Forrester v. City of San Diego: Is Pain Compliance an Appropriate Police Practice under the Fourth Amendment

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FORRESTER v. CITY OF SAN DIEGO: IS PAIN COMPLIANCE AN APPROPRIATE POLICE PRACTICE UNDER THE FOURTH AMENDMENT?

I. INTRODUCTION

The Fourth Amendment of the United States Constitution prohibits the government from engaging in an unreasonable search or seizure of its citizens. The United States Supreme Court has ruled that the Fourth Amendment's reasonableness standard governs the examination of all claims against law enforcement officers for using excessive force when making an arrest. This standard requires "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interests at stake."

1. U.S. CONSTITUTION amend. IV. "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." Id.

2. Graham v. Connor, 490 U.S. 386, 395 (1989). The Court made explicit what they had made implicit in previous rulings, and held that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest . . . or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard . . . . Because the Fourth Amendment provides an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct, that Amendment . . . must be the guide for analyzing these claims. Id.

3. Id. at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985); United States v. Place, 462 U.S. 696, 703 (1983)); see Delaware v. Prouse, 440 U.S. 648, 654 (1979) (stating reasonableness standard usually requires that "an objective standard" should measure facts that establish intrusion "whether this be probable cause or less stringent test"); Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978) (stating Fourth Amendment's standard of reasonableness based upon motivation "to safeguard the privacy and security of individuals against arbitrary invasions" (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)); United States v. Ramsey, 431 U.S. 606, 616-19 (1977) (noting that "'[t]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable'") (quoting Carroll v. United States, 267 U.S. 132, 147 (1925)); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) (discussing that "Court has weighed public interest against Fourth Amendment interest of individual" (citation omitted)); Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (discussing that "there is no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails" (citation omitted)); Beck v. Ohio, 379 U.S. 89, 97 (1964) (stating that "good faith on part of the arresting officer is not enough," when protecting Fourth Amendment rights (quoting Henry v. United States, 361 U.S. 98, 102 (1959)); McDonald v. United States, 335 U.S. 451, 455-56 (1948) (stressing that without search warrant, those charged with detection of crime and arrest of criminals would possess power to endanger precious right of privacy); Carroll, 267 U.S. at 149 (stating that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search
generally, this balancing test involves considering the totality of the circumstances. The Court has stated that the reasonableness of a particular seizure "depends on not only when a seizure is made, but also how it is carried out." In addition, the Court has long recognized that the right to make an arrest or investigatory stop necessarily entails some degree of force or the threat thereof to accomplish the arrest.

In *Forrester v. City of San Diego*, the United States Court of Appeals for the Ninth Circuit affirmed the holding of the United States District Court for the Southern District of California which found that police officers from the city of San Diego did not violate anti-abortion protesters' Fourth Amendment rights. The demonstrators alleged that the city's police officers violated their Fourth Amendment right, against unreasonable seizure, when the police employed "pain compliance" techniques against

and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens

4. *Garner*, 471 U.S. at 8-9. "To determine the constitutionality of a seizure, [the Court] 'must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *Id.* (citing *Place*, 462 U.S. at 703); see *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981) (describing balancing of competing interests as key principle of Fourth Amendment); *Prouse*, 440 U.S. at 654 (stating that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"); *Martinez-Fuerte*, 428 U.S. at 555 (same); see also *Camara*, 387 U.S. at 536-37 (stating that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails"). The "[t]est of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Graham*, 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)); see *Garner*, 471 U.S. at 8-9 (phrasing issue as "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").

5. *Garner*, 471 U.S. at 8; see *United States v. Ortiz*, 422 U.S. 891, 895 (1975) (stating that "[w]here only a few are singled out for a[n automobile] search, motorists may find the searches especially offensive"); *Terry*, 392 U.S. at 28-31 (stating officer did not violate person's Fourth Amendment rights because officer's investigation did not go beyond scope of search allowed).

6. *Graham*, 490 U.S. at 396 (stating that circumstances dictate kind of force to use); see *Terry*, 392 U.S. at 22-27 (concluding that "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he [or she] has reason to believe that he [or she] is dealing with an armed and dangerous individual").

7. 25 F.3d 804 (9th Cir. 1994), cert. denied, 115 S. Ct. 1104 (1995).

