The Fourth Amendment Use of Force Model

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About the editor/author:

Having defended numerous police misconduct and prisoner rights cases in both federal and state courts, Mr. Robles is a trial lawyer with considerable expertise in Section 1983 and New Mexico Tort Claims Act litigation. Both as an Assistant City Attorney with the City of Albuquerque and in private practice, he has litigated claims involving high speed vehicle pursuits, warrantless arrests, search warrant procurement and execution, use of less-lethal force, police K-9 apprehension (bite), and police shooting cases. He has successfully defended five police shooting cases, three by jury trial and two by summary judgment, and five police K-9 apprehension cases.

In addition to trial work, Mr. Robles has represented governmental entities before the Tenth Circuit in several cases. He has successfully represented his clients in a police shooting, wrongful imprisonment, and two police K-9 apprehension cases, among others.

In addition to his trial and appellate work, Mr. Robles frequently provides training seminars for law enforcement, corrections, and other security personnel. In addition to teaching basic cadet level courses, he regularly provides advanced level training for tactical team members and supervisors in high liability areas. He has written a police training manual entitled *The Law of Less-Lethal and Deadly Force*, and an article published in *The Tactical Edge*. In addition to his various bar association memberships, he is also a member of the International Association of Chiefs of Police and the National Tactical Officers Association.

CHAPTER 1: THE LAW OF LESS-LETHAL AND DEADLY FORCE–AN INTRODUCTION

"[A] republic is an empire of laws, and not of men."

John Adams, *Thoughts on Government*, 1776.

The rule of law requires that every citizen is governed by the same law, applied fairly and equally to all. Under this ideal, rules governing law enforcement's conduct are not the whims of individuals. Rather, the United States Constitution and the case law construing it guides and controls what law enforcement are authorized to do.

The rule of law is the bedrock upon which American liberty and justice are based. Neither order nor liberty can succeed without the rule of law. In part, our citizens' faith and trust in the rule of law depends not only upon the authority of the police to enforce the law, but also upon those officers' faithful adherence to the law. If not, the rule of law and all those values which it protects are compromised.

For more than thirty years, the law enforcement community has devoted enormous thought and resources to the subject of an officer's use of force. Among other things, law enforcement has created use of force policies, continua, and models. These guidelines have helped instill in officers the ability to quickly assess a suspect's actions and respond with an appropriate amount of force. Although valuable, these self-created guidelines have limitations.

Often, these guidelines are based in part on vague ideas such as morality, public/community concerns, experience in the field, and human rights. Instead of embodying the constitution and the case law regarding the use of force, these guidelines are generally one state's or agency's personal belief as to what level of force is appropriate. Worse yet, use of force policies and continua

sometimes only reflect the opinion of its author. Although these guidelines reflect law enforcement's sincere effort to do justice for the citizens that they serve, the role of law enforcement is to enforce the law, not create it.

In defense of their efforts and accomplishments, the law enforcement community has had no realistic choice but to create their own use of force guidelines. The cases addressing use of force issues are "scattered" in difficult to research books and costly electronic databases. Even if an officer is able to obtain copies of use of force cases, the officer must still sift through many unrelated, though legally significant, issues found in a use of force case. An officer must then identify a court's ruling on the use of force question without the benefit of a law school education.

Not until now, the courts, and more significantly the lawyers who work with the police, have compiled the use of force case law in a manner that is readily accessible to the average officer. Accordingly, this book has compiled the use of force case law for the purpose of teaching law enforcement personnel the limits the courts have placed on an officer's use of force. Moreover, this book seeks to create a use of force framework based on the rule of law set forth in the United States Constitution and the case law construing it.

The rules governing a law enforcement officer's use of force begin with the Fourth Amendment to the United States Constitution.[1] The Fourth Amendment states:

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[1] Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("apprehension by the use of deadly force is a seizure subject to the reasonableness requirements of the Fourth Amendment."); Graham v. Connor, 490 U.S. 386, 395 (1989) ("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 and its 'reasonableness' standard, rather than under a 'substantive due process' approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that (continued...)

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.[2]

From this amendment, the United States Supreme Court created the rules by which both less-lethal and deadly force are analyzed. Specifically, the Supreme Court used three (3) terms from the Fourth Amendment to create the law governing the use of force:

1. seizure;

2. reasonableness; and

3. probable cause.

Building upon these three (3) terms, the Supreme Court developed the tests used to determine whether an officer's use of force is constitutionally justified. A "seizure" is an "intentional acquisition of physical control" over a person.[3] Specifically, an officer's use of force to stop, arrest, or otherwise control a citizen is a "seizure"[4] of that person.

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[1] (...continued)
Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.") (italics in the original).

[2] U.S. Const. amend. IV ("[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.").

[3] Brower v. County of Inyo, 489 U.S. 593, 596 (1989).

[4] Garner, 471 U.S. at 7 ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person. While it is not always clear just when minimal police interference becomes a seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.") (citations omitted); Graham, 490 U.S. at 395 ("*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 (continued...)

The amount of force which an officer uses to seize a citizen must be "reasonable."[5] Stated another way, the reasonableness of a particular seizure "depends not only on *when* it is made, but also on *how* it is carried out."[6]

"Probable cause" represents the baseline amount of information which an officer must know to justify the use of deadly force.[7] More to the point, the Fourth Amendment authorizes a police officer's use of deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others. . .."[8]

With only a superficial understanding of the terms seizure, reasonableness, and probable cause, the rules governing an officer's use of less-lethal and deadly force may seem simple enough. In reality, however, knowing the amount of force which is reasonable in a given situation is difficult to assess in the often dangerous and uncertain world in which officers must perform their work.

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[4] (...continued)
under the Fourth Amendment and its 'reasonableness' standard. . ..") (italics in the original).

[5] Garner, 471 U.S. at 7-8 (quoting United States v. Place, 462 U.S. 696, 703 (1983) ("Petitioners and appellant argue . . . [that] the Fourth Amendment has nothing to say about *how* that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."); Graham, 490 U.S. at 395 (quoting Garner, 471 U.S. at 7-8) ("we analyzed the constitutionality of the challenged application of force solely by reference to the Fourth Amendment's prohibition against unreasonable seizures of the person, holding that the 'reasonableness' of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out.")).

[6] Graham, 490 U.S. at 395 (quoting Garner, 471 U.S. at 7-8).

[7] Garner, 471 U.S. at 11.

[8] Garner, 471 U.S. at 11-12; see also Romero v. Bd. of County Comm'rs, 60 F.3d 702, 704 (10th Cir. 1995), cert. denied, 516 U.S. 1073 (1996).

Fortunately, the United States Supreme Court and the United States Circuit Courts of Appeal have provided considerable guidance regarding what level of force is reasonable in a given situation.

Much like traditional law enforcement use of force models/continua, the case law as a whole creates a hierarchy in which the use of a specific level of force requires the existence of certain facts and circumstances. Knowing what the case law authorizes and prohibits in a given set of facts is critical to understanding what constitutes reasonable force. Relying upon Supreme Court and circuit court case law, this book identifies the parameters that the *United States Constitution* places on an officer's use of less-lethal and deadly force. In doing so, this book goes beyond other use of force guidelines that are based on the opinions of a trainer, agency, or professional organization.

Before the United States Supreme Court created the use of force law, the Fourth Amendment search and seizure case law defined the terms seizure, reasonableness, and probable cause. Indeed, the law governing the use of force and the law of search and seizure is inextricably intertwined. Stated another way, an officer must not only justify his or her use of force, but also why the officer was at that location in the first place.

