2-1-1991

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Benjamin I. Whipple

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Comments

The Fourth Amendment And The Police Use of "Pain Compliance" Techniques on Nonviolent Arrestees*

A Presidential Commission presented the Wickersham Report1 to Congress in the early 1930s. The report documented and condemned brutal interrogation techniques commonly used on suspects by law enforcement officials around the country. The report called for police conduct respectful of the personal liberties guaranteed by the Constitution2 and became a pivotal influence in the reformation of police practices and procedure.3 George W. Wickersham, chairman of the Commission, stated in his introductory comments that "[r]espect for law, which is the fundamental prerequisite of law observance, hardly can be expected of people in general if the officers charged with enforcement of the law do not set the example of obedience to its precepts."4

In the fall of 1989, the United States Commission on Civil Rights reported that "a continuing flood of complaints and letters of concern,"5 had been received from citizens across the country6

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* The author wishes to express his sincere thanks to the many individuals who contributed to this Comment.
2. *Id.* at 2, 3.
6. Chairman Allen of the Commission reported that complaints originated in:
“with allegations of police misconduct in the context of public, nonviolent demonstrations.” The Office of General Counsel of the Commission detailed highlights of these complaints in a memorandum, together with an assessment of the legal standards and remedies applicable to claims of excessive police force. As part of its investigation of the complaints, the Commission also conducted a public symposium at which police chiefs, other law enforcement officials, federal prosecutors, civil rights protesters and others testified concerning the alleged police misconduct. Chairman Allen of the U.S. Civil Rights Commission, convinced that “the civil rights of nonviolent, public demonstrators [had] been violated in the administration of justice,” formally petitioned Attorney General Thornburgh to initiate a Department of Justice investigation.

Atlanta, Georgia; Boston, New Bedford, and Brookline, Massachusetts; Denver, Colorado; Dayton, Ohio; Madison, Wisconsin; New York City; Pittsburgh, Pennsylvania; Los Angeles, San Diego, Sacramento and Santa Cruz, California; South Bend, Indiana; Las Vegas, Nevada; and West Hartford, Connecticut. Complaints continue to arrive involving other jurisdictions. Many other jurisdictions, I should add, have handled and continue to handle nonviolent, public demonstrations without prompting charges of excessive force. Letter from William B. Allen, Chmn., U.S. Comm’n on Civil Rights, to Att’y Gen. Richard Thornburgh (Sept. 22, 1989) prefacing Allegations, supra note 5, at 1-2 [hereinafter Letter].


9. The following excerpt from the memo recounts a sampling of the reported treatment:

At a recent Connecticut demonstration, a man who went limp when arrested stated: “I was lifted slightly off the ground when one of the officers... twisted my left wrist and lifted me... Something popped in my left wrist. The pain was immediate and intense and I came close to passing out... I was denied a trip to the hospital because I wouldn’t give my name.”

Some individuals who withstood the pain of the holds found the pain compliance escalate by use of combinations: “I was handcuffed behind my back with flexible, elastic style restraints. Officers then applied extreme pain pressure to my wrists in an attempt to make me stand. After I refused, pressure was applied to my ears and nose... I was lifted off the ground by all of my weight being hung on my wrists. I believe that my left arm was broken during this procedure.”

Another demonstrator claimed: “Twice I made the following statement to the arresting officer and all of the officers there; ‘Officer, we are peaceful, nonviolent, and will not resist. It is not necessary to inflict pain on us or to use pressure points.’ The response from the officer was, ‘If you walk, we won’t hurt you.’”

Id. at S11352.

10. Allegations, supra note 5. Speakers at the September 15, 1989 briefing included Linda K. Davis, Chief of the Criminal Section of the Civil Rights Division of the Justice Department; Police Chief Robert McCue of West Hartford, CT; Asst. Chief Melvin High of the Metropolitan Police Department of the District of Columbia; Don Jackson, former police sergeant in Hawthorne, CA and currently Vice President of the Santa Monica NAACP, Charles Litekey, a former priest and currently a nonviolent peace activist; and Chet Gallagher, Las Vegas police officer and pro-life participant in Operation Rescue operations.

11. Letter, supra note 6, at 2.
into the issues raised by the complaints.\textsuperscript{12} Members of Congress also received numerous complaints of brutal police practices in encounters with nonviolent protesters.\textsuperscript{13} In response to the concerns raised by the complaints, an amendment\textsuperscript{14} was added to the Appropriations Act for the VA, HUD and various independent agencies, in the waning days of the first session of the 101st Congress. The text of the amendment is found in House Report 2916 (H.R. 2916). The Act was passed by the House and Senate and signed into law by President Bush.\textsuperscript{15} The amendment, proposed by Senator Armstrong of Colorado,\textsuperscript{16} denied Community Development Grants to any agency or municipality which "fails to adopt and enforce a policy prohibiting the use of excessive force by law enforcement agencies. . . against any individuals engaged in nonviolent civil rights demonstrations."\textsuperscript{17} This

\textsuperscript{12} Id. at 1. The letter furnishes a summary of the complaints:

The complaints allege that police officials in several U.S. cities used, under direct supervision, excessive and unnecessary force against passive demonstrators in their arrest and post-arrest procedures. No one has complained of having been arrested: the demonstrators fully expected and intended that. Rather, the allegations, which should trouble anyone however they may view the merits of the protests, include an unwarranted infliction of pain by police officials using pain compliance techniques; gross disregard for pain and injury resulting from use of plastic handcuffs, which tighten further when persons wearing them are subjected to pain compliance holds; continued use of plastic handcuffs on persons for as long as eight hours while incarcerated; improper use of mace on crowds which included women and children; improper use of nunchucks [sic], a martial arts weapon; removal by police of identifying badges and nametags based upon the rationale that these objects might injure demonstrators; denial of the right to counsel; excessive or unreasonable bail; sexual abuse; and unwarranted and improperly conducted strip and cavity searches of female detainees by male guards in view of male prisoners. Complaints and affidavits indicate many injuries, including fractures, dislocations, serious sprains, and nerve damage.


\textsuperscript{14} Sen. Armstrong's amendment was a revised version of an amendment initially proposed by House Rep. Bob Walker, passed in the House, and eventually marked out by the Senate Appropriations Committee. Walker's amendment would have denied funds to a municipality in which three or more employees were convicted for use of excessive force in handling of non-violent civil rights demonstrators. Senate Comm. on Appropriations, 101st Cong., 1st Sess., S. Rep. No. 101-28, 101st Cong., 1st Sess. 87 (Sept. 6, 1989).