8. *Id.* at 805. The United States District Court for the Southern District of California entered judgment upon jury verdict for the city of San Diego. *Id.* The district court reasoned that the San Diego Police Department's pain compliance policy represented a constitutional use of force in executing the arrests. *Id.*

9. " '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." Benjamin I. Whipple, Comment, *The Fourth Amendment and the Police Use of "Pain Compliance" Techniques on Nonviolent Arrestees*, 28 SAN DIEGO L. REV. 177, 181 (1991).

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
the district court concluded that the city of San Diego's policy regarding pain compliance did not violate the Constitution because the police officers did not use excessive force in effectuating the arrests. The Ninth Circuit examined the police officers' use of pain compliance under the Fourth Amendment's reasonableness test. Applying this test, the Ninth Circuit concluded that sufficient evidence supported the jury verdict. Consequently, the Ninth Circuit affirmed the district court's decision that the officers "acted reasonably in using the pain compliance techniques to arrest the demonstrators." The Ninth Circuit stated that "whether the amount of force used was reasonable is usually a question of fact to be determined by the jury." The court further stated, "[w]e review the jury's verdict to determine whether it is supported by substantial evidence, that is, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
Circuit also affirmed the lower court's ruling without deciding the constitutionality of the city's pain compliance policy.\textsuperscript{15}

Four reasons demonstrate the importance of the Ninth Circuit's holding. First, the decision gives the police authorization to inflict certain forms of severe pain on peaceful demonstrators.\textsuperscript{16} Second, contrary to previous Supreme Court rulings, this decision has shifted the balance between individual and governmental interests in favor of the government.\textsuperscript{17} Third, the ruling may significantly chill the right to free speech, under the First Amendment, when demonstrators face potential arrest.\textsuperscript{18} Fourth,

\textsuperscript{15} Id. at 808. By finding that the officers did not use unreasonable force, the jury concluded that "neither the officers nor, implicitly, the policy, caused any deprivation of constitutional rights." \textit{Id.} The court reasoned that the jury's conclusion rendered moot the question of whether the city's policy authorized the use of constitutionally excessive force. \textit{Id.; see City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (ruling that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point"); e.g., Hinton v. City of Elwood, 997 F.2d 774, 782 (10th Cir. 1993) (finding that because police officers' conduct did not violate arrestee's Fourth Amendment rights court could not impose any liability against city); Robinson v. City of St. Charles, 972 F.2d 974, 977 (8th Cir. 1992) (finding plaintiffs had no § 1983 claim against city because jury determined that police officers did not violate plaintiffs' constitutional rights).

\textsuperscript{16} \textit{See Forrester, 25 F.3d at 805 (upholding jury finding that police did not use excessive force in executing pain compliance techniques against passive anti-abortion demonstrators). After Forrester, municipalities may have significant latitude with respect to the amount of force police can use against an arrestee. "Some officers have been criticized for manhandling demonstrators and causing injuries in recent anti-abortion protests at which nunchakus were used." Bob Pool, The LAPD's Idea Man: Officer's Latest Gadget Is Designed to Put the Squeeze on Crime, \textit{L.A. Times}, Feb. 15, 1990, at B3. As evidence demonstrates that police have become more sereptitious in their techniques, the article quotes the inventor of a tweezer-like device: "Best of all, it does it with a subtleness that is missing when officers whack at suspects with night sticks or twist controversial, menacing-looking martial arts weapons around their wrists . . . . Image is important in police work . . . . You don't want something that gives the image of overkill." \textit{Id.}

\textsuperscript{17} \textit{See Graham v. O'Connor, 490 U.S. 386, 399 (1989) (ruling that "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' . . . and subjective concepts . . . have no proper place in that inquiry"); Tennessee v. Garner, 471 U.S. 1, 11 (1985) (stating "use of deadly force to prevent the escape of all felony suspects . . . is constitutionally unreasonable. It is not better that all felony suspects die than that they escape"); Terry v. Ohio, 392 U.S. 1, 17 (1968) (stating search done in public "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly").

