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## Tasers and Use of Force: Hitting a Moving Target

Michael A. Keeley  
michael.a.keeley@gmail.com

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**Tasers and Use of Force: Hitting a Moving Target**

by

Michael A. Keeley

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in Partial Fulfillment of the  
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### **Abstract**

Law enforcement officers experience dynamic and sometimes dangerous encounters while performing their duties. To combat this, society gives them the authority to use reasonable force to accomplish their lawful objectives and law enforcement agencies provide them the tools and the training to effectively manage the incident. The use of force by law enforcement officers is guided by factors locally, state-wide, and nationally through policy, statute, and regulation. Law enforcement administrations have an impact on the use of force by an organization's members through formal means such as policy, and informal means such as organizational culture. Administrative views are guided by internal and external factors including legislation, regulations, mission, ethics, and stakeholders. Officers' duties are frequently guided by codified structures, such as statute and policy, but they must use discretion to fill in the blanks of how to act when not explicitly dictated. It is within these blanks that a robust ethical framework is critical to ensure the officer's actions reflect the values of the organization and the profession. Perhaps the entity with the most impact on the use of force by law enforcement is the court system through case law. This paper will review how these different factors impact the use of force by law enforcement, and specifically, the use of electronic control weapons.

*Keywords: Taser, Conductive Energy Weapons, Conducted Energy Weapon, Electronic Control Weapon, CEW, ECW, Use of Force, Less Lethal, Less Than Lethal*

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## Chapter 1: Introduction

Victor Appleton's novel *Tom Swift and His Electric Rifle* imagined a man who invents a weapon that projects bolts of electricity that can incapacitate its target (1911). This book formed the basis of what is now known as an electronic control weapon (ECW). The ECW was developed by Jack Cover in the 1970s and the company it launched was named after the book that inspired its invention, TASER. An acronym for "Thomas A Swift's Electric Rifle," Taser has become eponymous and synonymous with ECWs. The term electronic control weapon itself has evolved since the Taser's introduction. The technical terms of conducted energy weapon, conductive energy weapon, and electronic control device have been in law enforcement and legal realms at various times when referring to what will be referred to as ECWs in this paper. In popular vernacular, "stun gun" and "taser" are used to describe all manner of weapons using electricity to induce some type of reaction from a body and the term "taze" or "tazed" have been coined to describe the act of this induction of response. While all these weapons are not the same, they are grouped together in public mindset. The use of ECWs, and subject's reaction to it, has been captured in numerous television shows or movies, and rarely accurately.

Introduced as a less lethal tool to law enforcement in the 1990s ECWs have been in use by some major law enforcement agencies, including New York, Dallas, and Orange County Sheriff's Department since the early 2000s (Plouffe, 2018). They were purchased by law enforcement as a less lethal weapon to "stun and immobilize subjects" (Haskins, 2019). By 2011, over 11,000 agencies had deployed ECWs in some capacity representing nearly two-thirds of the agencies in the United States (Bulman, 2011).

## Background

In all incidents in which force is used, officers weigh the value of its intent against various outcomes. The tactic's ability to attain an intended outcome, usually control, quickly is weighed against potential pain and injury to the subject. Also considered is the potential injury to the officer. Officers have many tools at their disposal to attain the objective they are striving for. Officer presence and commands accomplish their goals in the vast majority of all encounters. In 99.56 percent of encounters with police, no force is used (Sanow, 2002). When force is used, officers have numerous options and are trained to use the option they believe is most reasonable and appropriate to resolve the issue. These can include less-lethal options and lethal options. Lethal options are traditionally thought of as firearms but can also include using a vehicle to stop a threat or other tactics with the intent or likelihood to cause death. The less-lethal options available to officers are many. These generally lie in a varied hierarchy or "continuum" between the previously mentioned officer presence and lethal options. They can include soft empty-hand techniques such as control holds or joint locks to control, limit, or direct movement of the suspect. Hard empty-hand techniques such as hand, elbow, or knee strikes are used to cause blunt force trauma to the suspect to gain compliance through pain and motor function interruption. Irritant sprays such as oleoresin capsicum (OC), also known as pepper spray or mace, use pain and irritation that disables a suspect or gains pain compliance. Batons, such as the ASP or PR-24, and 40mm or shotgun launched projectiles such as beanbags, foam, or wooden batons cause blunt force trauma and use pain or disabling force to assist in apprehension.

The ECW is one of the more recent and technology-heavy of the intermediate force weapons positioned between empty-hand tactics and lethal force. Although designed to reduce or eliminate injuries to subjects, injuries and deaths related to ECW use is well documented. There



have been over 1,000 deaths that have occurred following an ECW exposure since the early 2000s (Reid, 2019). In the early deployment of ECWs, Taser International Inc., the major ECW supplier to law enforcement, touted the ECW as being less injurious to subjects and officers than a hands-on encounter, and that it was less likely to cause injury to officers or suspects than any other use of force option (Taser International Inc., 2003, p. 3).

Research has been done through various disciplines on the physiological effects of ECW usage on subject health and injuries, officer injuries, instances of use of force and the sociologic impact of ECW use. Research on ECW use on special populations, and its proportional use on certain demographics has been done. The importance of certain logistical considerations, including distance to subject, size of the subject, drug and alcohol use, and others, have been noted on the effectiveness of the tool. The success of the tool has a direct correlation to its proper usage by officers therefore the perceived benefit of it as a tool compared to other less-lethal options.

While ECW use and its impact on citizens and subjects has been studied in various respects since its inception, research has been done in the realm of officer use tendencies. This research illustrates that with a change in use of force policy, specifically the level or type of resistance exhibited by the subject, ECW use can be reduced significantly. However, the research noted that a reduction in use of the ECW is not always a positive thing as instead officers often need to substitute another force option. These options can create additional risk to the officer as they frequently involve closer proximity and more physical exertion in their application. Many multi-jurisdictional studies show the use of an ECW to control a subject or conclude a force encounter quickly had reduced injuries to involved officers (Paoline et al., 2012). Other less-lethal tactics may also not be as effective as the use of the ECW in halting the subject's

resistance, resulting in additional application of force or longer exposures to harmful events (Womack et al., 2016).

### **Statement of the Problem**

The ECW is one of the intermediate force tools incorporated by the modern law enforcement officer and is in use by over 14,000 law enforcement agencies (Haskins, 2019). The ECW is also one of the most technologically advanced, publicly misunderstood, scholarly debated, and civilly litigated weapons ever used by law enforcement. Once seen as a tool to prevent any physical altercation, and sometimes believed to be a replacement for deadly force, the acceptable application of force via an ECW has varied wildly. Its acceptable use has changed due to practical field observations, research in both the law enforcement and medical fields, and civil and criminal litigation. Officers must weigh a plethora of variables about themselves, the subject, and the incident before deciding to use any force, including an ECW. The legality of their actions will be dictated by the legislature, the appropriateness by policy and training, and the reasonableness by the courts. This dizzying array of factors often needs to be mentally computed by an officer in a split second, while the review and critique can take years.