\textsuperscript{16} Senator Armstrong, on the occasion of his proposing the amendment, brought the alarming complaints of police behavior to the attention of his colleagues by inserting the entire memorandum by Jeffrey O'Connell, Assistant General Counsel of the U.S. Commission on Civil Rights, into the Congressional Record. He especially invited those senators with strong stomachs to read the details. 135 CONG. REC. S11351 (daily ed. Sept. 19, 1989) (statement of Sen. Armstrong).

\textsuperscript{17} The amendment as enacted reads:
threatened denial of potentially millions of federal dollars,\textsuperscript{18} evinced Congress' belief that such police behavior violates basic civil rights and should be curtailed without delay.\textsuperscript{19}

Congress' preventative action in passing H.R. 2916 may effectively persuade municipalities to voluntarily avoid techniques which could be considered excessively forceful when arresting passive resisters. But the provision does not define "excessive force;" nor does it mention "pain compliance." Courts have yet to squarely address the fundamental legal issue underlying the alleged police misconduct: whether the deliberate infliction of severe pain by officers on a passively resisting arrestee is an unreasonable seizure under the fourth amendment.\textsuperscript{20} This comment addresses that question by first considering the facts of a typical "pain compliance" scenario based on a class action settled during trial before the central California district court of the Ninth Circuit.\textsuperscript{21} Issues not relevant to the pain-infliction analysis are eliminated, although the issue of standing for injunctive relief is examined. Specific factors enumerated by the Supreme Court in Graham v. Connor\textsuperscript{22} as necessary for an understanding of fourth amendment "unreasonableness" in a given arrest context are then examined, balanced, and applied to the "pain compliance" scenario. Finally, the Comment examines various definitions of "excessive force" to conclude that unnecessary force in an arrest is unreasonable force. That is, when alternative means of apprehension could be used on a passively-resisting arrestee which are less injurious and intrusive than the infliction of pain, the use of "pain compliance" constitutes an unreasonable seizure.

None of the funds appropriated under title II of this Act under the heading entitled Community Planning and Development, Community Development Grants, to any department, agency, or instrumentality of the United States may be obligated or expended to any municipality that fails to adopt and enforce a policy prohibiting the use of excessive force by law enforcement agencies within the jurisdiction of said municipality against any individuals engaged in nonviolent civil rights demonstrations.

\textit{Appropriations Act, supra note 14.}


19. The rationale behind the amendment is well expressed in the joint Conference Report on H.R. 2916, recommending passage:

\begin{quote}
The conferees strongly deplore reported instances of the use of excessive force by law enforcement agencies in arresting nonviolent civil rights demonstrators. Such misconduct by official governmental instrumentalities is exceedingly objectionable and offensive, and must be condemned and curbed with the imposition of effective policies to prevent any further occurrences. The Secretary of the Department of Housing and Urban Development is therefore directed to formulate adequate reporting and certification standards by municipalities. . . .
\end{quote}

135 CONG. REC. H7201, H7216 (Oct. 18, 1989) [hereinafter JOINT REPORT].

20. Chairman Allen phrased the question as "what level of force may be properly applied to persons passively rather than actively resisting arrest." Letter, supra note 6, at 2.


I. Pain Compliance in Action

“Pain compliance” is a catch-all phrase used to categorize a variety of pain-inducing techniques available to officers to “persuade” an uncooperative arrestee to comply with their demands. For example, an officer may place his or her fingers firmly on a subject’s pressure points; may insert his or her fingers in a subject’s nose and pull up; may twist the subject’s arm(s); may bend backwards a subject’s finger(s); or may press the subject in a sensitive spot with the officer’s baton. Depending on the technique, the pain induced can range from mild discomfort to extreme and debilitating physical agony. The use of a “nunchaku,” a martial arts lethal weapon, is a particularly painful technique recently introduced to some police departments. The nunchaku device modified for police use consists of two twelve-inch plastic handles connected by a four-inch nylon cord. When the cord is torqued around limbs, the extreme pressure and constricted circulation cause severe pain.

In John v. City of Los Angeles, six plaintiffs on behalf of them-
selves and others similarly situated, filed suit against the City of Los Angeles, the Los Angeles Police Department, Police Chief Daryl Gates, and others. Their objective was to curtail the Los Angeles Police Department's (LAPD) use of pain compliance techniques, particularly that of the nunchaku, on "peaceful, non-violent individuals" where other less injurious means of arrest are available.

Plaintiffs were engaged in a demonstration sponsored and organized by the pro-life activist group Operation Rescue. They had blocked the entrance to an abortion clinic with their bodies in an attempt "to prevent what they believe is the taking of human life." Los Angeles police officers placed plaintiffs under arrest for trespassing. Plaintiffs, however, remained on the ground in a limp fashion, seated or curled in a fetal position. At this point, the alleged misconduct of the police occurred:

Although he [plaintiff Fisher] was not locking arms or making his hands inaccessible, he was stomped on his back by a police boot, slammed to the concrete, and subjected to extreme pressure as both of his arms were raised behind and upwards until one arm was broken, despite his cry "you are breaking my limbs!" Then after Fisher expressly told police he would comply voluntarily, particularly in view of his broken arm, defendants' arresting officer still stuck his thumb in Fisher's nostril and raised Fisher by a lifting pressure in his nose. At no time did Fisher struggle or provide any active resistance against the officers.

Likewise, on June 10, 1989, the remaining plaintiffs all have testified that they did not provide any active resistance whatsoever to the officers' actions. Despite the fact that none of them were locking arms or participating in any "human wormball" or anything of the sort, they were nonetheless subjected to "pain compliance" by nunchakus on both arms. In the case of plaintiffs John, Frassett, and Santiago, the nunchakus were not released even after they actually cooperated or said they would cooperate with the police. Plaintiffs Harris and Houseman initially did not move because they were "unable to stand" due to the pain. Eventually, both were "dragged"

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29. The parties settled the case during trial and stipulated to a judgment, without admission of wrongdoing, permanently enjoining defendants from using nunchakus against plaintiff class members. The class was defined as "[a]ll persons who have been or in the future will be subjected to pain compliance techniques in connection with their arrest at Operation Rescue demonstrations within the City of Los Angeles." The order included costs and attorney's fees for plaintiffs pursuant to 42 U.S.C. 1988. Id.


31. A "veteran" Operation Rescue activist, testifying before the U.S. Commission on Civil Rights, described Operation Rescue as "a grass roots movement in this country, made up of people from every religious background and every social and ethnic status, who come together prayerfully, passively, and nonviolently, motivated to rescue the lives of innocent children that they believe are going to be slaughtered unless they intervene and prevent that slaughter." Allegations, supra note 5, at 32 (testimony of Chet Gallagher).