To show the link between the law of search and seizure and use of force, this book will review the law of warrantless arrest. Chapter 2 will review the topics of consent and the community care taking function. Chapter 3 will present the topic of reasonable suspicion and the law of investigatory detentions. Chapter 4 will address probable cause and the law of arrests. In addition to presenting the settled law governing each topic, these chapters will also provide useful examples of what is meant by the terms seizure, reasonable suspicion, and probable cause from the leading Supreme Court cases on the subject.

With regard to the use of less-lethal force, Chapter 5 presents the leading United States

Supreme Court use of force case, Graham v. Connor, and the standard this case announced. Chapter 5 will then address what the courts have stated about the legal parameters in which an officer may use the different types of less-lethal force. Specifically, this chapter will address the show of force, verbal commands, restraints, empty hand tactics, chemical irritants, conducted energy immobilization devices (*i.e.* tasers), straight/expandable batons, police service dogs, less-lethal extended range munitions, and SWAT/tactical teams. Like Chapters 2-4, Chapter 5 will review the leading cases to provide an in-depth understanding of how less-lethal force is analyzed by the courts.

As for deadly force, Chapter 6 reviews the rules which govern an officer's use of deadly force, including the leading United States Supreme Court case of Tennessee v. Garner. Chapter 6 will then address what the courts have stated about the legal parameters in which an officer may reasonably use deadly force. Specifically, this chapter will analyze what the term "threat of serious physical harm" means, define the "probable cause" standard used in Garner, and identify when a verbal warning is "feasible." This chapter will then address the danger creation theory, the use of deadly force against emotionally disturbed/suicidal individuals, and the less intrusive alternative theory. Like the chapters before it, Chapter 6 will review the leading deadly force cases to provide a better understanding of how deadly force is analyzed by the courts.

Chapter 7 addresses an officer's duty to intervene in situations in which he or she witnesses another officer violate a citizen's constitutional rights.

As explained in Chapters 5 and 6, the use of force case law collectively creates a hierarchy in which the use of a specific level of force requires the existence of certain facts and circumstances. Knowing what the case law authorizes and prohibits in a given set of facts is critical to an officer's determination of what constitutes reasonable force. To assist with the understanding of the case law,

Chapter 8 will present a use of force model which is based on Graham, Garner, and the clearly established circuit court case law. The name of this model is the Fourth Amendment Use of Force Model.

Case law, by definition, is always evolving. The courts may never review the almost infinite variety of circumstances in which an officer may use force. Indeed, many of the future cases will involve force applications with tools and situations which are currently unknown to many in law enforcement. Although a step or two behind, the case law will ultimately address the challenges which law enforcement faces.

Because the law is ever changing law, the rules identified in this book represent the current state of the law. Once an officer has learned the existing law, however, the officer will be in a better position to assess a newly decided case's significance and make any changes necessary to conform to future rules. More importantly, this book will help arm an officer with the knowledge of what the rule of law requires of him or her.

At this juncture, The testimony of Chief Justice of the United States Supreme Court, John Roberts, is instructive:

> A certain humility should characterize the judicial role. Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.

Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.). By replacing the words "justice" and "judge"with either "police officer" or

"deputy," Chief Justice Roberts' words should serve as a reminder to law enforcement of its role in our constitutional form of government.[9]

[9] See also Learned Hand, *Continuing Legal Education for Professional Competence and Responsibility,* Report on the Arden House Conference, at 116-123 (1958) (Judge Learned Hand once reminisced: "I remember once I was with [United States Supreme Court Justice Oliver Wendell Holmes]; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupe. When we got to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: 'Well, sir, goodbye. Do justice!' . . . He replied: 'That is not my job. My job is to play the game according to the rules.'"

CHAPTER 8: THE FOURTH AMENDMENT USE OF FORCE MODEL

The objective reasonableness test announced in Graham v. Connor is the analytical model by which all use of force cases are reviewed. As required by Graham, an officer's use of force is assessed by examining the facts and circumstances known to the officer including:

1. the severity of the suspect's crimes;
2. the immediacy of the threat posed by the suspect to the safety of the officers or others; and
3. whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

The genius of Graham is that it is adaptable to every officer/citizen encounter in which there is a show or use of force. The limitation of Graham is that it does not tell an officer how much force to use in a given situation. The Supreme Court left the task of identifying what level of force is reasonable to the lower courts.

The foundation and structure of the Fourth Amendment Use of Force Model is based on Graham and the circuit court cases interpreting Graham. As depicted in *figure 1*, the structure of the Fourth Amendment Use of Force Model is based on an officer's objective assessment of the three prongs of the Graham test. Unlike many use of force models that solely focus on the suspect's actions in the moments leading up to an officer's use of force, the Fourth Amendment Use of Force Model assesses *all* of the legally relevant facts and circumstances confronting the officer.

This chapter will present in detail how the Fourth Amendment Use of Force Model uses the three prongs of Graham's objective reasonableness test to create a practical and legally defensible use of force model. This chapter will explain how an officer can apply each prong of the Graham test to situations ranging from cooperative encounters through deadly force situations. This chapter

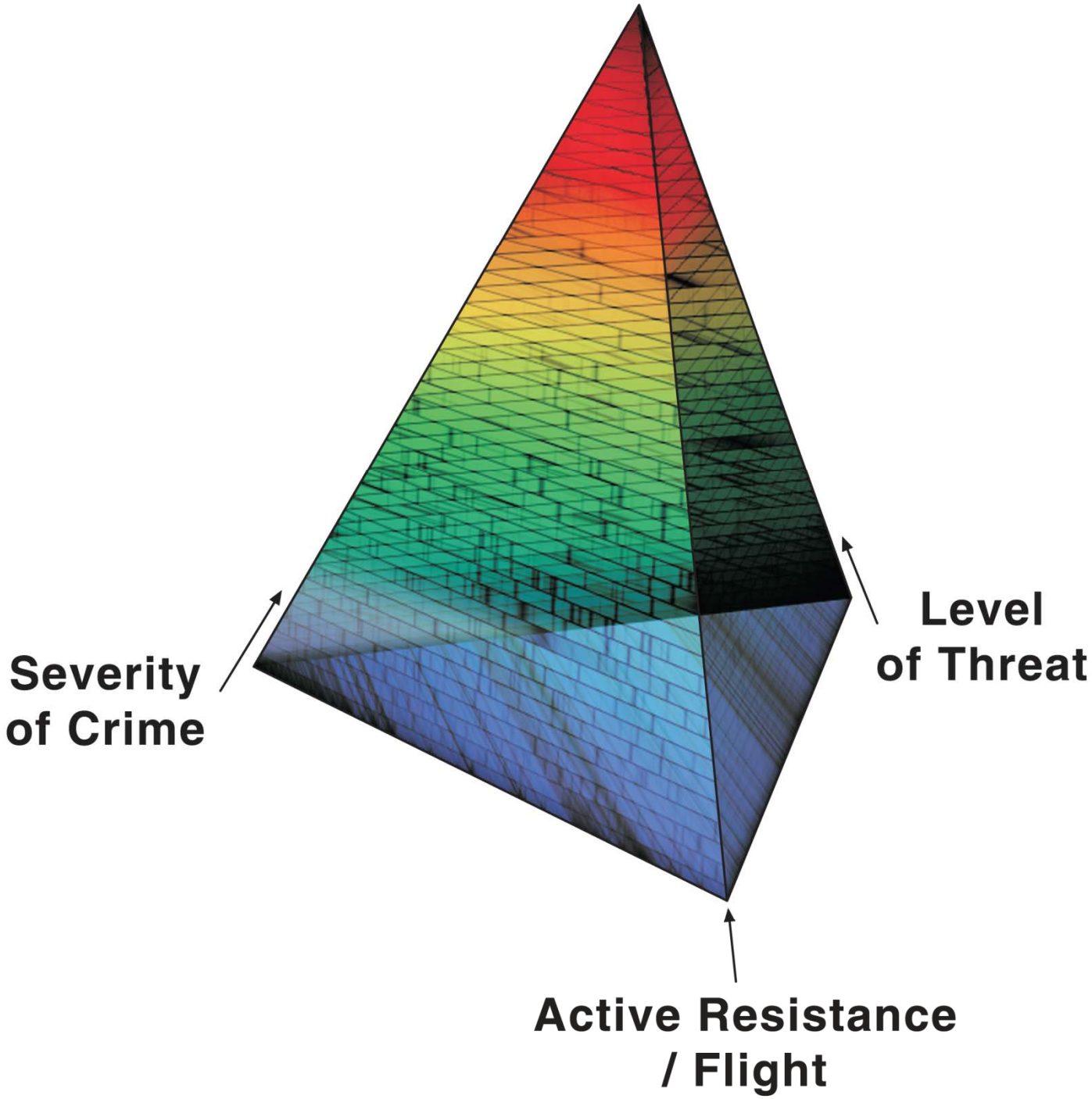
Severity
of Crime
Level
of Threat
Active Resistance
/ Flight