### **Conclusion**

The use of ECWs by law enforcement officers in use of force situations is not a static one. An “if this, then that” flow-chart of appropriate ECW use has not, and likely cannot, be devised to dictate its appropriate use. Because the varied entities such as legislatures, administrations, and courts will always continue to transform their mandates and philosophies, so too will their influence upon officer’s actions. Like other intermediate use of force measures, the existence of many influencing factors and variables mean that the proper use and reasonableness of an ECW use will continue to evolve and change.

## **Chapter 2: Review of the Literature**

In considering ECW use by law enforcement officers in use of force situations, scholarly journals, court decisions, and statutes were all reviewed. In addition to these materials, media articles, policies, professional websites, and training materials were consulted to provide information on practical application of the topic. These materials were examined through a legal, administrative, and ethical lens to determine their impact on the subject.

### **The Impact of Case Law on Law Enforcement Use of Force**

The courts of the United States have been shaping the ability of individuals to use force against others for over 100 years. The 1921 United States Supreme Court case of *Brown v. United States* gave life to the idea that if one is attacked and reasonably believes they are in immediate danger of death or grievous bodily harm, they need not retreat and may use reciprocal force. Justice Oliver Wendell Holmes noted “Detached reflection cannot be demanded” of the person threatened with the force, giving rise to the court’s consistent theme with use of force incidents: actions cannot be judged with 20/20 hindsight (*Brown v. United States*, 1921). Courts have continued to evolve on what is considered “reasonable” in the realm of force, particularly when used by law enforcement as agents of the government.

### ***Litigious History***

In most cases, the basis of federal court action on use of force cases originating at the local level has been the Fourth Amendment’s prohibition on unreasonable search and seizure, and the 14<sup>th</sup> Amendment’s due process clause. The Fourth Amendment, ratified as part of the original bill of rights, states:

The 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 the persons or things to be seized. (1789)

The courts have determined that the use of force by law enforcement should be considered a seizure as using force upon another is a suspension of their ability to freely move or choose their own actions. The Fourth Amendment also presents the concept of “reasonableness” by explicitly stating people are free from *unreasonable* seizures. The reasonableness standard, which will be discussed later within this paper, is a prevailing theme when litigating use of force issues.

The 14<sup>th</sup> Amendment addresses due process, or the fair treatment of individuals by the government, by stating, in part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (1868)

Like the Fourth Amendment establishment of reasonableness through the prohibition of *unreasonableness*, the 14<sup>th</sup> Amendment ensures due process by stating rights cannot be taken *without* due process. By stating that no *state* shall take actions to “abridge the privileges or immunities” of its citizens, the amendment ensures that all other amendments, and the civil rights they afford, apply to the actions of state governments (14<sup>th</sup> Amendment, 1868).

While the Fourth Amendment and 14<sup>th</sup> Amendment are the constitutional basis for most force related litigation, it is U.S. Code § 1983 that civil cases against the actor (the law enforcement officer) are brought for resolution. It is in this section, named “Civil action for

deprivation of rights” that it is explicitly outlined that “every person who, under color of any statute...subjects...any citizen...to the deprivation of any rights...shall be liable” for their actions (U.S. Code § 1983, 1996). This code allows for civil remedies, often monetary, to be ordered to redress any improper action by the actor.

### ***Landmark Litigation***

For law enforcement, there are two seminal United States Supreme Court cases regarding the use of force: *Tennessee v. Garner* (1985) and *Graham v. Conner* (1989). While there are hundreds of other cases that impact the use of force in general, these two cases created the greatest precedence in which courts view the use of force by law enforcement. In *Tennessee v. Garner*, the court applies the Fourth Amendment’s standard that seizures must be reasonable, and in *Graham v. Conner*, it applies it more widely.

In *Tennessee v. Garner*, the seizure in question was the act of law enforcement officers using deadly force to apprehend a fleeing felon. Prior to *Tennessee v. Garner*, use of force by law enforcement had been viewed by the courts considering the 14<sup>th</sup> Amendment’s due process clause. In one precedent, *Johnson v. Glick* (1973), the courts determined four factors to review force. The need for force, the proportionality of force, injuries to the subject, and the subjective intent were all factors the court would consider in determining if the act violated an individual’s civil rights. *Tennessee v. Garner*, however, began the application of the view of force in terms of reasonableness as is stated in the Fourth Amendment. Justice Byron White, in his majority opinion, agreed with the Sixth Circuit Court that use of deadly force is a seizure. If a seizure occurred, it must be reasonable, per the Fourth Amendment. The *reasonableness standard* for use of force was born.

Though *Tennessee v. Garner* gave rise to the reasonableness standard, it did so in a limited manner and only in the instance of deadly force. It was *Graham v. Conner* that expanded the reasonableness standard to all use of force acts committed by law enforcement and added the caveat that this reasonableness must be “objectively reasonable.” The United States Supreme Court held that *all* claims of excessive force, not just deadly force cases, should be analyzed under the Fourth Amendment reasonableness standard established in *Tennessee v. Garner*. The court further stated in its opinion from Chief Justice William Rehnquist that:

The Fourth Amendment "reasonableness" inquiry is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.

(1989)

As opposed to the standards used prior to *Tennessee v. Garner*, which looked at the *subjective* intent in the use of force, the court was now applying a standard from *Brown v. United States* to a law enforcement officer's use of force, saying that their actions could not be judged with 20/20 hindsight. This *objective* reasonableness involves judging the incident through the eyes of the officer that used the force, and it must reflect the independent characteristics of the officer, the subject, and any other facts or variables at play. The court, through Chief Justice Rehnquist's opinion, also noted that an officer's decisions and action must be made without the benefit of contemplation, which impacts the consideration of reasonableness as well. “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make

split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation” (*Graham v. Conner*, 1989). The objective reasonableness standard is now often referred to as the “Graham standard.”

### ***Case Law***

The ECW is a relatively new type of intermediate force weapon when compared to others such as the baton and chemical agents. ECWs core function comprises of electrical energy transmitted from the weapon to the subject with the purpose of affecting their behavior sufficiently enough to enable an officer to detain the individual or stop the threat. As stated before, most ECWs work in two ways: first, probe deployment, in which the probes of the weapon impact the subject and cause neuromuscular incapacitation, or lock-up of muscles, and second, drive-stun, which causes pain compliance at the site of connection between the weapon’s electrical terminals and the subject’s body. For the court, this is often referred to as “stun mode.” The complicated nature of the ECW, particularly when compared to other intermediate force options, such as strikes by fists or batons, or even chemical agent sprays, make it the target for a disproportionate number of lawsuits compared to its use. Eric Daigle (2020), the principle and founder of the Daigle Law Group, notes that he believes that the ECW is the most litigated force tool used by law enforcement, including the use of firearms.

The litigation specific to ECWs varies based on its use. Because they are now considered different levels of force, the probe deployment and drive-stun or stun mode use are differentiated when discussed in litigation. Using ECWs as a blunt force trauma tool has even been seen in court. ECWs are seen in litigation based on non-use of force situations as well, such as employment rights (can an employer prevent an employee from bringing an ECW to work?) and second amendment issues (can a state ban the private owning of ECWs?). Civil cases against the

manufacturer of the most popular ECW, Taser International Inc. alleging issues with the device itself and not with the circumstances of its use, have also occurred. These types of cases will not be the focus of this paper, however.