32. Plaintiff's Memo, supra note 30, at 23.


34. Operation Rescue "rescuers" assume a limp or fetal position when confronted by police agents of the state as an expression of identification and solidarity with infants vulnerable in the mother's womb. J. O'Connell, supra note 8, at 1, n.2.
by police anyway, using the nunchakus that broke Housman's arm and sprained Harris' wrist. Plaintiff John testified that Chris Keys, the first demonstrator to be arrested on June 10, was "completely picked up and suspended off the ground by defendants' police officers as he was carried to the bus screaming in agony."35

This case provides the factual scenario for the analysis which follows.

II. ELIMINATION OF ISSUES

The question presented by this scenario is whether it is lawful for police to intentionally inflict severe pain on a non-violent, passive arrestee to compel that person to walk. In order to sharpen the focus of the question, it may be helpful to identify and eliminate several threshold issues which are not central to this analysis.

First, for purposes of this Comment, it is presumed that sufficient probable cause exists to justify an arrest. By placing the subject under arrest the police officers are carrying out their lawful duty. The issue is whether the manner of arrest employed by the police is lawful.

Second, the California legislature has made resisting arrest by passively going limp a statutory violation. The California Penal Code states that "[e]very person who willfully resists, delays, or obstructs any public officer or peace officer, in the discharge or attempt to discharge any duty of his office...is punishable..."36 "Willful resistance" has been construed by California courts to include "passive resistance."37 The principal case on this point is In re Bacon,38 dating from the mid-sixties, in which the court held that Berkeley students violated this statute. The students went limp when placed under arrest so that police officers had to drag them out of the administration building in which they had gathered for a political protest "sit-in." The fact that the students' passive resistance was politically motivated did not, in the eyes of the court, make their behavior

35. Plaintiffs' Memo, supra note 30, at 7-8 (emphasis and citations omitted).
38. "We hold, therefore, that a person who goes limp and thereby requires the arresting officer to drag or bodily lift and carry him in order to effect his arrest causes such a delay and obstruction to lawful arrest as to constitute the offense of resisting an officer as defined in section 148." In re Bacon, 240 Cal. App. 2d 34, 53, 49 Cal. Rptr. 322, 333 (1966).
any less a statutory violation. "Going limp" before an arresting officer may be a form of political statement, but it has not been accorded "free speech" constitutional protection.

Understanding that passive resistance to an arrest is a statutory violation helps one gain an appreciation of the arresting officers' perspective of passive arrestees. The arrestees, though religiously and/or politically-motivated and non-violent, are nonetheless violating a statute and deliberately making the officers' job burdensome. Yet, violation of the law does not suspend an arrestee's Constitutional rights nor authorize an unreasonable seizure.

Third, police officers are entrusted with the authority to use force to effect arrests. The California Penal Code provides that "[a]ny peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance." Citizens who place themselves in a position which invites arrest, and who then resist arrest by going limp, must expect to be "handled" in some way by police. The impasses created by an arrestee's refusal to voluntarily get up and walk makes the use of some force a necessity, if officers are to fulfill their duty to enforce the law. The issue, then, is what degree of force is permissible to effect arrest in such circumstances.

Lastly, this Comment does not take the position that all use of pain compliance techniques is per se unconstitutional. In comparison with other police responses on an "escalation of force" scale of ascending physical severity, pain compliance is placed on a lower to intermediate rung. If the use of deadly force is not unconstitutional in an arrest context under certain circumstances, it follows that appropriate occasions arise for use of the lesser force of pain compliance. Officers are routinely trained in pain compliance techniques,
with new holds and methods continually being devised.\textsuperscript{46} The issue is rather one of application; that is, whether pure pain can be used as a means of coercion on a limp, non-violent arrestee to compel that person to walk "when other less injurious, equally effective and safe means exist to effect the lawful arrest of such individuals."\textsuperscript{46}

III. PROCEDURAL FRAMEWORK FOR RELIEF: SECTION 1983 AND EQUITABLE INJUNCTION

On the federal level, the primary cause of action available to challenge alleged police misconduct is a personal claim for damages\textsuperscript{47} under the Civil Rights Act of 1871.\textsuperscript{48} A second, independent analysis is required to determine the availability of equitable relief enjoining the technique, across the board, from further use on anyone in similar circumstances.\textsuperscript{49} This secondary inquiry will entail a look at the Supreme Court's reasoning in \textit{Los Angeles v. Lyons}\textsuperscript{50} in which a plaintiff seeking an injunction against the LAPD to enjoin their use of chokeholds on non-threatening detainees was found to lack standing.

\textit{A. Section 1983 Relief}

The Act in which section 1983 is placed was "[o]riginally called the Ku Klux Klan Act because of its focus on eliminating Klan ac-

\textsuperscript{45} \textit{Guidelines, supra} note 43.
\textsuperscript{46} \textit{Plaintiffs' Memo, supra} note 30, at 3.
\textsuperscript{47} Criminal liability also exists for police use of excessive force under 18 U.S.C. § 242 (Supp. 1990), which makes it unlawful for anyone acting under the color of law to deprive an inhabitant of the U.S. of any federally protected right. The prosecution, undertaken by the Criminal Section of the Civil Rights Division of the Justice Department, must establish an officer's subjective intent to use excessive force, and the standard of proof is beyond a reasonable doubt. \textit{See} \textit{Screws v. United States}, 325 U.S. 91 (1945). In contrast, section 1983 claims need not inquire into the officer's subjective state, as will be discussed in this Comment's \textit{Graham v. Connor} analysis, and proof need only be established by a preponderance of evidence. \textit{Graham v. Connor}, 109 S. Ct. 1865 (1989).
\textsuperscript{48} 42 U.S.C. § 1983 (1981). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. ..." \textit{Id}.
\textsuperscript{49} The plea in \textit{John v. City of Los Angeles}, on behalf of plaintiffs and anyone else similarly situated, was for a declaratory injunction enjoining the police from using nunchakus and other pain compliance techniques "to move sitting civil rights demonstrators who, as a routine feature of their protests, do nothing more than to passively refuse to stand up and walk at the time of their arrest." \textit{Plaintiffs' Memo, supra} note 30, at 2.
\textsuperscript{50} 461 U.S. 95 (1983).
tivities which were terrorizing the South." While state courts may be active in curbing and redressing police misconduct, the Supreme Court has commented, "the statutory grant of federal jurisdiction over section 1983 suits indicates that Congress, at least, continues to adhere to the belief that police abuse is a sufficient threat to constitutional rights to warrant a 'federal right in federal courts.'"