Figure 1

limits, possession of a switchblade, etc.);

5. Felony drug-related crimes beyond mere possession of a controlled substance (*e.g.* manufacturing, possessing with intent to distribute, trafficking of a controlled substance, etc.);

6. Misdemeanor crimes of violence directed against officers (*e.g.* assault on a peace officer, battery on a peace officer, resisting arrest, etc.);

7. Inherently violent felony crimes which the suspect committed in the past (*e.g.* bank robbery, assault/battery on a peace officer, shooting into an occupied dwelling, etc.);

8. Felony crimes of violence completed immediately prior to the arrival of officers (*e.g.* homicide, aggravated assault/battery, etc); and

9. Felony crimes of violence directed against officers or citizens while officers are present (*e.g.* homicide, aggravated assault/battery, etc.).

Please see *figure 2*. Using the applicable state or federal criminal law, an officer can construct a statutory hierarchy of crimes which is tailored to the jurisdiction in which he or she works.

An officer's analysis of the severity of the crime begins with, but certainly does not end with, the initial call for service. Using information learned from the initial dispatch, over the radio while en route to the call, statements by victims and witnesses, and evidence at the scene, an officer can form reasonable suspicion, if not probable cause, to believe that the suspect(s) committed certain crimes. This process of assessing the severity of a suspect's crime(s) requires a thorough working knowledge of the law of reasonable suspicion and probable cause. Certain calls, of course, do not grant an officer the luxury to collect much evidence before an officer must take action.

Experience, as well as the case law, teaches that suspects can rapidly increase the level or immediacy of the threat that they pose to an officer or citizen. For instance, the shoplifting suspect

will then identify the parameters that the *case law* places on an officer's use of less-lethal and deadly force. Specifically, this chapter will cover the show of force, verbal commands, restraints, empty hand tactics, chemical irritants, conducted energy immobilization devices, straight/expandable baton, police service dogs, less-lethal extended range munitions, and deadly force.

§ 1. Objective reasonableness.

As used by Graham, "objective reasonable" is much like the related concepts of reasonable suspicion and probable cause. Objective reasonableness requires more than an officer's *subjective* beliefs about a suspect and the level of threat that the suspect poses. Indeed, an officer can not base a decision to use force on a "hunch," a "feeling," or some other unquantifiable belief. This is an *objective* test which means that the officer's good faith beliefs for taking a certain action is irrelevant.

Instead, an officer must be able to identify specific and articulable facts to justify his or her use of force. Essentially, an officer must describe the information that he or she observed, heard, or otherwise collected through reliable police channels. Sometimes just as important, an officer must identify unknowns and why this lack of information is important to an assessment of the suspect's threat level.

Based on those specific and articulable facts, an officer can then use his or her training and experience to interpret the known information and reach a reasonable conclusion as to the level of threat posed by the suspect. Stated another way, the conclusion an officer draws about a suspect must be based on the known facts.

This process does not deal with hard certainties, but with probabilities. The use of the 20/20 vision of hindsight to analyze an officer's use of force decision is prohibited. This is why the

Graham test is called objective *reasonableness*, not objective *certainty*.

Consider the following examples which illustrate the point that an officer's assessment of a suspect's threat level must be based on facts known to the officer.

Example No. 1: at a domestic violence call, an officer observes a suspect:

1. becoming increasingly more animated/exaggerated in his or her movements.;
2. increasing his or her verbal or physical resistance to an officer's verbal commands;
3. moving his or her feet into a balanced or fighting stance;
4. Staring at, through, and past an officer (1,000 yard stare);
5. increasing his or her muscular tension (*i.e.* jaw clenches, neck muscles tighten, etc.);
6. closing once open hands to form fists; and/or
7. dropping his or her shoulder.

These observations of the suspect, viewed through the eyes of a trained and experienced officer, form the factual basis for an officer's conclusion that the suspect posed a threat of a physical assault against the officer.

Example No. 2: after "interrupting" a drug buy, as another example, an officer observes that a suspect's:

1. jacket or shirt hangs unevenly as a result of a heavy object;
2. excessive, bulky clothing is inconsistent with the weather; and/or
3. waistband or lapel areas have an unnatural bulge.

Based on the officer's knowledge of danger cues, these observations of the suspect form the factual basis for an officer's conclusion that the suspect possesses a weapon.

Example No. 3: after stopping a person who the officer believes was involved in a burglary

the previous night, the officer observes the suspect:

1. using verbal misdirection (*i.e.* denying his identity, blaming someone else, etc.);
2. subtly creating distance between the himself and the officer; and/or
3. turning his or her body in the direction of the avenue of escape.

Viewed through the lense of training and experience, these observations form the factual basis for an officer's conclusion that the suspect is attempting to flee.

There are many other examples.

§ 2. Severity of the suspect's crime(s).

Although relevant, the severity of the suspect's crime(s) is more than just whether the crime is a misdemeanor or a felony. Instead, the use of force case law has construed the "severity of a crime" to mean the level of violence or threat to safety generally associated with that particular crime. Sorting through criminal statutes and the manner with which those statutes are viewed by the use of force case law, an ascending hierarchy based on the level of violence/threat generally associated with a particular crime appears.

Acknowledging that the criminal statutes in various jurisdictions differ, *Figure 2* presents the severity of the suspect's crime(s) as a progressive hierarchy based on the violence typically associated with specific *categories* of crime:

1. Generally non-violent misdemeanor crimes (*e.g.* traffic code violations, shoplifting, etc.);
2. Generally non-violent felony crimes (*e.g.* fraud, passing a worthless check, etc.);
3. Violent misdemeanor crimes (*e.g.* assault, battery, false imprisonment, etc.);
4. Misdemeanor crimes involving dangerous weapons (*e.g.* firing a gun within city