The United States Federal Court System is built on a hierarchy of progressively more impactful layers. As the court pyramid is ascended, the rulings made affect larger populations. The first level is the district or trial court, then the circuit court, which is the first court of appeals, then the United States Supreme Court, or the court of final appeal. While independent of each other, the separate 13 circuit courts often look to others for precedence, or prior decisions, but they are not held to these decisions. For a case to be seen by one of these courts, which are courts of limited jurisdiction, a violation of federal law or the United States Constitution must be alleged. As stated before, frequently violations of the Fourth Amendment, the 14<sup>th</sup> Amendment, or U.S. Code § 1983 are what initiate a cases introduction to federal jurisdiction. State courts are concerned with if an officer violated a criminal statute within the state, and they would be charged under that statute. State courts also have a progressive system for appeals and a court of last resort, or state “supreme court” that can examine state constitutional violations, however the number of these entities preclude them from inclusion within this paper. Occasionally, it is the state statute that is the actual target of the alleged amendment violation. These cases are brought to demonstrate that the law that was created by the legislature itself is not constitutional. In these cases, the legislatures themselves must revisit and rewrite their laws based on court rulings.

Overwhelmingly, case law created upon the ruling and issuance of opinions by circuit courts or the United States Supreme Court has been limiting to when and how law enforcement can use ECWs. The Americans for Effective Law Enforcement website listed over 200 cases that it considered “restrictive” to the use of ECWs (n.d.). These cases have been determined to be



limiting because “a court has determined, a jury has found, or a settlement has indicated, that the quantum of force used either was, or may have been, unreasonable” (Americans for Effective Law Enforcement, n.d.). This trend may directly relate to how ECWs were initially marketed and the training that accompanied them. Early training published through Taser International Inc. noted that the effort spent by officers in a force situation was much less when the incident was resolved through ECW use rather than “hands-on” physical apprehension. It was partially due to this fact that ECWs were initially seen as a tool that could be used on nearly all resistant individuals (Taser International Inc., 2003). Taser International Inc.’s views of subject and officer injury rates when ECWs were used were based on internal research and was shown to be at least partially accurate by other independent studies (Paoline et al., 2012).

Many new tools or techniques in law enforcement, use of force and otherwise, start with broad application and are subsequently whittled down by practical refinement, professional oversight, and civil litigation. ECWs have not been immune to this reality and more recent training from Taser International Inc. shows a much less liberal interpretation of when the use of an ECW is appropriate. A litany of restrictions based on physical and mental characteristics of the subject and restrictions on deployment location and probe impact are quite prevalent in the current training. The training now is also focused on those subjects that are aggressively resisting, showing something akin to assaultive behavior, before deployment (Taser International Inc., 2017). It is unknown whether the changes in Taser International Inc.’s training materials have come about due to case law, other civil litigation, or simply refinement of internally determined best practices.

**District Courts.** *Michenfelder v. Sumner*, a Ninth Circuit court decision from 1988, may help explain why, for much of its infancy, the ECW was considered on par with other types of

intermediate force weapons. The court held that the ECW was less confrontational and more favorable than the use of batons, chemical agents, or even, sometimes, physical restraint (*Michenfelder v. Sumner*, 1988). Considering the ECW as more favorable to intermediate force weapons such a baton or chemical agents would have placed ECWs lower on a “use of force continuum” than the other weapons. The concept of the use of force continuum was prevalent at the time of the ruling and early in the ECWs development. Used as a training and decision-making model, this placement of the ECW on the continuum would have made its use on individuals who are not actively resisting, but who are not overtly cooperative, seem appropriate.

The Ninth Circuit Court’s decision in *Bryan v. McPherson* was one of the first circuit court decisions involving restricting the relatively new technology and procedures that ECWs presented. The case, stemming from a 2005 incident, determined that the ECW should be considered an “intermediate, significant level of force that must be justified by the governmental interest involved” (*Bryan v. McPherson*, 2009, p. 4). This was a departure from the view that the ECWs represented a lower level of force than going hands-on with a suspect and shuffled the hierarchy of intermediate force tools for law enforcement. The decision in *Bryan v. McPherson* (2009) noted that ECWs are “a greater intrusion than other non-lethal methods of force” and so should be considered a higher level of force than other non-lethal tools (p. 9).

Nearly contemporaneously with *Bryan v. McPherson*, the Eighth Circuit Court, which covers Minnesota, was considering *Brown v. City of Golden Valley*. In this case, the court agreed with the lower district court’s admonition that “it was unreasonable to, without warning, taser a nonviolent passenger who was not fleeing or resisting arrest and was suspected of a minor, nonviolent crime” (*Brown v. City of Golden Valley*, 2009). The court also acknowledges that the level of crime is not the only determining factor in reasonableness, but also the threat to the

officer or others that should be considered when using an ECW. Though in separate circuits, viewing ECW use after *Bryan v. McPherson* and *Brown v. City of Golden Valley* show that the courts were similarly restricting the use of the weapon.

In *Meyers v. Baltimore County, Maryland* (2013), the question of repeated cycles of ECW deployments was examined by the Fourth Circuit Court. In its decision, the court clarified that each deployment, or energized cycle, that is directed at a subject was an independent use of force. In this case, the first three cycles of the ECW were reasonable based on the factors at hand. The subsequent seven, however, where the subject was no longer resisting, were not. The court's opinion stated, "it is an excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a [Taser] on an individual" and continued on to give criteria which would indicate that the individual should no longer be subject to additional shocks (*Meyers v. Baltimore County, Maryland*, 2013, p.16). These factors include if the subject is no longer armed, has been brought the ground, has been restrained, or is no longer *actively* resisting arrest. While actively resisting arrest can have different meaning to different officers, its meaning will become clearer with subsequent case law. This case made it clear that courts will examine -- and therefore officers must ponder-- whether each pull of the ECW trigger is objectively reasonable.

In *Estate of Ronald Armstrong v. The Village of Pinehurst* (2016) the Fourth Circuit Court again wrestled with the reasonableness of ECW use in certain situations. In this case, the majority opinion, written by Judge Thacker, noted that "unreasonable force in response to resistance that does not raise a risk of immediate danger" and "noncompliance with police directives and nonviolent physical resistance do not necessarily create a continuing threat to the officers' safety" (*Estate of Ronald Armstrong v. The Village of Pinehurst*, 2016, pp.25-26). This

case also referenced the *Brown v. City of Golden Valley* decision from the Eighth Circuit Court, showing the court's reliance on other arguments and precedence to bolster their own decisions.

**United States Supreme Court.** The United States Supreme Court has not yet heard a case dealing solely with the reasonableness of an ECW use in a use of force situation. This does not mean it has not influenced case law regarding ECW use, however. *Kingsley v. Hendrickson* and *Thomas v. Nugent* are both cases that involve the use of an ECW, but the decisions made did not explicitly impact the use of ECWs by law enforcement. In *Kingsley v. Hendrickson*, the Supreme Court vacated an appeals court rejection of liability for use of an ECW in stun mode and other force against a detainee. The court remanded this case based on erroneous jury instructions, saying that the jury had to find that the officers had acted recklessly to find the force excessive. The Supreme Court noted the complainant must only show that the force was objectively unreasonable. The decision did not overtly name the ECW use in its reasoning for remanding the case to the lower court, but effectively it re-affirms that ECW use falls under the Graham standard of objective reasonableness.