\textsuperscript{18} The fact that prospective demonstrators might subject themselves to this kind of force may discourage many of them from participating in demonstrations. \textit{See Forrester, 25 F.3d at 809 (Kleinfeld, J., dissenting) (stating that because "only the pro-life demonstrators of Operation Rescue, not other demonstrators, have been subjected to a policy of arrest by deliberate infliction of severe pain," the policy raises First Amendment questions).
few courts have clearly decided the constitutionality of governmental pain compliance policies. 19

This Note examines the Ninth Circuit’s decision in Forrester in light of prior Fourth Amendment jurisprudence. 20 Part II discusses the relevant case law regarding law enforcement’s use of excessive force and the Supreme Court’s reasonableness test. 21 Part III describes the underlying facts in the Forrester case. 22 Part IV explores the reasoning behind the majority and the dissenting opinions in Forrester. 23 Finally, Part V analyzes the decision in light of past Supreme Court opinions. 24 This Note concludes that a “pain compliance” policy against passive arrestees violates Fourth Amendment precedents by ignoring the tantamount importance of certain individual rights under the Constitution. 25

II. BACKGROUND: CONSTITUTIONAL PROHIBITION AGAINST UNREASONABLE SEIZURE

The Fourth Amendment of the Constitution prohibits the police from engaging in unreasonable seizures. 26 The process of seizure or arrest always involves the use or threat of force. 27 The Supreme Court

19. Although the Court has not specifically ruled on this issue, it has made clear the importance of individual interests in an arrest context. See Terry, 392 U.S. at 24-25 (stating that “even limited search of outer clothing for weapons constitutes a severe ... intrusion upon cherished personal security”); Henry v. United States, 361 U.S. 98, 101 (1959) (noting that “[a]rrest on mere suspicion collides violently with the basic human right of liberty”).

20. For a discussion of relevant Fourth Amendment jurisprudence, see supra notes 1-6 and accompanying text.

21. For a discussion of the legal framework with regard to police use of excessive force and the reasonableness test, see infra notes 26-65 and accompanying text.

22. For a discussion of the facts in the Forrester decision, see infra notes 66-86 and accompanying text.

23. For a discussion of the rationale behind the majority and dissenting opinions in Forrester, see infra notes 87-136 and accompanying text.

24. For a discussion of the relevance of past Supreme Court decisions to Forrester, see infra notes 26-65 and accompanying text.

25. For a discussion of the importance of individual rights under the Fourth Amendment, see supra notes 1-6 and accompanying text.


27. Graham, 490 U.S. at 396; see also Garner, 471 U.S. at 11 (stating that “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force”); Terry v. Ohio, 392 U.S. 1, 22-27 (1968) (finding that “law enforcement officers need to protect themselves and other prospective victims [from] violence”).
developed the framework for examining arrest/seizure cases in *Tennessee v. Garner* and *Terry v. Ohio*. *Garner* involved a state statute which provided that "if, after [a police officer] has given notice of the intention to arrest [a criminal suspect], he either flee[s] or forcibly resist[s], the officer may use all the necessary means to effect the arrest." Acting under this authority, police officers shot and killed a minor who fled after the police ordered him to halt. The shooting occurred in the backyard of a house that the police suspected him of burglarizing. The minor's father filed an action under section 1983 of the Civil Rights Act of 1871 (section 1983) seeking damages for violations of his son's Fourth Amendment right of freedom from unreasonable seizure.

The Supreme Court invalidated the statute "insofar as it authorizes the use of deadly force against . . . an [apparently unarmed, non-dangerous] fleeing suspect." The Court ruled that the police must use force reasonable under the totality of the circumstances. In evaluating the totality of the circumstances, courts must employ a balancing test to weigh the competing individual and governmental interests.

An individual subjected to police brutality may bring a cause of action against the government under section 1983. The Supreme Court has

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Whenever an officer restrains the freedom of a person to walk away, he [or she] 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. *Id.* at 7 (citations omitted).

29. 392 U.S. 1 (1968). The Court, inquiring into whether the Fourth Amendment applied to the facts, stated that "[i]t 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.


31. *Id.*

32. *Id.* at 3-4.


35. *Id.* at 11.

36. *Id.* at 8-9. The question involves "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure." *Id.; see also* Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981) (stating that "key principle of Fourth Amendment is reasonableness—balancing of competing interests" (citation omitted)); Camara v. Municipal Court, 387 U.S. 523, 556-37 (1967) (stating that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails").


stated that "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.'"39 An allegation must necessarily involve a violation of rights protected by the Constitution and not merely violations

42 U.S.C. § 1983. "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the alleged application of force." Garner, 490 U.S. at 394 (citation omitted); see Baker v. McCollan, 443 U.S. 137, 140 (1979) (stating that "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws'.")