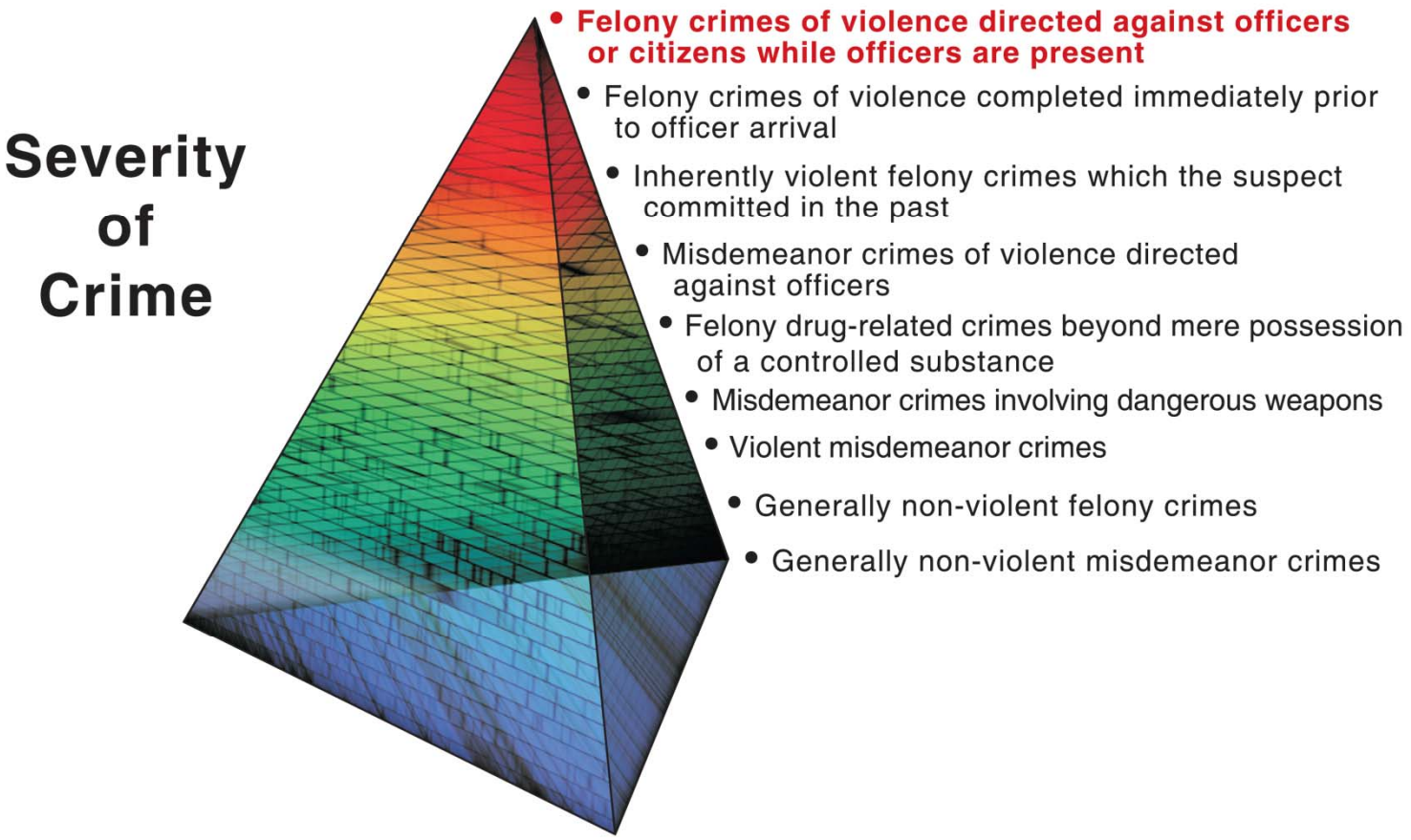
Severity of Crime
• Felony crimes of violence directed against officers or citizens while officers are present
• Felony crimes of violence completed immediately prior to officer arrival
• Inherently violent felony crimes which the suspect committed in the past
• Misdemeanor crimes of violence directed against officers
• Felony drug-related crimes beyond mere possession of a controlled substance
• Misdemeanor crimes involving dangerous weapons
• Violent misdemeanor crimes
• Generally non-violent felony crimes
• Generally non-violent misdemeanor crimes

Figure 2

can quickly turn into an aggravated assault suspect when an officer attempts to arrest the suspect. Thus, the key to matching the severity of the crime to the suspect's escalation of force is for the officer to first identify the crime(s) which he or she initially believed that the suspect committed. Next, the officer must specify the crime(s) which his or her investigation revealed that the suspect committed. Finally, an officer must identify the crime(s) the suspect committed at the moment the officer used force. By identifying the suspect's crime(s) at the beginning, middle, and end of the encounter, an officer can show in an objective way the extent to which the suspect increased the severity of the crimes involved.

§ 3. The immediacy (*i.e.* level) of the threat posed by the suspect.

Graham v. Connor uses the phrase "immediacy of the threat." The concept is best explained as the *level* of threat posed by the suspect. Accordingly, the Fourth Amendment Use of Force Model uses the terms "immediacy" and "level" interchangeably. Like severity of the crime, the case law as a whole identifies an ascending hierarchy based on increasing levels of threat.

The immediacy or level of threat posed by a suspect is a function of two factors: 1) the method used by the suspect to deliver force against an intended victim; and 2) the time necessary for the suspect to deliver that force. This section describes these two factors.

The method used by the suspect to deliver force against an intended victim is assessed by three (3) factors:

First, an officer's assessment of the method used by the suspect to deliver force begins with what the officer knows about the suspect's criminal history, habit of possessing a weapon, and other uncharged violent conduct. Another way of describing this factor is to refer to the suspect's propensity for violence known to the officer. The officer may base his or her assessment of the

suspect's propensity for violence on the officer's personal knowledge, information provided by other officers, victims, informants, or other reliable police channels. As often is the case, however, an officer may not know anything about the suspect until after the officer hears the initial dispatch.

Second, an officer assesses the suspect's method of delivering force by determining the suspect's ability to use force or the suspect's access to or possession of a weapon *immediately prior to the time* that the officer makes contact with the suspect. Prior to actually making contact with the suspect, an officer can assess a suspect's present ability to deliver force or the suspect's access to or possession of a weapon in many legitimate ways. A short list of examples includes:

1. What crimes is the suspect alleged to have committed immediately prior to the arrival of officers? Although this example is obvious, an officer can reasonably conclude that an armed robber is armed. Likewise, an officer can reasonably conclude that a suspect in a domestic violence call has access to weapons such as kitchen knives, and scissors.

2. What weapons, if any, did the suspect possess and how did the suspect use those weapons prior to the arrival of officers?

3. Is the suspect a member of a street gang or other organization that uses violence to achieve gang or organizational objectives?

4. Has the suspect received training in the military, the martial arts, etc.?

5. Is the suspect an illegal drug manufacturer or trafficker?

6. Did or does the suspect have access to a location from which he or she can obtain a weapon or an object that can be used as a weapon (*e.g.* kitchen, work bench, sporting goods store, etc.)

7. Does the suspect have a reputation for carrying a weapon?

Certainly, there are many other facts from which an officer can determine a suspect's present ability to deliver force or access to or possession of a weapon. Again, an officer may base his or her assessment of the suspect on personal knowledge, information provided by other officers, victims, or informants, or other reliable police channels.

Third, an officer must determine what type of force or weapon the suspect is using against officers and/or citizens *at the time* that officer uses force. Clearly, the most important consideration in determining the suspect's level of threat is what the suspect does to an officer or citizen in the moments leading up to an officer's use of force.

The time necessary for a suspect to deliver force or use a weapon against an officer(s) and/or citizen(s) is the second factor necessary to assess the level of danger posed by the suspect. Time translates into the speed with which a suspect can deliver force or use a weapon against an officer(s) and/or citizen(s). Stated another way, the less time that a suspect requires to deliver force, the faster (*i.e.* more dangerous) the suspect becomes.

Of course, a suspect can use or deliver force in many forms. For example, a suspect can use physical force (*e.g.* punch, kick, etc.), improvised weapons (*e.g.* pool cue, screw driver, motor vehicles, etc.), or traditional weapons systems (*e.g.* cross-bow, firearm, bomb, etc.) to threaten the safety of an officer or citizen. Acknowledging the many methods which are used to deliver force, the case law draws a distinction between force applications that require the suspect to make "contact" with the victim and those weapon systems that can deliver force at a distance.

Physical force, certain improvised weapons, and edged weapons, generally require the suspect to place him or herself close enough to the victim to allow the suspect to punch, stab, club, or otherwise strike the victim. In terms of distance *alone*, the closer the suspect is to the victim the

less time the suspect needs to deliver force. As the suspect reduces or closes the distance between himself and the victim, the suspect progressively reduces the time necessary to deliver force.