In *Thomas v. Nugent*, the Supreme Court granted a *writ of certiorari*, or review of the case. The court did not hear arguments but remanded the case to the lower court for review. This case is inherently about qualified immunity and how it is judged, though it was a case involving eight applications of an ECW. The lower court's finding that the facts in this case did not show an obvious example of excessive force or unreasonableness, and thereby granting immunity, was put into question by the Supreme Court remanding it back to them. This may have been the court questioning the reasonableness of the number of ECW applications without overtly doing so.

### ***The Total Effect***

ECWs represent what may be the biggest change in how officers use force since they began carrying firearms, and the courts are still catching up. This has caused the objective reasonableness standard, when viewed in the light of ECW use, to become a moving target. The frequency and effect of these cases also cause ECW policy and training to constantly evolve to provide officers the proper understanding and tactics to properly provide for the community.

The court's effect on the use of force is undeniable. The sheer number of cases involving the use of ECWs by law enforcement that effect how and when the use is considered reasonable is staggering. From district courts to the United States Supreme Court, an officer's actions are reviewed in the light of many factors to determine if it is excessive or not. While both the circuit courts and the United States Supreme Court have seen and ruled on dozens of use of force related cases since *Tennessee v. Garner* and *Graham v. Conner*, the standards they established of objective reasonableness being the litmus for civil rights violations has not been usurped. They are the mirror that every officer must view themselves in every time they place their hands on a subject, and they are the lens through which administration and the courts will view an officer's actions after the incident. They are as instrumental to a law enforcement officer's legal and ethical use of force as they were when the United States Supreme Court ruled on them over 30 years ago.

### **Administrative Lens View**

While the court's decisions can affect individual officers' use of force nationwide, each law enforcement organization creates an opportunity to develop their own structures, formal and informal, that guide its members on their actions. Traditionally, law enforcement organizations operate in a para-military fashion. The functions of uniforms, rank hierarchy, and direct or

operational orders are borrowed from the military and re-tasked to serve the community. Commonly, as one moves up the rank structure, more responsibility and knowledge are gained. With this increase in knowledge and responsibility comes a requirement that one's view and understanding of the organization's duties, missions, and principles also become more in-depth and critical. At the top of this hierarchy an organization's administration must make decisions based on a multitude of factors and must influence various stakeholders to further their objective. It is these influencing factors, and the tactics taken to implement a plan to obtain a goal, that make up an "administrative lens view."

### ***External Factors in Use of Force***

A law enforcement officer's position as an agent of the government that is imbued with the authority to temporarily suspend the rights of individuals merits the existence of extensive regulations to govern their actions. The policies that are implemented in organizations are directly affected by other governmental agencies through regulations, such as state-run standards and training organizations, legislation, such as justifiable use of force statutes, other federal guidelines or orders such as grants and executive orders, and case law, specifically that dealing with oversight and training.

**Regulations.** Currently all states have some entity that is charged with some form of police officer standards and training (POST) requirements. Many of the POST agencies are created through statute and they can have varied breadth of influence depending on the state. Most determine requirements and guidelines for peace officer training and education, licensing and certification, and, at times, discipline. Use of force is a highly divisive and volatile subject, and nearly all these regulating boards have some impact on regulating the use of force by officers certified or licensed within their purview (Follett, 2020).

Minnesota's POST board has various functions regarding the use of force in an officer's course of duties. The board has long had various learning objectives required for its mandated training. There are use of force learning objectives that outline what every officer must be trained upon during their yearly use of force training. Besides this, the learning objectives in associated training such as crisis intervention and conflict management provide guidance for administrations to shape their use of force policies and training (Minnesota Board of Peace Officer Standards and Training, n.d.)

In Minnesota, the POST board was recently charged with various additional initiatives by the Minnesota Legislature related to use of force and the reporting there of as well (H.F.1, 2020). The development of a use of force reporting and training database for all licensed officers is to be completed in 2021. This database will include an area for real-time officer complaint reporting, whether or not it is force related, as required by newly enacted statutes. In addition to the force reporting and tracking initiatives, the POST board has also marshaled a new "Ensuring Police Excellence and Improving Community Relations Advisory Council" that is charged with police use of force and how it impacts community relations (Berkel, 2020).

As law enforcement officer's work lives are guided by, and actions frequently dictated by, policy, it is likely the most significant impact the POST board will have on use of force is its new *Use of force model policy*, again, mandated by the Minnesota Legislature. Minnesota law enforcement agencies' use of force policies must have been as written or "substantially similar" to what was created by the POST board by December 15, 2020 (Minnesota Police Officer Standards and Training, 2020). The policy dictates officer's *ministerial* duties, or what they must do and when they must do it, and their *discretionary* duties, or when they have a choice in the actions that they take in relation to using force on a subject. The policy includes all force above

unresisted handcuffing up to and including deadly force. Within this is what the *Use of force model policy* referred to as “other than deadly force” or “force used by an officer that does not have the purpose of causing, nor create a substantial risk of causing, death or great bodily harm” (Minnesota Police Officer Standards and Training, 2020, p. 2). In popular law enforcement vernacular this would also be referred to as “less-lethal,” “less-than lethal,” and sometimes “non-deadly” force. ECWs would be considered an agency authorized device provided it is used in accordance with prior training and would fit within the other than deadly force section of the *Use of force model policy* (Minnesota Police Officer Standards and Training, 2020).

As an other than deadly force option, an ECW, as well as other intermediate force weapons such as chemical agent spray and impact weapons, it falls under *Use of force model policy* section “e” and states:

e) Use of Other Than Deadly Force

1. When de-escalation techniques are not effective or appropriate, an officer may consider the use of other than deadly force to control a non-compliant or actively resistant individual. An officer is authorized to use agency-approved other than deadly force techniques and issued equipment in the following circumstances:
  - a. effecting a lawful arrest; or
  - b. the execution of legal process; or
  - c. enforcing an order of the court; or
  - d. executing any other duty imposed upon the public officer by law; or
  - e. defense of self or another (p. 3).



While this policy guides the general use of force that would not have the intention of causing death or serious bodily harm, further guidance and restriction is frequently included in use of force policies for individual intermediate force weapons. Other techniques, such as soft hands techniques utilizing wrist and joint locks, and hard hand techniques such as kicks and strikes, would also have sections delineating acceptable and unacceptable utilization scenarios and situations. Some departments choose to have separate policies for each type of intermediate force weapon to ensure understanding of that individual weapon's usage parameters. The model policy from the Minnesota POST board does not differentiate these varied, less-lethal force options and leaves it up to individual agencies to provide restriction and guidance in a final organizational policy. These restrictions and additional guidance provided by the policies are the opportunity for administrations to shape the lens it views the use of force by the members of the organization.