Standing for bringing such a claim depends upon the satisfaction of two elements:

By the plain terms of section 1983 two-and only two-allegations are required in order to state a cause of action under [42 U.S.C. section 1983]. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state law.

The allegation of a violation of a federal right has been understood to mean "rights protected by the Constitution, not . . . violations of duties of care arising out of tort law." Section 1983, therefore, "is not itself a source of substantive rights" but a means to seek civil redress for federal rights "elsewhere conferred." The requirement, then, is to "isolate the precise constitutional violation," as "[t]he first inquiry in any section 1983 suit." In the passive arrestee-"pain compliance" scenario, the allegation of a constitutional violation, as required for section 1983 standing, flows directly from the fourth amendment guarantee against an unreasonable seizure. The second section 1983 element, that plaintiff allege the offender acted under the color of state law, is easily satisfied where, as is typical in the pain compliance context, the ones charged with misconduct are uniformed police officers and their superiors acting in the course of their official duties.

51. Gilmere v. City of Atlanta, 774 F.2d 1495, 1498 (11th Cir. 1985). The court also stated, "[t]he legislative history of section 1983 has been outlined many times. See Patsy v. Board of Regents, 457 U.S. 496, 502-08 (1982); Mitchum v. Foster, 407 U.S. 225, 238-42 (1972)."
56. Id. at 144, n.3.
57. Id.
58. Id. at 140.
59. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." U.S. CONST. amend. IV.
60. Soto v. City of Sacramento, 567 F. Supp. 662, 669, n.11 (E.D. Cal. 1983). The specific criteria for police officers is whether "they were clothed with the authority of the
B. Standing for Equitable Injunctive Relief

Plaintiffs in John v. City of Los Angeles first sought a preliminary injunction prohibiting the LAPD from using pain compliance techniques on all future non-violent demonstrators. This pre-trial request for a preliminary injunction was denied. A dominant factor in the injunctive relief standing analysis is the precedent laid down in Los Angeles v. Lyons. Lyons, stopped for a traffic violation, neither resisted nor threatened the LAPD officers. Nevertheless, he sustained serious injuries from their application of a chokehold. The Supreme Court (four justices dissenting) did not reach the question of whether to enjoin the police use of chokeholds when an officer is not threatened with deadly force. Instead, they found as a threshold matter that Lyons lacked standing for his injunctive claim. For Lyons to have established an actual controversy in this case, [he] would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter. . . or (2) that the City ordered or authorized police officers to act in such manner.

The Lyons requirement calls for a “sufficient likelihood” of recurrence which would only be satisfied by the existence of official approval or a stated policy endorsing the conduct, coupled with a plaintiff’s allegation of an anticipated future encounter with the conduct in question. While in the past the Court has emphasized its reluctance to enjoin practice if the misconduct in question is sporadic or unique, it had not heretofor required such a stringent individualized test. As stated in Allee v. Medrano: Isolated incidents of police misconduct under valid statutes would not, of course, be cause for the exercise of a federal court’s equitable powers. But “[w]e have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied.” Where, as here there is a persistent pattern of police misconduct, injunctive relief is appropriate.

state and were purporting to act thereunder.” Id.
64. Id. at 97-98.
65. Id.
66. Id. at 105-06 (emphasis in original).
67. Id. at 110-11.
Applying the Lyons analysis to the policy and conduct of the LAPD at the time of the arrests in John v. City of Los Angeles, one finds that the departmental use of "pain compliance" techniques on passive arrestees was not only a common practice but also an officially acknowledged police department policy. As stated by one captain, "other agencies have in the past elected to carry demonstrators", but "historically, the LAPD has adopted the posture of forcing the demonstrators to move through pain compliance techniques." A lieutenant declared that "[u]pon review of alternative methods of arrestee control [and] prevailing tactics displayed by Operation Rescue/Pro-Choice demonstrators, management review deemed appropriate the continued use of pain compliance methods in control of passive resistant demonstrators."

The passage of H.R. 2916 linking availability of grant monies to policies designed to curb the use of excessive force by police may result in the modification of many official municipal policies like that articulated in John v. City of Los Angeles. An official municipal rejection of the police policy of applying pain compliance techniques on passive resisters, would eliminate the "continuing controversy" and obviate the need for injunctive relief.

IV. THE CONSTITUTIONAL QUESTION: WHAT IS AN UNREASONABLE SEIZURE?

A. The Graham Test: Objective v. Subjective Factors

The determination of whether the police use of force in an arrest is justifiable or excessive bypasses a tort analysis and is at once a fourth amendment constitutional issue. This starting point was recently clarified by the U.S. Supreme Court in Graham v. Connor, where an action arose from the excessively rough treatment of a diabetic man by police who had stopped him for investigative purposes. The court stated:

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70. The San Diego Police have likewise adopted the use of nunchakus on demonstrators for "pain compliance purposes": "After careful review of the literature, presentations by [San Diego] Police Department personnel and public testimony we have concluded that the current Department's proper use of the Nunchacka [sic] device, on an individual basis, as well as their use at demonstrations and in crowd control should be continued." Subcommittee on Use of Force, Citizens Advisory Board on Police/Community Relations, Recommendation on the Use of Nunchakas [sic], San Diego, Cal. (June 13, 1989).

71. Plaintiff's Memo, supra note 30, at 5.

72. Id. at 4 (emphasis added).

73. See Joint Report, supra note 19.


75. The man, sensing an oncoming insulin reaction due to low blood sugar, had hurried into a convenience store to buy orange juice to counteract his sugar imbalance.
Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons. . .against unreasona-
ble. . .seizures' of the person.\textsuperscript{76}

The Graham Court reaffirmed the fourth amendment analysis of manner of arrest/seizure cases developed in Tennessee v. Garner\textsuperscript{77} and Terry v. Ohio.\textsuperscript{78} The Graham court stated:

Today we make explicit what was implicit in Garner's analysis, and hold that\textit{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.\textsuperscript{79}

This clarification was necessitated by the widespread application by federal courts of a fourteenth amendment substantive due process analysis to excessive force claims.\textsuperscript{80} The common ancestor of the

Finding the line at the counter too long, he rushed outside in a state of agitation and started to drive to his girlfriend's house. In the mistaken belief that the man had robbed the store, the policemen watching his behavior stopped him and denied his pleas for medical assistance despite explanations (and proffered documentation in his wallet) of his oncoming diabetic reaction. As the reaction ensued, he was handcuffed tightly, shoved face-first onto a car hood, and thrown headlong into the squad car. When the report came from the convenience store that no robbery had transpired, the man, now suffering from several serious injuries, was driven home. Graham, 490 U.S. at 388-89.