Even if the suspect stands a considerable distance away from the intended victim, the suspect can become an immediate threat by moving quickly toward the victim. The key to assessing this type of threat is determining how quickly a suspect can reach the victim at the speed at which the suspect is traveling. By understanding the relationship between time and distance, an officer can then determine the immediacy or level of the threat.

In contrast to force applications that require the suspect to make "contact" with the victim, there are weapon systems that can deliver force at a distance. Certainly, firearms can deliver deadly force at great distances. One way in which a suspect can create an immediate threat with a firearm is by moving the muzzle of the weapon in the direction of an officer or citizen. A suspect can also create an immediate threat by making an overt or furtive movement that foreshadows a deadly threat. For example, an unarmed suspect's attempt to take an officer's firearm away from him or her creates an immediate threat. An armed robbery suspect's movement of his hand to his waist when confronted by officers can pose an immediate threat.

With the understanding that the following categories do not have definite boundaries, *Figure 3* presents a progressive hierarchy of the levels of threat a suspect may pose:

1. *Cooperative*. The suspect is cooperative when he or she complies with an officer's verbal or non-verbal directions;

2. *Resistance by a suspect*. As a preliminary matter, an officer should not use the words "passive" and "active" to describe an unarmed suspect's level of resistance. Instead of using words that are subject to differing interpretations, an officer should describe the specific actions which a

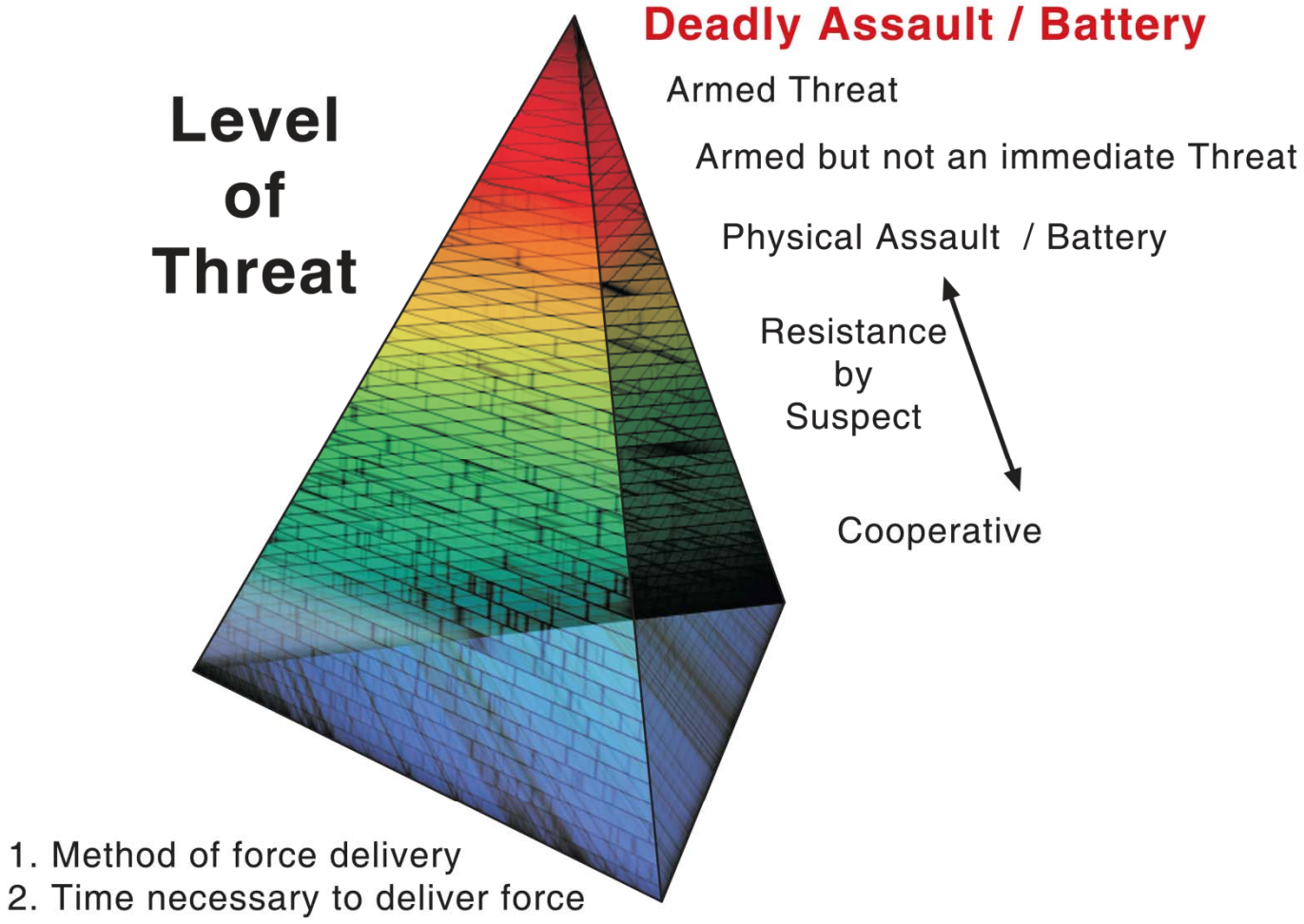
Level of Threat
Deadly Assault / Battery
Armed Threat
Armed but not an immediate Threat
Physical Assault / Battery
Resistance by Suspect
Cooperative
1. Method of force delivery
2. Time necessary to deliver force

Figure 3

suspect is using or attempting to use to resist an officer's commands and application of force.

At its lowest level, a suspect shows resistance by failing to respond (either physically or verbally) to an officer's directions. Next, a suspect may verbally confront or physically resist the officer's efforts to take the suspect into custody.

Moving up the hierarchy, a suspect may use physical force to hold on to an immovable object or another person in an effort to prevent/delay an arrest. For example, an intoxicated motorist holds onto the steering wheel of his car when the officer attempts to remove the suspect from the car. This type of resistance is also found when a protestor uses physical strength to hold on to another protestor or immobile object.

At the high end of unarmed resistance, a suspect may pull, move, or run away from an officer who has a legitimate basis upon which to detain the suspect. This level of resistance also exists when a suspect uses force to prevent an officer's attempt to take the suspect into custody. If a suspect directs force against an officer, this action is no longer properly characterized as resistance. Instead, a suspect's use of force against an officer is a physical assault.

4. *Physical assault.* In every encounter in which a suspect *physically* assaults an officer, the suspect brings to the encounter differing levels of strength, skill, stamina, etc. On one hand, a suspect's physical assault may be easily handled by an officer with a firm grip or compliance holds. On the other hand, as demonstrated by the cases presented in Chapter 6, a suspect's physical assault of an officer can also pose a deadly threat under certain circumstances.

To properly catagorize the level of threat posed by a physical assault, an officer must identify the disparity of force which exists between officer(s) and suspect(s). Specifically, an officer can assess the officer(s)'/suspect(s)' respective abilities for delivering physical force by comparing the

officer(s)'numbers, age, gender, size, defensive tactics skills, will to win, drug use, etc. with that of the suspect(s). An officer can also assess the disparity of force by identifying special circumstances, if any, which affect the level of physical force used by the suspect(s). For instance, an officer can reasonably conclude that the disparity of force favors the suspect if the suspect suddenly assaults the officer, the officer is in vulnerable physical position at the moment of the assault, the suspect demonstrates a high pain threshold, the suspect shows an ability to rapidly escalate force, the struggle injures or exhausts the officer, etc.