**Statutes and Laws.** All states have some statute or law governing the use of force by individuals against another, up to and including, deadly force. Some have different statutes that only pertain to peace officers use of force, and they vary on when force would be considered legal and just. Minnesota Statute § 609.06 pertains to both citizens and licensed peace officers when authorizing force (Authorized use of force, 2020). This statute authorizes force for peace officers when:

(1) used by a public officer or one assisting a public officer under the public officer's direction:

- (i) in effecting a lawful arrest; or
- (ii) in the execution of legal process; or
- (iii) in enforcing an order of the court; or
- (iv) in executing any other duty imposed upon the public officer by law. (para. 1, 2020)

This statute also limits certain types of force with recent amendments. In 2020, restrictions on chokeholds, binding of all limbs together behind one's back to "render the person immobile," and securing a person facedown for transportation in a vehicle were all eliminated as legal tactics except in cases where deadly force is authorized (Authorized use of force, 2020, para. 3).

The authorized use of deadly force by peace officers is separated from the justifiable use of deadly force by citizens in Minnesota statutes. Minnesota Statute § 609.066 allows for the use of deadly force to:

(1) to protect the peace officer or another from death or great bodily harm, provided that the threat:

- (i) can be articulated with specificity by the law enforcement officer;
- (ii) is reasonably likely to occur absent action by the law enforcement officer; and
- (iii) must be addressed through the use of deadly force without unreasonable delay; or

(2) to effect the arrest or capture, or prevent the escape, of a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony and the officer reasonably believes that the person will cause death or great bodily harm to another person under the threat criteria in clause (1), items (i) to (iii), unless immediately apprehended. (2020)

While ECWs and other intermediate force tools are less-lethal tools, their use in some situations could be considered deadly force and administrations should have an awareness of this. Taser International Inc.'s user training version 20 cautions the use of its ECWs on higher risk populations, elevated individuals, fleeing individuals (on foot or on any manner of conveyance), and individuals in water due to a greater risk of injury (2017). These injuries could result in great bodily harm or death and would be considered deadly force. Including these restrictions in policy

and training is necessary to codify the risk and help officers understand that the use of the ECW is not solely guided by less-lethal force policy and statutory limitations.

While Minnesota Statute § 609.06 and 609.066 have the greatest impact on officers use of force, other, tangential statutes exist administrators must know as they impact use of force policy and procedure. Minnesota Statute §629.33, When force may be used to make an arrest, classifies an officer's legal right to use force when necessary to effect an arrest (2020). Minnesota State Statutes Chapter 626 outlines numerous rules and regulations for peace officers. These include searches, reporting, and pursuits. It is also in this section that the Minnesota POST board derives its powers and are charged with implementing the changes mentioned in the prior section.

**Federal Decrees and Recommendations.** The federal government can have direct or indirect impact on local law enforcement's use of force policy, training, and oversight. These include best practices, training, education, and resources meted out by such entities as the Department of Justice through its Community Oriented Policing Services (COPS) branch, or through its member agencies such as the Federal Bureau of Investigations (FBI). The research done by, and the resources available to, these governmental organizations can provide administrators with valuable insight to the rapidly changing realm of the use of force by law enforcement.

The federal government has convened large commissions to study the functions of law enforcement and its impact on the American people. One of these commissions was The President's Task Force on 21st Century Policing. The Final Report of the President's Task Force on 21st Century Policing contains six main topic areas or "pillars" including: Building Trust and Legitimacy, Policy and Oversight, Technology and Social Media, Community Policing and

Crime Reduction, Officer Training and Education, and Officer Safety and Wellness (C.O.P.S., 2015, p.1). All of the pillars are designed to give guidance to law enforcement organizations on areas of improvement that will increase their transparency, accountability, and connection to the community. The subject of use of force could be considered in the light of any of the pillars, however pillars two (Policy and Oversight) and three (Technology and Social Media) have direct impact on use of force and ECWs. The report recommends “comprehensive policies on the use of force” and provides recommendations for training resources centered upon use of force. Pillar three specifically mentions developing national standards for “‘less than lethal’ technology” (C.O.P.S., 2015, p.3). ECWs would be included in these recommendations and are the most mainstream and widespread less-lethal technology used by law enforcement today.

While the federal government has many resources to help law enforcement administrators learn, develop, and refine their agencies view of use of force, it also has tools in which it can force a law enforcement agency to change its strategies, or an administration to alter its lens. The Department of Justice’s Civil Rights Division can initiate a “consent decree” with an organization it determines is unable to properly complete its core objectives, including ensuring the civil rights of its citizens. While these issues can manifest themselves in various ways, improper use of force is frequently the harbinger of problems and often what starts an investigation that can cause a negotiated or judge ordered consent decree, as is what occurred in the Los Angeles Police Department after the Rodney King incident (Alpert, 2017). Once issued, the Department of Justice can make decisions on policy, procedure, training, education, and discipline for an organization, removing some or all of these powers from the organization’s administration. The use of the consent decree by the Department of Justice is not widespread, as in 2015 there were only 13 agencies under a consent decree in the United States (Department of

Justice, 2015). Though the use of this power is rare, it often results in the power of an organization's administration and the direction of an organization's efforts being altered drastically.

Recently, President Trump used an additional tool to impact law enforcement administration's power over their organization. Executive Order (E.O) 13969, Safe Policing for Safe Communities (2020) mirrors much of what is contained in House File 1, the Minnesota Legislature's bill that mandated changes in both Minnesota Post Board processes and span of control, but also statutory changes. Like those state measures, E.O. 13969 mandates the elimination of chokeholds, improvements to use of force reporting, and funding for additional training and education. As a mandate from the federal government, through the President of the United States, this Executive Order affects administrators in all law enforcement agencies at the local, state, and federal level, and removes a certain amount of input and choice on some issues.

**Courts.** The impact of courts on law enforcement policy and procedure cannot be understated. While the impact of case law and the courts on officer's actions and tactics was previously discussed, the impact of the courts on an administrative view of use of force is relevant here. The courts have a large part in negotiating or ordering a consent decree for a flailing law enforcement agency. They also can order civil penalties and judgements against agencies that have failed to train, equip, or discipline its officers properly. Frequently the Fourth Amendment claims that accompany civil lawsuits name both the involved officer that perpetrated the alleged rights infraction and the agency and municipality he works for. United States Supreme Court decisions in *Monell v. New York City Department of Social Services* (1978) and *City of Canton, Ohio v. Harris* (1989) both apply U.S. Code § 1983, the United States Code that allows for civil remedy in civil rights violation cases, to governmental organizations, specifically

the law enforcement agency or governing municipality of the individual who is alleged to have violated an individual's rights. Specifically, they apply to the failure to train an individual and how this can apply culpability in a civil matter to organizations (Civil Action for the Deprivation of Civil Rights, 1996). The specter of civil rights violations, as well as the large civil judgements and public relations and community relations impact that accompany them can shape an administrator's view when looking at use of force. These factors could cause administrators to hamstring their officers through policy in an attempt to prevent any type of altercation that could have even the minimal prospect of being viewed a violation of an individual's rights, and this could in turn put the officer or the public in greater danger.