\textsuperscript{76} Id. at 394, quoting U.S. Const. amend. IV. See also Lester v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987), which states, "[t]o sum up, an excessive force in arrest claim is quintessentially a Fourth Amendment claim."

\textsuperscript{77} "Whenever an officer restrains the freedom of 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." Tennessee v. Garner, 471 U.S. 1, 7 (1985) (citations omitted).

\textsuperscript{78} In Terry v. Ohio, 392 U.S. 1 (1968), a suspect was detained and frisked for weapons prior to arrest. The Court, inquiring into whether the fourth amendment governed the facts, stated, "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id. at 16. See also Graham, 490 U.S. at 375, n.10, quoting Terry, at 392 U.S. 1, 19, n.16: "A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority. . .in some way restrained the liberty of a citizen.'"

\textsuperscript{79} Graham, 490 U.S. at 395.

\textsuperscript{80} Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973); United States v. Delerme, 457 F.2d 156, 157 (3rd Cir. 1972). This substantive due process approach was combined with cruel and unusual punishment or unreasonable seizure analysis from the eighth (Howell v. Cataldi, 464 F.2d 272, 281-82 (3rd Cir. 1972)) and the fourth amendments (Jenkins v. Averett, 424 F.2d 1228, 1231-32 (4th Cir. 1970), overruled by Davidson v. Cannon, 474 U.S. 344 (1986); McKenzie v. Lamb, 738 F.2d 1005 (9th Cir. 1984)). There also surfaced, in the case of a pre-trial detainee, an inherent right against excessive force unrooted in any specific constitutional provision.
substantive due process approach to these claims was *Johnson v. Glick* in which Judge Friendly applied neither a fourth nor an eighth amendment analysis to the claim of a pre-hearing detainee assaulted by a correctional officer. Instead, he stated, “quite apart from any ‘specific’ of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.” *Johnson v. Glick* adopted the phrase, “shocks the conscience” as the constitutional line which, when crossed, branded the conduct in question as constitutionally prohibited. By providing a working definition of the phrase, Judge Friendly created a measuring stick by which to gauge “excessive force:”

the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether the force was applied in a good effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Until *Graham*, this was the test most used by the courts to determine the constitutionality of physical force applied by law enforcement agents on citizens, free or imprisoned.

The *Graham* court replaced the *Johnson v. Glick* test of “excessiveness” in the arrest context with a standard of “objective reasonableness,” to bring the analysis more into conformance with the language of the fourth amendment. The Court furnished several determinative factors to help courts gauge the reasonableness of police conduct in an arrest context. For organizational purposes, these may be broken down into five distinct considerations:

1) **Individual rights.** Evaluation of the reasonableness of a seizure requires “a careful balancing of the ‘the nature and quality of the

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81. 481 F.2d at 1032-33.

82. Id. See also the discussion of *Johnson v. Glick*, in *Graham*, 490 U.S. at 397-99, and a helpful criticism of the application of the *Johnson v. Glick* due process standard to excessive force claims in Freyermuth, *Rethinking Excessive Force*, 1987 DUKEL.J. 692.

83. Judge Friendly's determination found its basis in Rochin v. California, 342 U.S. 165 (1951), where enforcement officers obtained evidence by forcefully extracting the contents of a suspect's stomach. The Court, in an opinion by Justice Frankfurter, overturned the defendant's conviction based upon a due process clause violation, describing the police conduct as that which "shocks the conscience." *Rochin*, 342 U.S. at 172.

84. *Johnson v. Glick*, 481 F.2d at 1033.

85. Virtually the same was the *Gumz* three-part test, used by some courts, which categorized an enforcement officer's conduct as unconstitutional if it "1) caused severe injuries; 2) was grossly disproportionate to the need for action under the circumstances; and 3) was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience." *Gumz v. Morrisette*, 772 F.2d 1395, 1400 (7th Cir. 1985), cert. denied, 475 U.S. 1123 (1986).

intrusion on the individual’s Fourth Amendment interests’”’ against”87
2) “[t]he countervailing governmental interests at stake.”88
3) Totality of circumstances. Such a balancing demands “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”89
4) Perspective on the scene. The perspective used to judge the “reasonableness” of any police behavior must be that of:

a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . The calculus of reasonableness must embody allowances 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.90

5) Objective appraisal, regardless of subjective motive. The police misconduct inquiry need not delve into questions of the officer’s state of mind, feelings and motivations. Rather, the inquiry should be whether the behavior itself was objectively reasonable in light of the aforementioned factors.91

In summary, an excessive force analysis is not complete unless,

88. Graham, 490 U.S. at 396 (emphasis added).
89. Id. The Graham Court noted the finding in Garner that the “question is whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.” Id., quoting Tennessee v. Garner, 471 U.S. at 8-9.

The Graham “totality of the circumstances”, adopted from Garner, follows the approach taken by the Court in other police-citizen encounters, namely, police searches and police questioning of suspects. In Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973), in determining whether consent to search a car trunk had been voluntarily given, the Court looked to its prior treatment of “voluntariness” in the context of police techniques in questioning a suspect. In the decisions reviewed, the Court found that “none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. . . .” The Schneckloth Court then applied the same “totality of circumstances” test to the determination of whether the “consent to search was in fact voluntarily given, and not the result of duress or coercion, express or implied. . . .” Schneckloth, 412 U.S. at 248.
90. Graham, 490 U.S. at 396-97.
91. Id. referring also to Scott v. United States, 436 U.S. 128, 137-39 (1978) and Terry v. Ohio, 392 U.S. 1, 21 (1968).

The Graham Court made clear that an inquiry into whether conduct was “malicious and sadistic” has no bearing on whether a particular seizure is unreasonable under the fourth amendment. This contrasts with the “less protective” eighth amendment analysis, in the context of force used on convicted prisoners, in which inquiry into the officer’s state of mind is clearly called for. Graham, 490 U.S. at 396-97.
from the on-the-scene perspective of a reasonable officer, the governmental interests are balanced against the individual’s private rights, with a view to all the relevant surrounding circumstances, except the state of mind of the seizing officer. This rule of objective reasonableness, guided by specific balancing factors such as the nature and severity of the crime, the degree of resistance, and some latitude for split-second on-the-scene police decisions, creates what has been described as a “lower threshold of liability.” That very difficult element to prove, that the officer acted out of malice, is no longer required. Thus, the *Graham* decision should make an excessive force claim easier to establish than was possible under the *Johnson v. Glick* substantive due process approach.

