach* v. *City of Fredericktown, Mo.*, 882 F.2d 294 (8th Cir. 1989); and the use of tasers, *Matta-Ballesteros* v. *Henman*, 896 F.2d 255 (7th Cir. 1990); *Michenfelder* v. *Sumner*, 860 F.2d 328 (9th Cir. 1988).

[22]*Kellen*, 745 F.Supp. at 1432.

[23]471 U.S. at 1.

[24]*Id.* at 11.

[25]*Id.*

[26]719 F.Supp. 1408 (E.D.Mich. 1989).

[27]*Id.* at 1426.

[28]*Id.*

[29]717 F.Supp. 992 (S.D.N.Y. 1989).

[30]*Id.* at 995.

[31]*Id.*

[32]*See, Bell* v. *Wolfish*, 441 U.S. 520 (1979).

[33]717 F.Supp. 1330 (N.D.Ill. 1989).

[34]*Powell* v. *Gardner*, 891 F.2d 1039, at 1044 (2d Cir. 1989).

[35]Brooks v. *Pembroke City Jail*, 722 F.Supp 1294, at 1299 (E.D.N.C. 1989). *See also, Wilkins* v. *May*, 872 F.2d 190 (7th Cir. 1989).

[36]342 U.S. 165 (1952).

[37]481 F.2d at 1028.

[38]*Id.* at 1032.

[39]*Id.* at 1033.

[40]*Martin* v. *Gentile*, 849 F.2d 863, at 870 (4th Cir. 1988).

[41]739 F.Supp. 1089 (E.D.Tex. 1990).

[42]*Id.* at 1094.

[43]722 F.Supp. 1294 (E.D.N.C. 1989).

[44]*Id.* at 1301.

[45]430 U.S. 651, at 671 (1977).

[46]475 U.S. 312 (1986).

[47]*Id.* at 318.

[48]*Id.* at 320.

[49]*Id.* at 322.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.