### ***Internal Factors in Use of Force***

Internal factors that impact an administrative lens when viewing use of force policy and procedure differ from external. Internal factors are usually less formal and structured and involve local and organizational stakeholders as opposed to state or national players that have little or knowledge of the organization's existence. From an administrator's view, these internal factors can help shape the minutia of policy, procedure, training, and discipline to fit unique organizational factors.

**Stakeholders.** Yvon Perqueux has various definitions of stakeholders in his journal article *Stakeholders in Perspective*, but he defines them as people, or groups of people, with legitimate and valued interest in an organization's actions or objectives (2005). For law enforcement organizations these include community members, city government, other municipal employees, mutual aid partners, and employees of the organization. These stakeholders' likely value and will work toward the success of the organization, however, regarding use of force policy and procedure, the interests of the stakeholders may be competing.

Community members may not understand the true dynamics of a use of force encounter and the external factors that impact the actions of an individual officer. Though the force used may be reasonable, justified, and proper, it does not mean it will be palatable to those who view it from a different perspective. This lack of understanding may lead to pressure on the elected officials within a jurisdiction about an incident that is misconstrued as improper. Elected officials are inherently influenced by the public they serve and the concerns and views they have. All criminal justice organizations are at some level, governed by elected officials. Some organizations are led by administrators that are elected such as a county Sheriff. Often, the lead administrator of a department, such as a chief of police, is appointed by elected officials such as a county board or city council. Decisions and actions taken by law enforcement agencies are at least somewhat influenced by a political pressure and it may influence their view of the use of force parameters as their jobs may be affected by the views of the stakeholders.

Inter-organizational stakeholders, the officers themselves, can impact the administrative lens on use of force in a multitude of ways. Poorly educated officers that hold significant positions, such as use of force instructors, may be tasked with details outside of their actual expertise. Frequently, administrators will lean upon a perceived “expert” to provide guidance when wading in the murky use of force waters, sometimes to their and the organization’s detriment. The opposite is also true as well, however, and well educated, knowledgeable, and motivated officers can help provide direction and focus to an administrative view on the subject.

**Organizational Culture.** Use of force policies cannot encompass all possible situations and responses, and the culture of an organization will help form an individual officer response to resistance or aggression. Organizational culture is significant within law enforcement organizations as it is what most directs the behavior of the organizational members especially

when it comes to problems in the work environment (Stojkovic et al., 2015). Organizational culture is the words, actions, and attitudes of the individuals when they are not being observed. Formal rules, policy and procedures direct individual's actions but it is the organization's culture that will determine how an individual acts when no formal rules exist, or there is room for interpretation, such as in use of force policies. Administrations need to understand that the individuals within the organization are performing the socializing of others, especially new employees, thereby creating the culture of the organization. Providing opportunities such as field training officer, instructors, detectives, and other specialty positions to those who embrace the view which administration covets will heavily affect the culture of the organization. Similarly, it is important that first line supervisors and leaders also reflect the administration's view as they are closer to where the culture of an organization actually manifests itself most regularly and have the greatest ability to change or correct it.

**Mission and Vision.** A mission statement is a “description of an organization's common purpose” (Stojkovic, et al., 2015, p. 36). An administration's vision for an organization should be central in determining the mission of the organization. Ideally, the organization's mission is reflected throughout the department and can be seen in the formal policies and procedures and the informal institutional culture and the all-around actions of the individuals within the organization. In this way, the administrative view and vision must be reflected throughout the decisions made regarding use of force parameters to ensure congruity with the department's mission.

### **Ethical Application of ECW in Use of Force**

Many of the aspects of a career in law enforcement that draws an individual to the profession can also become a detriment to officers who do not act with a true ethical compass.



Independence, authority, and discretion are powerful tools to enable an officer to properly do their job on the street, but they are tools that cannot be taken lightly and without regard to other's rights. An officer's actions cannot be decreed in every situation, and it is in the situations where specific tactics are not dictated, and they must make independent decisions that the influence of ethics must rear its head. Law enforcement officers have had to use force for the good of the community since the advent of law provided a notion of what the community itself felt was right and wrong. The "Bobbies" or "Peelers" of 19<sup>th</sup> century London were equipped with truncheons to ensure their safety when enforcing peace and deterring the criminal element (Bauer, n.d.). When an officer must use force, they must have the internal ethical debate weighing numerous factors and must sometimes do so in an instant. As new technologies emerge in law enforcement, they create new ethical dilemmas and increased variables for officers to consider. Using an ECW confounds the use of force because the effect on the subject can vary, providing additional outcomes in what may have been an officer's "if this, then that" thought process. Currently, law enforcement agencies and their governing bodies are attempting to remove discretion from a law enforcement officer's toolbox by limiting when an officer can use a certain type of force. This elimination of options reduces the focus on ethical decision making and increases the number of tactical "flow-charts" an officer must progress through at a moment's notice. These decisions are growing the view that officers should be "Robocop" while using force, but ethical, emotional, and empathetic officers in everything else they do.

A law enforcement officer has the authority to suspend another's rights when they suspect that person has committed a crime. The action precipitating this could be as simple as turning on the emergency lights on a squad car, or as invasive as firing a firearm at a suspect. As noted earlier, *Graham v. Connor*, (1989) confirmed law enforcement officer's legal authority to use

reasonable force to accomplish their lawful objectives, including stopping criminal behavior or apprehending and detaining suspects. In each case, the officer must take stock of what they know and do not know to accurately assess which tool to use and then reflect upon if it fits with established rules or internal ethics.

While all uses of force come with an ethical dilemma, the focus of this exercise is to determine how to implement ethical decision-making in the use of force specific to the ECW. The ECW is a force tool that can be used to cause pain to gain compliance. Most law enforcement ECWs can deploy barbed darts which, when impacting a subject and energized, can cause a phenomenon known as neuromuscular incapacitation, or muscle lockup. The multitude of ways an ECW affects a subject causes a complicated ethical debate within the individual who chooses to deploy it against another person.

The ECW is a device that can subdue an individual with little or no injury to them while causing little or no physical exertion by the individual deploying it. ECWs have shown a reduction in injuries to both officers and suspects when used during a force encounter (Ferdik et al., 2014). Unfortunately, the ECW is not a panacea and comes with risks to the individual who it has been used against. Injuries from the dart punctures and falls resulting from the neuromuscular incapacitation that the effectiveness of ECWs is built upon are not uncommon. While a direct connection between ECW exposure and death has not been thoroughly documented, the over 1000 ECW-proximate deaths that have occurred since 2001 is a number that cannot be discounted (Ferdik et al., 2014).

### ***Duties***

A law enforcement officer's sworn duty is to uphold the codes and ordinances of their jurisdiction, the laws of the state, and the Constitution of the United States. Officers also have an

obligation to protect the property and well-being of the citizens they serve. Law enforcement officers are still humans, so they also have a drive for self-preservation and an informal duty to provide emotional, financial, and physical support for their families. Law enforcement officers also have duties and obligations to those they are investigating, detaining, and arresting. These include preserving the civil rights of these suspects, using force only when necessary, and then using only the amount needed to attain their objective. These duties are taken on upon recitation of the Oath of Office and often connected to ethics through an ethical code of conduct such as the International Association of Chiefs of Police's (IACP) Law Enforcement Code of Ethics (IACP, n.d.). This is often formalized within an organization by an oath or by inclusion in formal policy.