B. “Objective Reasonableness” in the “Pain Compliance” Arrest

The various factors supplied by the *Graham* Court for gauging objective reasonableness, when applied to the typical non-violent, limp arrestee scenario, provide a picture of what is reasonable police conduct under the circumstances.

1. Individual Interests

Private interests which the courts have recognized in a “seizure” setting include a right not to be subjected to unwarranted emotional indignities, physical pain, and bodily injuries, as well as an expectation interest that if one behaves peaceably, one should not be treated with violence by the police.

The Court in *Terry v. Ohio* gave careful consideration to an individual’s personal dignity interest. In reference to the “stop and frisk” procedure, whereby an officer “pats down” a suspect’s body in a search for weapons, the Court remarked, “it is simply fantastic to urge” that requiring a citizen to stand helpless against a wall with arms raised could be considered a “petty indignity.” Rather, “[i]t is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to

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92. *J. O’Connell, supra* note 8, at S11354.
93. By way of comparison, under 18 U.S.C. section 242, one may be criminally prosecuted for depriving a person of constitutional rights while acting under color of law. 18 U.S.C. § 242 (1988). The section 242 charges against the eight National Guardsmen who shot into the crowd of student demonstrators at Kent State were dismissed because the judge found lacking the evidence of the defendants' willful, “specific intent” to deprive the victims of their rights. United States v. Shafer, 384 F.Supp. 496, 503-504 (N.D. Ohio 1974). The current statute, however, has been removed of its “willfulness” language by a 1988 amendment.
95. 392 U.S. 1 (1968).
96. *Id.* at 16-17.
be undertaken lightly." Similarly, pain compliance measures also directly affront an individual's personal dignity in that they are designed to overcome the composure and self-control of the arrestee and act to reduce the person to tears and often screams of agony.97

Courts have also held that an individual need not establish serious physical injury to bring an excessive force claim: pain and bruising can suffice. The estate of the decedent arrestee in Gilmere v. City of Atlanta98 was found to have grounds for relief under the fourth amendment for blows to the head the arrestee received at the hands of police while being taken into custody.100 The dissent noted, "[w]hile it is true that [the arrestee] experienced some physical discomfort, there is not evidence that he was in any way injured in the altercation; there were no marks of any kind upon [his] scalp, face, or back." Yet, the majority stated in reference to the blows "Patillo's fourth amendment interest in his bodily security was clearly significant. . . ." Likewise, in Linn v. Garcia,103 the plaintiff received redress for non-permanent bruises and pain he had sustained from the nightsticks of arresting officers, despite the fact that he resisted arrest. In Robins v. Harum,104 a couple under arrest for misdemeanor violations and enroute to the station, was "manhandled...without any apparent provocation" or resistance. The court recognized as components of an unreasonable seizure injuries to the man's wrist and back; the woman's bruises; and feelings by both of humiliation and emotional trauma.106 Thus, courts have held that "excessive force" qualifies as an "unreasonable seizure" even when the grievance falls short of permanent injury. "Pain compliance" techniques have been shown to cause not only extreme pain, severe bruising, and excessive humiliation, but also to carry a high likeli-
hood of lingering injury, such as broken bones and nerve damage.  

These decisions comport with the notion that nonviolent conduct should entitle an arrestee to a reasonable expectation of receiving nonviolent treatment from the police. If a frisk is considered a "serious intrusion," and if instances of blows and bruising can confer liability, then the deliberate application of severe and injurious pain on a passive arrestee must constitute an even more serious and unreasonable intrusion. Clearly the overriding governmental interest must be extremely great to warrant such a seizure.

2. Governmental interests

A number of critical governmental interests are at stake in the typical nonviolent, limp arrestee scenario. The police are of course charged with the governmental duty of enforcing the law and are empowered to use force if necessary. In performing this duty, it is in the interests of the officers and of society as a whole that they limit the risk of injury to themselves and that they act with efficiency in terms of time and manpower.

Lifting the dead weight of even one person poses a hazard capable of causing officers serious back and leg injury. Officers are authorized to use force when their safety is threatened, but what degree of force is reasonable to effectively counter passive resistance? While pain compliance techniques may make it unnecessary for an officer to lift a passive arrestee, that result is not guaranteed. In practice, it turns out that "the use of the nunchakus [does] not eliminate nor even thwart the necessity for the officer[s] to drag and lift the demonstrators. . . In fact, there [are] those who [are] immobilized by the 'pain compliance techniques.'"

Alternative methods of removal used by various police departments include dragging, lifting, and the use of gurneys, stretchers, and wheelchairs. None of the methods eliminates the need for a certain amount of lifting by the officers in attendance. Nevertheless, many police departments believe it is best not to resort to "pain com-

106. In a feature article on the "nunchaku," the L.A. Times reported another pro-
tester's experience with the lasting effect of the device: "a nurse and antiabortion pro-
tester from Poway [California], said she suffered sprained wrists and hands and nerve damage to her thumbs and fingers. She was arrested with nunchakus at a demonstration in April [1989] and today, 'I still can't hardly lift up a coffee cup,' she said." Serrano,

107. A pertinent, but not "countervailing" governmental interest is that of limiting liability by conducting operations in accordance with state and federal law and previously set policy guidelines.

108. CAL PENAL CODE § 835(a) (Deering 1989).


110. J. O'Connell, supra note 8, at §1355.
Compliance to induce passive resisters to walk. Instead, as ambulance attendants do routinely, they lift the limp bodies using safety-conscious techniques and often transfer the load to a carrying device. The Metropolitan Police Department of Washington, D.C., as a case in point, is a force "uniquely experienced in the handling of demonstrations." Appearing before the U.S. Commission on Civil Rights, Assistant Chief Melvin High explained that, "[t]he Department does not employ pain-inducing techniques of any sort in effecting arrests in nonviolent situations. . . . Our officers are instructed to bodily pick up and remove passive violators." These examples suggest that alternative removal techniques, done properly and with assistance, can effectively minimize the health and safety risks which passive resistance poses to arresting officers.

Another governmental interest is efficiency of time and manpower. "Pain compliance," as an intimidation device, may be effective in thinning the ranks of passive resisters. On-looking arrestees whose turns have not yet come, may, by seeing their compatriots suffer, be "persuaded" that the pain is not worth it and decide to cooperate with the officers. Thus, while "pain compliance" measures still require the attendance of several officers per passive arrestee, as documented by eyewitness and video-taped accounts, the time required for arresting an entire group may possibly be shortened.