With the understanding that the following categories do not have definite boundaries, the following three labels help to generally identify disparity of force as it relates to a suspect's use of physical force against an officer:

A. *Disparity of force in favor of officer*;

B. *Negligible disparity of force*;

C. *Disparity of force in favor of the suspect(s)*;

5. *Armed, but not an immediate threat."* A suspect is armed if he or she possesses an object that can be used as a weapon or has immediate access to one. However, an armed suspect may surrender to the police "without incident." Even though the armed suspect is "compliant," the case law recognizes that officers can use a substantial show of force and high-end empty hand tactics, among other things, to take the armed suspect who is not an immediate threat into custody.

6. *Armed threat*. A suspect is armed if he or she possesses an object that can be used as a weapon or has immediate access to one. Based on either the suspect's propensity for violence, the crime(s) committed immediately prior to the arrival of officers, or the manner in which the suspect is brandishing the weapon, an officer can conclude that a suspect is an armed threat. This

category does not encompass a suspect's use of a weapon to pose an immediate threat to an officer or citizen.

For example, an officer responding to a call of an emotionally disturbed man shooting his truck with a rifle may reasonably conclude that the suspect is an armed threat. This is not to say that the armed threat will not later become an deadly threat to the responding officer. But until the suspect makes a statement or a movement that indicates that he may use his weapon against an officer or citizen, the deadly assault designation is premature.

7. *Deadly assault*. As set forth in Tennessee v. Garner, a deadly threat exists when an officer has probable cause to believe that the suspect poses a threat of serious bodily harm to an officer or other. As explained in great detail in Chapter 6, a deadly threat may arise in many circumstances and with or without weapons. However, the thread which runs through the deadly force cases is that the suspect's means of delivering force must be capable of causing serious bodily injury *and* that the suspect is prepared to immediately deliver that force.

§ 4. Suspect's efforts to actively resist arrest or attempt to evade arrest by flight.

To understand the concept of actively resisting arrest or attempting to evade arrest by flight, an officer must look beyond the criminal statutes prohibiting this type of conduct. For the most part, the criminal statues address suspects who physically resist arrest or run. The statutes are not designed to cover the two ends of the force continuum: passive acts and violent attacks.

Specifically, a suspect can resist arrest and attempt to flee in many ways. For example, a suspect can refuse to comply with an officer's verbal commands without showing any physical resistance or making a verbal statement. A suspect can try to talk his or her way out of an arrest, using persuasion, pleas for leniency, or misdirection. In an attempt to get a jump on the officer, a

suspect can subtly create distance between himself and the officer. Of course, suspects can and have used every type of force, including deadly force, to resist and evade arrest.

Indeed, a suspect's use of physical force, improvised weapons, or traditional weapons generally has one or two purposes: resist or prevent arrest and/or flight from arrest. With the exception of emotionally disturbed or suicidal individuals, it is certainly the rare case when a suspect uses force for some other reason. Accordingly, an officer must correlate the efforts used by a suspect to prevent arrest with the corresponding level of resistance or flight.

Given the role which active resistance and flight play in the use of force analysis, *Figure 4* presents resistance and flight as choices which the suspect makes at the time the suspect uses force.

§ 5. An officer's response to a suspect's actions.

Using various tactics and techniques, an officer can lower, but not control, the level or the immediacy of the danger posed by the suspect. To the extent the surrounding circumstances allow, an officer can lower the threat level by maintaining distance between himself and the suspect, placing intermediate barriers between the officer and suspect, distracting the suspect by involving a cover officer, and using cover and/or concealment. In contrast to tactics which may only temporarily *lower* the threat, an officer can only *control or terminate* the threat posed by a show of or the use of force.

Much like traditional use of force models, the case law has created categories for an officer's use of force. *Figure 5* presents an officer's use of force applications in an ascending hierarchy described in the circuit court cases as a whole: the show of force, verbal commands, restraints, empty hand tactics, chemical irritants, conducted energy immobilization devices, straight/expandable baton, police service dogs, less-lethal extended range munitions, and deadly force.