### ***The Ethical Dilemmas of Force***

When deciding when to use force, an officer faces a myriad of moral dilemmas. They must use a level of force sufficiently forceful to accomplish an objective, but not overly forceful as to cause unnecessary pain or injury. Officers must quickly compute the information presented to ensure it warrants the conclusions made and determine if there are sufficient facts to make an accurate assessment. Duty and discretion must be weighed to determine if the infraction alleged is significant enough to warrant force being used at all to enforce it or to apprehend a suspect. Other options, such as time and space, are weighed as potential solutions or accompanying tactics to reduce the amount of force necessary. Recent use of force related events, and political and legislative measures, have increased the number of variables and outcomes that officers measure when having this split-second debate. The societal debate on the outcome of an event, as well as its political and legal repercussions, may significantly impact an officer's actions. Focusing on ECWs, the officer's realization that while the likelihood of death or serious injury is

small, it is still a variable that needs to be considered and should influence the ECWs use in all situations.

The most pressing ethical and moral dilemma facing officers when using any force, ECWs included, is whether the force being used is the necessary amount to attain the desired objective, but not excessive. Deciding on what type of force to use and the amount is a moving target for law enforcement officers. Necessary force changes based on a variety of factors including the crime alleged, the officer's knowledge, skills and abilities, and physical attributes, and the characteristics of the individual on which the force is directed. The biblical tale of David versus Goliath is an excellent illustration of the elements that may influence the amount of force that is deemed reasonable. A "David" officer attempting to arrest a "Goliath" subject is viewed differently than the inverse. The force must be tuned based on these factors to ensure that it does the most good with the least harm. This is especially true with ECWs as they have been shown to have disproportionate impact on certain groups or characteristics (White & Ready, 2010).

### ***Implementing Ethics in Use of Force***

Promoting ethical actions within an organization includes both formal and informal measures. Implementation of the ethics policy begins the process by codifying the ethical rules an officer must abide by. This provides an organization structured and documented expectations and allows administration to take formal measures when ethical expectations are not met. The development of an ethical policy requires input from all stakeholders, including officers, administrators, elected officials, and community members. Critical review should be conducted by stakeholders and input should be synthesized throughout multiple revisions using different and diverse audiences to gather a wider range of opinions. The city administrator, city council, and mayor should review and approve the policy. As representatives of the community that is

being served, their input and blessing with the content of this policy is important to effectively implement it within the organization and the community.

All organizational policies should be reviewed considering the ethics policy. While this ethics policy should direct and influence all actions of the organization's members, ensuring that other policies reflect the goals of the ethics policy is key to having a coherent and consistent vision. This could be as simple as referring to the policy number within related policies or as complex as including clauses in policies noting the ethical considerations officers should consider when acting within a given policy.

Putting an ethics policy into effect means that a review by all affected members must be completed. An active discussion with administration to provide feedback or ask questions is also important to ensure understanding and to show the importance of the policy. An ethics policy that is based upon the mission and vision of the department and contains some acknowledged tenants of law enforcement should be understandable and in line with expected actions.

### ***After Implementation***

Regular, ongoing training on ethics is just as important as any other skill because like many other skills, it is perishable. Ethical lapses can be just as detrimental to an organization as an improper use of force or a poorly executed critical incident. They can bring about legal repercussions or a change in public opinion, both of which can doom an individual or an organization. Consistent, at least yearly, formal training ensures review by all affected members regularly. More importantly, however, is the integration of ethics policy, and the concepts and standards it dictates, into all training. This involves integrating overt ethical dilemmas into scenario and hands-on training. It also includes reviewing these scenarios not just for the tactics and skills being taught but also for the ethical basis for the actions taken. Hands-on and scenario

training activates the same areas of the brain that will then be used in actual incidents. This helps ensure that the transferred skills and abilities are retained by the officer and can be retrieved when actual ethical dilemmas occur (Dillon, 2020). The same muscle memory drills that enhance the physical reactions of officers, such as repeated drawing and firing of their firearms, can be used to enhance their ethical decision-making when connected in scenario-based training encompassing this skill.

Regular review of all policies is key to keeping them relevant and sustainable, and every time a policy is read is a review of its contents. It should empower all members of an organization governed by a policy to question and comment on any policy, the ethics policy included. It should encourage members to question or clarify any portion of a policy with their supervisor or an organization's leadership. Administration should also have regularly scheduled critical analysis of all policies, with the ethical policy being no different. This allows the administration to determine if the policy is still in line with the mission and vision of the department and the community.

Review of the ethics policy should also occur when the organization's members are involved in critical incidents or other high-profile critical incidents outside of the organization call into question the actions of law enforcement. The concept of "sentinel events reviews" in healthcare is one that requires a thorough review of all aspects of an unexpected death or grave illness as a result of action of healthcare workers. These sentinel events allow a comprehensive understanding of what did --or did not-- occur that may have contributed to the outcome (Stone, 2019). Similarly, a critical incident review allows administrators and trainers to project the actions of their officers and determine if the training and policy of the organization would cause

similar outcomes. Determining this allows organizations to change their policy and training to impact the outcome of incidents in the future.

### ***The Ethical Resolution***

Decisions made by a single law enforcement officer can have great impact not just on the individuals directly involved in the incident, but on society as well. These decisions can have an effect entirely unknown to the person undertaking them and can irrevocably change individuals and society.

Ethical formalism would indicate that using force upon someone would be unethically corrupt as its intent is going to have a negative impact on the person it is used against. The act of hurting, injuring, or otherwise physically subduing a person could never be seen as ethical using this deontological system (Pollock, 2019). Law enforcement officers would not be able to do their job if they acted in accordance with strict ethical formalism and would be at the mercy of those who do not follow its virtues.

Utilitarianism would present that the use of force to obtain an officer's lawful objective would be ethically sound as society has given the officer the authority to do so for the good of all (Pollock, 2019). "The rights of one individual may be sacrificed for the good of many" (Pollock, 2019, p. 37). The right of society to be free from criminal activity overrides a criminal's right to not be harmed, if that criminal has engaged in an action that requires force to overcome. Specifically, an ECW's effectiveness in reducing injuries to officers and suspects, decreasing the rate of lethal force used, and stopping a threat fits the ethical standard of utilitarianism greater good (Womack et al., 2016). Its effectiveness allows it to be considered the least amount of force necessary to accomplish an objective in many situations.

While a law enforcement officer's ethical framework must include some utilitarianism functions, this may be a low bar to set. A practical view of the *ethics of care* may be a more appropriate standard for law enforcement officers to strive for when using force. The ethics of care has been stated as "seeking to maintain relationships by contextualizing and promoting the well-being of care-givers and care-receivers in a network of social relations" (Care Ethics, 2020, para. 1). In a sense, law enforcement officers can be considered caregivers, and all citizens, including criminals, could be considered care-receivers. Officers should look to promote their well-being and the well-being of the individuals they are interacting with when using force. This can be done by promoting the concept of the *duty to intervene* and the officer's own personal growth and advancement.