This efficiency argument in support of the use of "pain compliance" is problematic. First, condoning police use of severe pain against passive arrestees raises the unsettling values question of whether this society's moral abhorrence of cruelty is giving way to interests of convenience and economic efficiency. A second problem is the question of whether a means of arrest has been transformed into a method of punishment. Eighth amendment jurisprudence categorizes deterrence of unlawful behavior as an end of punishment. When officers take this purpose into their own hands

111. "Many other jurisdictions, I should add, have handled and continued to handle nonviolent, public demonstrations without prompting charges of excessive force." Letter, supra note 6, at 2.
112. Allegations, supra note 5, at 16.
113. Serrano, supra note 24, at E1.
114. Id.
115. In the course of the "Allegations of Police Misconduct" hearing before the U.S. Commission on Civil Rights, Chairman Allen remarked, "There's always the very important question whether we aren't silently witnessing changes that we ought to be paying a lot more attention to in the ordinary practices of police departments." Allegations, supra note 5, at 30.
they have crossed over the line from being custodians charged with bringing an accused before the court to receive proper judgment to becoming curbside ministers of “justice.” And thirdly, from a practical standpoint there is the example of the Washington, D.C. police force. Although this department faces probably the highest volume of political protest of any in the country, its officers routinely and effectively apprehend large numbers of passive arrestees without resorting to “pain compliance” techniques.

3. Totality of Circumstances

In the context of the totality of circumstances, the excessiveness of “pain compliance” techniques becomes even more apparent. The Graham court listed “severity of the crime” as one factor, which in the case of trespassing rises only to the level of a misdemeanor. Additionally, such a protester poses no “immediate threat” of violence to officers or others. The body is a weight to move, but safe removal methods are available and frequently practiced, as discussed above. Whether such arrestees can be said to be “actively resisting arrest” requires a more involved determination. Passive resistance is certainly resistance, but whether the Court intended to include “deliberate inaction” within the compass of “active resistance” is not readily apparent. The police use of physical coercion, such as a body hold, the administration of pain, or the threatened or actual use of a weapon, may be necessary to bring under control the suspect who actively resists arrest by trying to escape or fighting the officer. However, a passive resister has yielded all physical control to the power of the officer, choosing to become personally entirely vulnerable.

discussion of factors distinguishing force used in arrest from force used as punishment.

117. “Pain compliance” techniques may be chosen, some believe, for their value in making an arrest an unforgottably disagreeable experience, i.e., as a method of punishment. Officer Gallagher of the Las Vegas Police Department and a participant as arrestee in numerous Operation Rescues, expressed in the briefing before the U.S. Commission on Civil Rights, that from his “insider’s” point of view, he perceived “a growing and horrible abuse of what I prefer to call pre-due process punishment at various levels in our criminal justice system.” In police jargon, it is phrased: “They may beat the rap but they won’t beat the ride.” Effectively what that means, you see, is that as police officers, we have enough ways of making the ride, that is, the arrest and everything that accompanies it, significant and oftentimes sufficient enough in terms of the punishment inflicted in a variety of ways, that whether they serve the time for the alleged offense or not sometimes didn’t really matter.

Allegations, supra note 5, at 32, 34 (testimony of Mr. Gallagher).

118. Id. at 16.
120. Id.
121. Id.
122. See CAL. PENAL CODE § 148 (Deering 1989) and In re Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966), discussed earlier.
4. On-the-Scene Perspective

_Graham_ requires that the reasonableness judgment be made “from the perspective of a reasonable officer on the scene.”123 The rationale for viewing an incident from this perspective is to allow for the necessity of decisions made in haste by officers in the midst of rapidly unfolding circumstances. However, this is not the context of the typical passive arrestee scenario. Typically, police are well aware of the tactics employed by these passive protesters far in advance of the confrontation, so that police departments have considerable time to prepare alternative law enforcement strategies to deal with the behavior.124

5. Objective, Not Subjective Analysis

The arresting officer’s personal prejudices and prevailing police department attitudes can have a tremendous influence on the kind of physical treatment arrestees receive. Don Jackson, a former Hawthorne, California police sergeant and current Vice President of the Santa Monica NAACP,126 testified before the U.S. Commission on Civil Rights regarding the statistically higher likelihood that people of minority races will be victims of police brutality.126 Attitudes other than racism can also make certain groups likely victims. He stated, “I think that there is a cohesive fabric of [police] misconduct which is tolerable. There are allowable mistakes, particularly against certain unwelcome groups, be you a poor person, a transient, a homeless person. You can make a lot more mistakes with that person

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123. _Graham_, 490 U.S. at 396-397.
125. National Association for the Advancement of Colored People.
126. Mr. Jackson was himself the recipient of severe police beating, much of which was filmed by a hidden NBC camera crew. He stated, “I have videotaped over 300 instances of police contacts with citizens, and I must say I would truly be remiss if I didn’t point out that police violence is a common, everyday occurrence that African-Americans face on the streets when contacted by police officers.” _Allegations, supra_ note 5, at 26 (testimony of Mr. Jackson).

This observation was later shockingly substantiated by the videotaped “March 3 [1991] beating of black motorist Rodney King by white officers [which] has unleashed a torrent of complaints about police brutality against Los Angeles minorities. The outcry [raised by the King incident] has prompted local and federal officials to launch widening investigations into claims of excessive force and racism among the LAPD.” Meyer, _Gates Wins Loud Support of Minority-Officer Groups Despite Division in Ranks_, The San Diego Union, Mar. 24, 1991, at A14, col. 1.
and get away with it.”

The plaintiffs in the factual scenario referred to in this Comment, because of their controversial views and/or conduct, are an “unwelcome group” to many, which may account for some difference in the treatment they received at the hands of police in comparison with passive resisters of other causes. However, because the *Graham* Court directed that the “objective reasonableness” analysis bypass an inquiry into the officer’s subjective intent, proof that an officer acted maliciously, whether out of racial, religious, political or other bias, need not be established.128

C. The Graham Balancing Act

The *Graham* test requires a careful weighing of the individual’s fourth amendment interest against the countervailing governmental interests, viewed in the context of the totality of circumstances and from the perspective of the reasonable officer on the scene.129 The previous analysis indicates that “pain compliance” on a passive arrestee severely intrudes upon that individual’s interests in his own bodily security and personal dignity, fourth amendment interests vital to the “sanctity of the person.”130

On the other side of the scale, the countervailing governmental interests of duty to arrest, officer safety, and economy of means in time and manpower, have each been shown to be effectively accomplished without the application of “pain compliance.” “Pain compliance” may save some time and effort by its intimidating effect, but not without an accompanying moral cost of callousness to suffering, a severe intrusion on fourth amendment interests, and a tacit approval of “curbside punishment.”