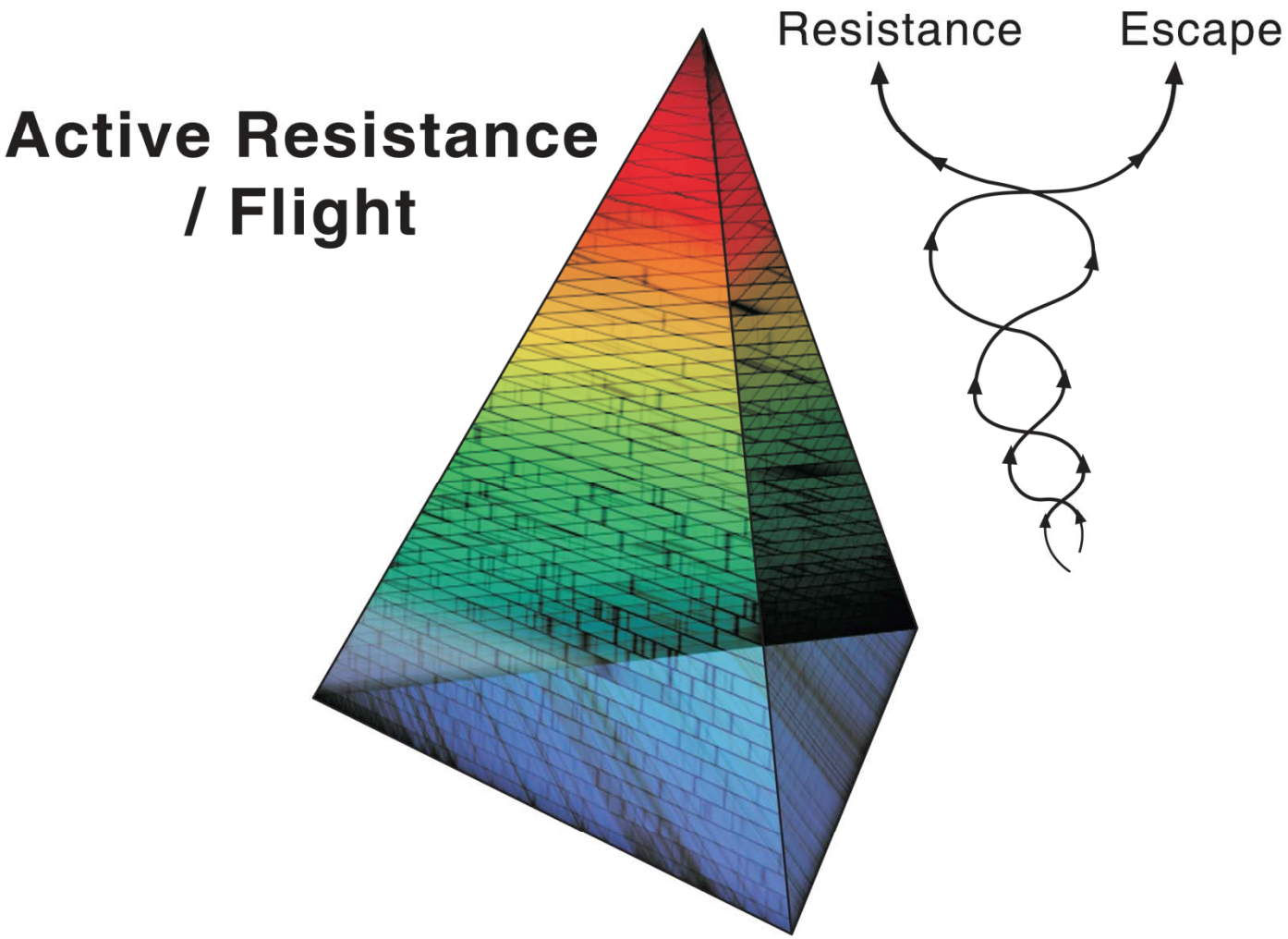

Figure 4

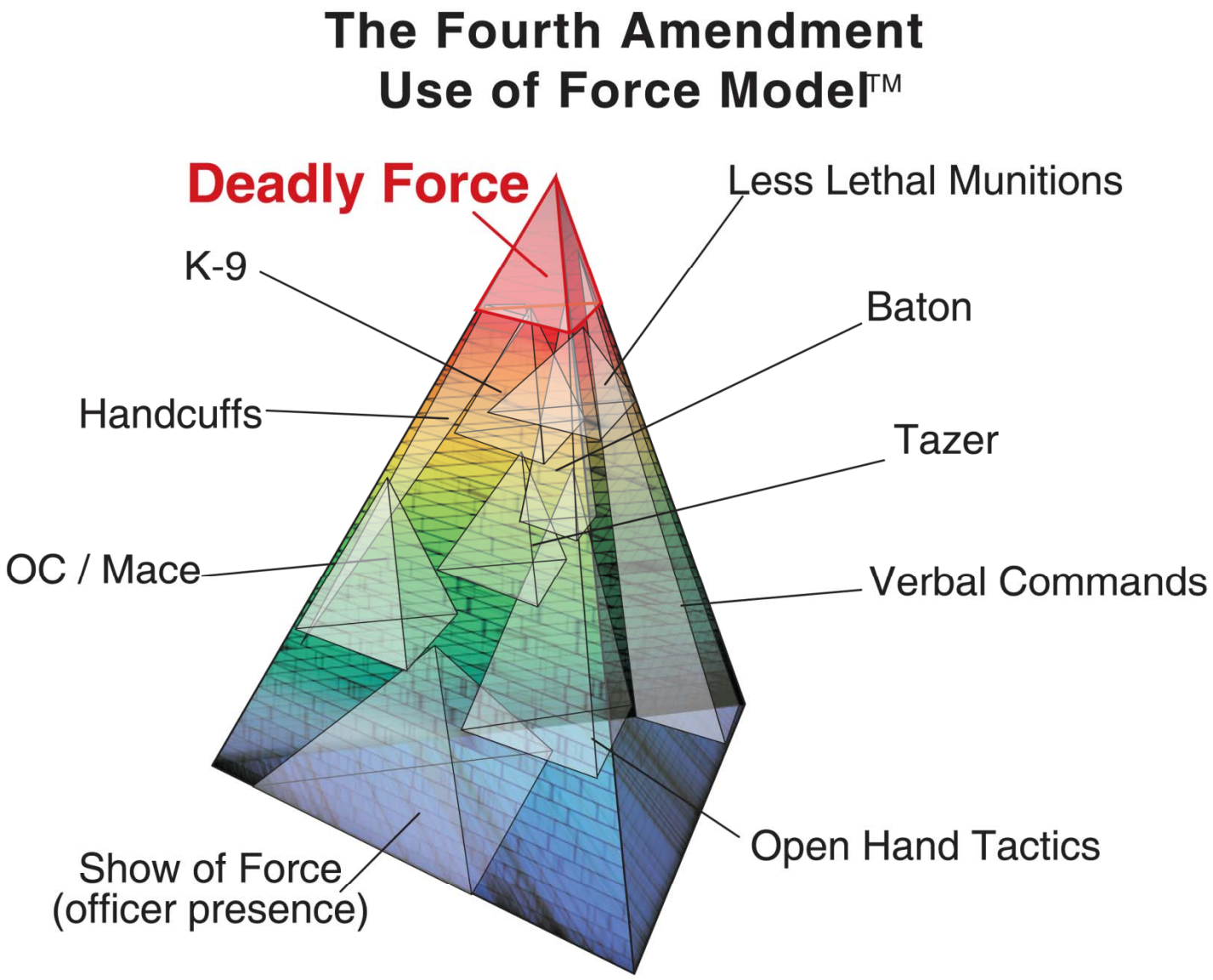
The Fourth Amendment
Use of Force Model™
Deadly Force
Less Lethal Munitions
K-9
Baton
Handcuffs
Tazer
OC / Mace
Verbal Commands
Open Hand Tactics
Show of Force
(officer presence)

Figure 5

Although no reported case has directly addressed this topic, the Fourth Amendment Use of Force Model acknowledges that improvised defensive tactics and weapons are often legitimate uses of force. Without case law for guidance, however, including improvised defensive tactics and weapons in the Fourth Amendment Use of Force Model was premature. As the case law develops, the Fourth Amendment Use of Force Model will include improvised defensive tactics and weapons.

Unlike traditional use of force continua, the Fourth Amendment Use of Force Model does not use hard lines to separate one type of force application from another. Instead, the model identifies a "range" in which the courts have found that a particular level of force is reasonable. Moreover, the individual ranges do not have definitive floors or ceilings. In fact, the ranges often overlap with the ranges below and above them. This is so because the objective reasonableness test is not capable of precise definition or mechanical application. Please see *Figure 6*.

§ 5(A) The show of force.

So long as an officer has reasonable suspicion to believe that a suspect is involved in criminal activity, an officer can use a show of force to control a suspect's movements. An officer may draw his or her weapon when he or she has reasonable suspicion to believe that the suspect is armed and dangerous. If the suspect is unarmed and non-dangerous, an officer is not authorized to draw his or her weapon. See Chapter 5(A) for more details. *Figure 6* shows a range of facts and circumstances in which a show of force constitutes an objectively reasonable amount of force.

§ 5(B) Verbal tactics.

So long as the language is not foul or abusive, an officer is authorized to use verbal persuasion, negotiation, and orders in an attempt to control a suspect's actions. No case requires an officer to give a suspect a verbal warning prior to the use of an open hands tactic, pepper spray, or

