

STUDY AID: UNDERSTANDING THE 4TH AMENDMENT'S OBJECTIVE REASONABLENESS STANDARD (AND QUALIFIED IMMUNITY ("QI"))

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(4th Amendment Addresses Misuse of Power (Brower): The 4th Amendment “addresses ‘misuse of power,’ not the accidental effects of otherwise lawful conduct.”

- **Qualified Immunity (“QI”) Protects All but the Plainly Incompetent or who Knowingly Violate the Law (Malley)**
- **Beyond Debate (al-Kidd, Mullenix, White):** The contours of the right must have been sufficiently clear that any reasonable official would have understood that his conduct violated the right; “existing precedent must have placed the ... constitutional question beyond debate.” (*Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011))

Balancing Test (Graham): Reasonableness inquiry requires a careful balancing of the nature and quality of the intrusion (use of force) on the individual's 4th Amendment interests against the countervailing governmental interests at stake.

Risk/Benefit Test (Scott): In judging whether officer's actions were reasonable, we must consider the risk of bodily harm that officer's actions posed to the subject in light of the threat to the public posed by the subject that the officer was trying to eliminate.

Reasonableness at the Moment Force is Used (Graham): Reasonableness test considers that 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.

Reasonableness Test (Graham): Requires careful attention to the facts and circumstances of each particular case, including (but not limited to):

- whether the subject poses an immediate threat to the safety of officers or others,
- whether the subject is actively resisting arrest or attempting to evade arrest by flight, and,
- the severity of the crime at issue,

Reasonable from Officer's Perspective (Graham): “Reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

Objective Test (Graham): Whether officers' actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Armstrong (4th Circuit): [a CEW “may only be deployed when ... officer is confronted with an exigency that creates an immediate safety risk,” and may not be used “in the face of stationary and non-violent resistance to being handcuffed” [*Bounds v. Parsons*, --- Fed.Appx. ---, 2017 WL 2992085 (CA4 July 14, 2017)]]

- If no exigency or immediate safety risk exists, slow down and consider alternative force options/solutions including negotiation, commands, or physical skills.
- Physical resistance alone does not equal immediate danger.
- Emotionally disturbed person (EDP) or mentally ill alone does not indicate immediate threat.
- Choose a force option reasonably likely to cure the immediate safety risk.
- Non-deadly danger to self does not justify higher force risk.

Each Force Application Must Be Justified: Each strike, OC use, force application, trigger pull, and 5-second CEW cycle must be objectively reasonable.

All Force Must Be Unambiguously Justified in Officer's Reports/Statements: Any factor used to justify use of or escalation of force must be explained.

Basic Factors or Test of “Objective Reasonableness” <i>Graham</i> risk prioritized by <i>Chew</i> (prioritized most important to least)	Not an <i>Intentional</i> Immediate Threat/Flight Risk Person in Need of Medical Assistance Due to Mental Health, Drugs, or Illness	Additional (minimum passive) Force Factors <i>(Mattos/Brooks procedure)</i> Force to Gain Volitional Compliance (Person is not an immediate threat or flight risk) (likely inapplicable under <i>Armstrong</i> (4 th Circuit))
<ol style="list-style-type: none"> 1. Immediate threat <ul style="list-style-type: none"> - beware “<i>possible</i>” threat fallacy 2. Actively resisting seizure/arrest 3. Circumstances tense, uncertain rapidly evolving (pace of events) 4. Severity of the crime at issue 5. Attempting to evade seizure <ul style="list-style-type: none"> - by flight - flight from serious event <p style="text-align: center;">Additional Basic Factors</p> <ol style="list-style-type: none"> 6. Availability of alternative methods of capturing, controlling, restraining, or subduing subject 7. What officers knew about subject's health, mental condition, or other relevant frailties 	<p>Mentally ill/Drugs (<i>Bryan v. MacPherson</i>): Officer should make greater effort to control situation through less intrusive means.</p> <p>Some courts believe acting out by emotionally disturbed person diminishes the level of force necessary and such persons are in need of a doctor, not a jail cell and in the usual case – where such a person is neither a threat to himself or anyone else – the government's interest in deploying force to detain him is not as substantial as its interest in deploying force to apprehend a dangerous criminal.</p> <p>Pain: If pain is used to gain compliance, (1) consideration whether person will perceive pain, and (2) be able to comply with officer's commands.</p> <p>Distraction: Must be able to articulate that force used for distraction to assist custody is reasonable.</p>	<p>Person must be given reasonable opportunity to comply with directives prior to each X26 CEW touch-stun application</p> <ol style="list-style-type: none"> 1. Officer must not have a reasonable perception that person is not capable of volitional compliance to commands; 2. must reasonably perceive person is “actively resisting”; 3. must give warning of imminent application of force; 4. must give person a reasonable: <ol style="list-style-type: none"> a. time “to recover from extreme pain” experienced; b. opportunity to “gather herself”; c. opportunity to “consider her refusal to comply”; 5. the duration of time between each X26 CEW touch-stun application (according to <i>Mattos</i>) must be > 36 seconds; and 6. officer needs to include in report that before each X26 CEW touch-stun used to attempt to gain the person's volitional compliance officer followed these guidelines. <p>Consider Alternates: less risk of injury (“Quantum of Force”) (Some courts may require greater justification)</p>