Finally, the argument is unpersuasive that reasonable officers in the field would deem such techniques objectively reasonable when a look at the totality of the circumstances reveals the minimal threat to officer safety in passive rather than violent resistance arrest situations, the availability of alternative safe methods to seize passive resisters, and the generous advance warning that obviates the need for split-second police decision-making. These factors all point to the conclusion that the application of “pain compliance” on a passively resisting arrestee fails to pass the “objectively reasonable” *Graham* test under the fourth amendment.

127. *Id.* at 29.
129. *Id.* at 396.

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D. “Unreasonable Seizure” as Otherwise Defined

Aside from the Graham factor analysis, the prevalent understanding of a reasonable seizure, among both courts and police agencies, is that the seizure be carried out using only the amount of force which is minimally necessary to effect the arrest.131

Chief Melvin High of the Washington D.C. Metropolitan Police Department reported that “[i]n a nonviolent demonstration. . .our police officers are trained to use the least amount of force necessary in effecting an arrest.”132 Interestingly, the Los Angeles Police Department, in its official Training Bulletin, adheres to a similar policy.133 The Training Bulletin states:

While the use of reasonable physical force may be necessary in situations which cannot otherwise be controlled, force may not be resorted to unless other reasonable alternatives have exhausted or would clearly be ineffective under the particular circumstances.134

Further,

only that force which is necessary may be used to gain control or resist attack. . .135

Also,

[i]n situations when physical force is applied, an officer must escalate or de-escalate to the reasonable and necessary amount of force as it directly correlates to the suspect’s action.136

And again,

[a]n officer may use only minimum reasonable force necessary to control the suspect.137

A number of courts have agreed that “reasonable force” means force that is “reasonably” or “minimally necessary” to effect arrest.138 In Gilmere, the court found determinative the fact that “the

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131. If “minimum force necessary” is not the standard, there exists no barrier to the logical extension of pain compliance. That is, “[s]uppose the person is able to resist the pain? How far do we go then? Do we go ahead and break the arm, and when you've broken one arm or when you've broken one finger, do you start on another finger?” Allegations, supra note 5, at 31 (testimony of Mr. Litekey).
132. Id. at 16 (testimony of Mr. High).
133. The California Penal Code also mirrors the interpretation of reasonable force as that which is the least amount necessary, stating: “Every public officer who under color of authority, without lawful necessity, assaults or beats any person, is punishable.” CAL. PENAL CODE § 149 (Deering 1989).
135. Id. at 2.
136. Id.
137. Id.
harm visited on the [arrestee]. . . were only minimally, if at all, necessary to enable [the officers] to carry out their official duties."\textsuperscript{39}

Similarly, the high court of Kentucky stated in \textit{Adler v. Commonwealth}:

\begin{quote}
\[\text{[A]n officer having the right to arrest a misdemeanant may use such force as is reasonably necessary to effect his purpose, but no more; he must avoid the use of unnecessary force or violence, and if there be resistance he may use such force as may be required under the circumstances to overcome the resistance.}\textsuperscript{40}
\end{quote}

Even in the days of the Wild West, a Texas state court\textsuperscript{41} held that a marshall's use of violence to remove an obstinant inebriant was unnecessary and inappropriate. Instead, the court found that the reasonable alternative required of the marshall was to get help to carry the man.\textsuperscript{42} Today, should not the same decency and respect be accorded a protester who is uncooperative for political or religious reasons?\textsuperscript{43}

\section{V. CONCLUSION}

The Supreme Court, in \textit{Schneckloth v. Bustamonte},\textsuperscript{44} balanced individual rights against governmental interests in the context of voluntary versus involuntary consent to search. The Court looked to the analogous context of police questioning of suspects, and stated:

Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. . . . At the other end of the spectrum is the set of values reflecting

\begin{itemize}
\item 139. \textit{Gilmere v. City of Atlanta}, 774 F.2d 1495, 1502 (11th Cir. 1985).
\item 140. \textit{Alder v. Commonwealth}, 211 S.W.2d 678, 679-80 (Ky. Ct. App., 1948), as found in 4 Am. Jur. Sec. 73 et seq. The rule is expressed in Sec. 43, [Kentucky] Criminal Code of Practice: 'No unnecessary force or violence shall be used in making the arrest.'
\item 141. \textit{Skidmore v. State}, 43 Tex. 93 (1875), describes the arrest of an intoxicated man who refused to accompany the marshall to the "calaboze" (from the Spanish calabozo, that is dungeon, or local jail. Webster's Ninth New Collegiate Dictionary 195 (1985)). The marshall responded to his refusal by striking him on the head with his six-shooter, causing a one-inch gash. The Texas Supreme Court upheld the arrestee's claim for excessive force, noting:
\begin{quote}
[T]here were two men within the distance of eighty-four feet from [the marshall] upon whom he could have called for assistance to carry the drunken man to prison. The code provides that in making an arrest no greater force shall be resorted to than is necessary to secure the arrest and detention of the accused.
\end{quote}
\begin{itemize}
\item 142. \textit{Skidmore}, 43 Tex. at 94.
\item 143. One panelist before the U.S. Commission on Civil Rights remarked:
\begin{quote}
I realize that [weight resistance] present[s] a logistical problem for the police, especially when there are large numbers of people involved. But a long time ago I read something like the level of a civilization of a given society can be determined by the way we [sic] treat those who break the laws.
\end{quote}
\begin{itemize}
\item 144. \textit{Allegations}, supra note 5, at 31 (comments of Mr. Litekey).
\end{itemize}
\end{itemize}

\textit{Skidmore}, 43 Tex. at 94.

\textit{Id.}

\textit{Id.}

\textit{Allegations}, supra note 5, at 31 (comments of Mr. Litekey).

society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.145

The same balancing of legitimate interests is required in examining the question of what degree of force is constitutional in the taking into custody of limp, nonviolent arrestees. This country prides itself on its accommodation of civil protest, divergent political persuasions, and of the free exercise of religious beliefs. Yet, when protest takes the form of civil disobedience, protesters must expect law enforcement agencies to uphold and enforce the laws of the land with physical force if necessary.

The fourth amendment, however, mandates that a legitimate seizure not be made unreasonably. The Graham test furnishes a workable standard for measuring the reasonableness of force. When applied to the "reasonableness" of using "pain compliance" to apprehend passively resisting arrestees, the analysis reveals that the important governmental interests of law enforcement, officer safety, and economic efficiency do not outweigh the individual's fourth amendment interests in physical security and personal dignity, particularly in light of the nonviolent arrestee's behavior and the availability of effective apprehension alternatives. This tipping of the balance in favor of the individual comports with the time-honored legal and conventional belief that "unnecessary force" is "unreasonable force."

BENJAMIN I. WHIPPLE