The Fourth Amendment Use of Force Model™

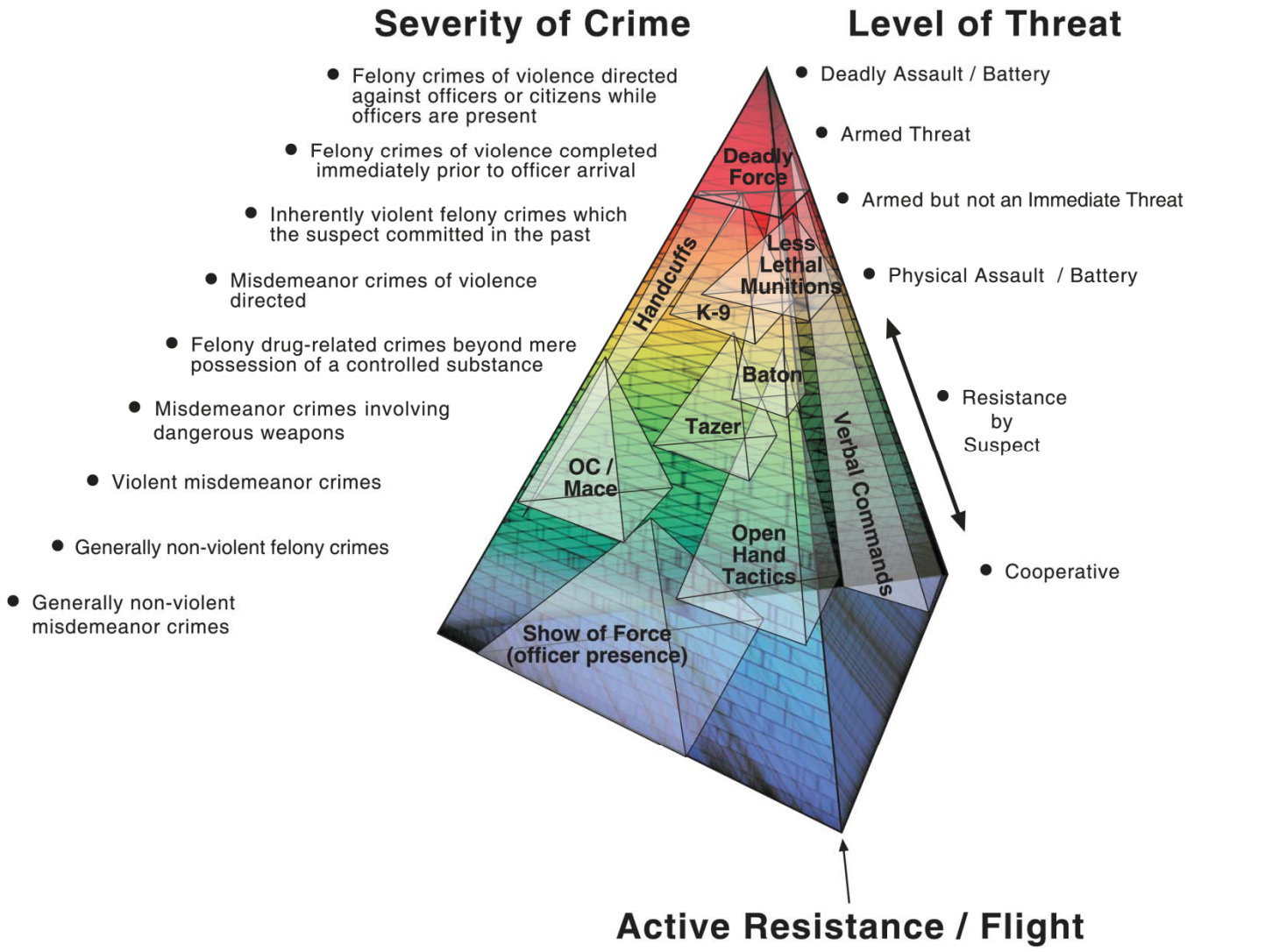

Figure 6

a baton. In contrast, an officer is required to give a verbal warning, if feasible, before deploying a police service dog, using less-lethal munitions, and using deadly force. See Chapter 5(B) for more details. *Figure 6* shows a range of facts and circumstances in which the use of verbal tactics constitutes an objectively reasonable amount of force.

§ 5(C) Restraints.

After making a proper investigatory detention or arrest based on probable cause, an officer is authorized to handcuff a suspect to help ensure an officer's personal safety. If the suspect displays some resistance, the use of some force during the handcuffing of an arrestee is objectively reasonable. To control a violent or actively resisting suspect, an officer may justifiably use his or her weight or pressure on the suspect's arms, legs and back. An officer may use handcuffs and a hobble restraint on a suspect who is actively resisting arrest and transport. The use of multiple officers to subdue, restrain, and handcuff a violent suspect who is actively resisting arrest is reasonable. See Chapter 5(C) for more details. *Figure 6* shows a range of facts and circumstances in which the use of restraints constitutes an objectively reasonable amount of force.

§ 5(D) Empty hand tactics.

Empty hand tactics encompass a number of techniques some of which the case law has not addressed. Some empty hand tactics, such as a firm grip, are far less forceful than an impact take down. What is clear from the decided cases, however, is that the empty hand technique chosen by the officer should be appropriate to the level of the suspect's resistance. Once an officer chooses an empty hand technique, the officer must temper his or her continued use of that technique according to the level of resistance shown by the suspect. See Chapter 5(D) for more details. *Figure 6* shows a range of facts and circumstances in which the use of empty hand tactics constitutes an objectively

reasonable amount of force.

§ 5(E) Chemical irritants.

An officer may justifiably use a chemical irritant such as pepper spray to subdue a somewhat "hostile" suspect armed with a knife and who refuses to submit to arrest. An officer's use of pepper spray to control an unarmed suspect who threatens an officer's safety or resists arrest is also reasonable. When a suspect is unarmed, an officer may reasonably use pepper spray to subdue a suspect which the officer fears would injure himself or commit suicide. See Chapter 5(E) for more details. *Figure 6* shows a range of facts and circumstances in which the use of chemical irritants constitutes an objectively reasonable amount of force.

§ 5(F) Conducted energy immobilization devices.

The law regarding conducted energy immobilization devices has yet to fully develop. The existing case law holds that an officer may use a taser/stun gun to control a misdemeanor suspect who is increasingly hostile, belligerent, and uncooperative. An officer may also use a taser/stun gun to control misdemeanor suspects who are actively resisting arrest. Finally, an officer may use a taser/stun gun to control violent felony suspects who are not responding to verbal commands. See Chapter 5(F) for more details. *Figure 6* shows a range of facts and circumstances in which the use of a conducted energy immobilization device constitutes an objectively reasonable amount of force.

§ 5(G) Straight/expandable baton.

The reasonableness of an officer's use of a baton to control a suspect or stop the suspect's threatening actions depends on how the officer uses the baton to accomplish that task. An officer may use a baton (held horizontally) to *push* a suspect who fails to obey a lawful command. When empty hand tactics are insufficient to effect an arrest of a suspect who tries to punch an officer, the

use of a baton strike on the suspect's forearm, thigh, or calf is reasonable. A baton strike may be used to stop a suspect from obtaining a weapon. If a baton is used as deadly force, the suspect's action must pose a threat of serious bodily harm to the officer or another. See Chapter 5(G) for more details. *Figure 6* shows a range of facts and circumstances in which the use of a baton constitutes an objectively reasonable amount of force.

§ 5(H) K-9s/police service dogs.

None of the reported cases have stated the specific circumstances which justify a K-9 handler's decision to deploy a police service dog to apprehend (*i.e.* bite) a suspect. In the reported cases analyzing the reasonableness of an officer's decision to use a police service dog to apprehend (*i.e.* bite) a suspect, the circuit courts have given considerable weight to the following factors:

1. Whether the suspect is armed (or reasonably believed to be) *or* otherwise poses an immediate threat to the safety of the officer or others. The K-9 handler's decision to deploy a police service dog should focus on the level of danger the suspect poses at the time the handler releases the dog, not on whether the underlying crime is a misdemeanor or felony;
2. Whether the environment (e.g. the woods, a large warehouse, nighttime, etc.) in which the suspect is hiding creates danger for the officers searching for the suspect;
3. Whether the K-9 handler provided the suspect with a verbal warning (if feasible) and a reasonable opportunity to surrender; and
4. Whether the suspect's refusal to give physical indications of surrender is sufficient justification for not calling off a police service dog.

See Chapter 5(H) for more details. *Figure 6* shows a range of facts and circumstances in which the

use of K-9s/police service dogs to bite a suspect constitutes an objectively reasonable amount of force.

§ 5(I) Less-lethal extended range munitions.

Based on the existing case law, it is clear that an officer may not use a beanbag round against a suspect who does not pose a threat to the safety of the officer. An officer may use a beanbag round to stop a suicidal suspect who poses an immediate threat to the suspect's own safety. Similarly, an officer may use a beanbag round when a suspect poses an immediate threat to the officer's safety. Before deploying a less-lethal munition, an officer is required to give a verbal warning, if feasible. If an officer shoots a suspect in the head with a less-lethal munition, however, this level of force used is properly considered *deadly* force. See Chapter 5(I) for more details. *Figure 6* shows a range of facts and circumstances in which the use of less-lethal munitions constitutes an objectively reasonable amount of force.

§ 5(J) Deadly force.

An officer is authorized to use deadly force when he or she has probable cause to believe that the suspect poses a threat of serious bodily harm to an officer or other. In other words, the suspect's method for delivering force must be capable of causing serious bodily injury, *and* the suspect must be poised to immediately deliver that force against an officer or citizen. See Chapter 6 for more details. *Figure 6* shows a range of facts and circumstances in which the use of less-lethal munitions constitutes an objectively reasonable amount of force.