The duty to intervene is the notion that an officer has a duty, and an ethical requirement, when they witness a wrongful act by another officer, to step in and halt the action (Ferrell, 1988). This concept is not only backed by many court decisions, but it has also been written into statutes in many locations and policy in others. This is most recognizable in use of force situations as the outcome could be life or death. While utilitarianism ethics allows us to use force, the ethics of care requires officers to preserve the well-being of others and would require actions halting the use of excessive force by their peers.

An argument could be made that the ethics of care, in this case the requirement that officers take measures to preserve the well-being of those they use force against, could also mean that an officer is ethically required to focus on personal well-being and growth. The reasonableness of force outlined in *Graham v. Conner* requires considering both the characteristics of the offender and the officer. It would be reasonable to also assume that an officer who is more proficient in the various skills of their trade, including communication,



observation, and force tactics, and that is in better physical shape, could require less force to obtain their lawful objective. In this way, the ethics of care dictates that officers should be dedicated to improving themselves physically, mentally, and tactically in order to give themselves the greatest chance of using the least amount of force possible.

### ***Stewardship Principles***

Using the ethics of care in decision making in force situations also is in line and upholds

Concordia-St. Paul's Responsible Stewardship Principles:

Responsible Stewardship of Resources - Be accountable and effective in the use of resources.  
Responsible Stewardship of People - Nurture talent and treat people with respect and uphold their dignity.

Responsible Stewardship of Decisions - Be mindful of the intended and unintended consequences of decisions on various constituents (especially the vulnerable) and on the environment.

The Responsible Stewardship of Resources is similar to the concept that one should ethically only use the amount of force necessary to obtain your lawful objective. In this way, officers need to use their resources, such as an ECW, other intermediate force weapons, or their own de-escalation or verbalization skills, to control a situation and ensure the outcome involves the least amount of force necessary. Officers must be accountable to this standard ethically as they will be held accountable through policy and regulation.

The Responsible Stewardship of People is attained by using the ethics of care to ensure you are treating them with respect and upholding their dignity through not causing them undue pain or suffering. It also requires caring for them and taking measures even after they have used force. This involves caring for the wounds, allowing subjects to make decisions when possible, standing them up and brushing them off, and treating them generally like a human being rather than a subject that just caused the use of force incident to occur.

The Responsible Stewardship of Decisions is upheld as the ethics of care require that your actions be promoting the wellbeing of others, and part of this is to have a thorough understanding of the possible outcomes of your actions. This consideration is expressly dictated in the Taser International Inc. training course when it outlines situations where the ECW should not be used because of the potential collateral damage and unintended consequences of the use of the ECW (2017). This training specifically mentions vulnerable populations, such as elderly, infirm, mentally ill, and pregnant as groups that may disproportionately incur adverse effects of the weapon.

### **Conclusion**

The sheer number of factors that must be integrated by law enforcement officers to provide a proper response to resistance or aggression is staggering. These factors include individuals and organizations from the local street corner to the highest political offices in the United States. Included in these individuals and organizations are widely varying ethics, values, morals, and priorities that can influence their views. This combination of personal and societal stakeholders makes for a delicate balance of personal rights and societal needs. It is because of this combination of factors that it is evident and relevant that the matter of use of force in general, and ECW use specifically, is a changing and evolving subject.

### **Chapter 3: Implications, Recommendations, and Conclusions**

While society has granted law enforcement officers the authority to suspend other's rights and use force to obtain a lawful objective, they have retained the right to review and revise when they believe it is reasonable through varied governmental structures. Society is constantly changing and developing, and with it, so is its view of the use of force by law enforcement. A law enforcement officer's tools and training are also changing and presenting new challenges for

officers and those who govern them. The ECW is a relatively new tool for the profession, and the stakeholders in its use are still learning its consequences and evaluating its use.

### **Practical Applications**

It is clear from the 1,000 plus ECW proximate deaths that have occurred since the year 2000 that ECW use by law enforcement officers should be considered and evaluated by the public (Reid, 2019). Each of the over 200 ECW centric court cases listed on the Americans for Effective Law Enforcement website have at least one law enforcement officer named in the case whose career may have hinged upon the outcome (n.d). For law enforcement administrations and municipalities that employ those officers, the misuse or misunderstanding of the standards for the use of ECW could cost them monetarily or worse. High-profile cases of use of force such as the Rodney King incident and more recently the George Floyd death, and the shooting of unarmed men such as Michael Brown or Jamar Clark have shown to reduce the public's support of law enforcement. Even smaller depictions of police force have been shown to reduce the public's trust in law enforcement (Donovan, K. & Klahm, C, 2018). Of particular concern for ECWs is the lack of actual understanding of the properties and function of the weapon. Many people do not understand the properties of electricity, such as the amps, volts, and watts, that differentiate the ECW from their household wall outlet that they have been taught to fear since infancy. Add to this the negative optics of its proper function (full neuromuscular incapacitation) and it is understandable that observing the ECWs use may cause concern over its necessity of it and proper place in an officer's graduation of their intermediate tools.

## Recommendations for Further Research

The most noted deficient area of research in the realm of use of force is the lack of centralized information on rates on incidence of force used by law enforcement. The earlier statistic of law enforcement using force in less than .45 percent of encounters with the public was published in 2002 and was the most recently found available data from a proper source (Sanow, 2002). Jon Shane, in his essay *Improving Police Use of Force: A Policy Essay on National Data Collection* noted that the lack of documentation has been an issue since at least 1931 (2016). He notes that without data, it is impossible to estimate the prevalence of law enforcement's use of force, thereby hampering efforts to improve practices. While agencies likely capture data on the use of force internally, a lack of central repository can hamper the examination of statistical trends across larger demographical sample sizes. While Taser International, Inc. has provided tools for data analysis such as their data logging software and specific ECW use reports, without mandating the gathering of data, and then amalgamating it with other organizations, the vast majorities of agencies would not produce a sample size large enough to consider it statistically accurate.

In Minnesota and on the federal level, steps have been taken to remedy this lack of information sharing about use of force. Minnesota Legislatures House File 1 in the 2020 second special session, and President Trump's Executive Order 13969 both contain provisions to start collecting data related to law enforcement's use of force. These steps may enable future researchers to see how changes in policy and procedure around force impact its use in the field. A vicarious benefit to this may be improved understanding by the public and stakeholders of the actual frequency of force used by officers as opposed to how it may be shown by popular culture

or the news media, allowing public policy debate to be dictated by logical argument and not “what’s seen on TV” (Shane, 2016).

## **Conclusion**

The use of force by law enforcement officers has changed dramatically since the modern notion of law enforcement was integrated into our society. Some tactics and equipment that were in the realm of science fiction a century ago are commonly used by officers to protect life and property today. The ECW was leap forward in technology when first presented as a defense and apprehension tool nearly 30 years ago, but with progress comes challenges. Many of the tools used by officers prior to the ECW had already been judged in the lens of *Graham v. Conner’s* reasonableness standard. It was to be expected that the ECW would fare no differently and in the subsequent years it has been evaluated based on many factors. With each pull of the ECW trigger, like any other use of force, comes an opportunity to review whether the tactics and tools law enforcement officers are using are right for our practitioners, our agencies, and our society.

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