The Court has consistently ruled that § 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that § 1983 describes." Baker, 443 U.S. at 144 n.3; see Garner, 490 U.S. at 393-94 (same).

"Criminal liability also exists for police use of excessive force under 18 U.S.C. § 242 [1994], which makes it unlawful for anyone acting under the color of law to deprive an inhabitant of the United States of any federally-protected right." Whipple, supra note 9, at 185 n.47. "The prosecution . . . must establish an officer's subjective intent to use excessive force, and the standard of proof is beyond a reasonable doubt." Id. In contrast, a § 1983 claim need not inquire into the subjective mind of the officer. Graham, 490 U.S. at 397 (stating that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional").


"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. § 1983]. First, the plaintiff must allege that some person has deprived him [or her] of a federal right. Second, he [or she] must allege that the person who has deprived him of that right acted under color of state . . . law." Soto v. City of Sacramento, 567 F. Supp. 662, 669 (E.D. Cal. 1983) (quoting Gomez v. Toledo, 446 U.S. 635, 640 (1980) (alterations in original)).


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of duties under tort law. Hence, a violation of an individual’s Fourth Amendment right of freedom from excessive governmental force gives rise to an action under section 1983.

A. What Is Unreasonable Force Under the Fourth Amendment?

The Supreme Court has analyzed claims of excessive police force in executing an arrest under the Fourth Amendment’s “objective reasonableness” standard. The Court noted that “the Fourth Amendment provides an explicit textual source of constitutional protection[s]” against the government.

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.

Id. The provision had the simple purpose of curbing police misconduct. 135 Cong. Rec. H7201, H7216 (Oct. 18, 1989) [hereinafter Joint Report]. “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.” Id.

40. See Baker v. McCollan, 443 U.S. 137, 146 (1979) (stating that plaintiff must seek remedy for tort type of injury in state court under traditional tort-law principles, while § 1983 imposes liability for violations of rights protected by Constitution); see also Estelle v. Gamble, 429 U.S. 97, 106 (1976) (stating “[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner”).

41. Graham, 490 U.S. at 393. The Graham Court stated that “many courts have seemed to assume . . . that there is a generic ‘right’ to be free from excessive force, grounded not in any particular constitutional provision but rather in ‘basic principles of § 1983 jurisprudence.’” Id. (quoting Justice v. Dennis, 834 F.2d 380, 382 (1987)).

42. Id. at 394-99. In Graham, the Court rejected the standard set forth by the United States Court of Appeals for the Second Circuit in Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). In Johnson, the court did not apply the Fourth nor Eighth Amendment, “the two most textually obvious sources of constitutional protection against physically abusive governmental conduct.” Graham, 490 U.S. at 392. Instead, the Johnson court “looked to ‘substantive due process,’ holding that ‘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.’” Id. at 392-93 (quoting Johnson, 481 F.2d at 1032). The Johnson court “set forth four factors to guide courts in determining ‘whether the constitutional line ha[d] been crossed’ by a particular use of force.” Id. at 393 (quoting Johnson, 481 F.2d at 1033). The four factors a court must consider in determining when the excessive use of force supports a cause of action under § 1983 include:

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

Graham, 490 U.S. at 390 (quoting Johnson, 481 F.2d at 1033).
ernment's use of excessive physical intrusion. Under this standard, the subjective intent of an arresting officer has no bearing on the determination of reasonableness. In Graham v. Connor, the Supreme Court characterized an excessive force claim arising in the context of an arrest "as one invoking the protections of the Fourth Amendment." Before Graham, many courts followed the standard in Johnson v. Glick, which focused on the perpetrating officer's subjective intent.

43. Graham, 490 U.S. at 395. The Graham Court reaffirmed the Fourth Amendment analysis it proposed in Tennessee v. Garner, 471 U.S. 1, 7 (1985), and Terry v. Ohio, 392 U.S. 1 (1968). For a further discussion of this issue, see supra notes 3-5 and accompanying text.

44. In Johnson, the Second Circuit adopted the "shocks the conscience" test as the constitutional line. 481 F.2d at 1033. The Johnson court founded its determination on the test set forth in Rochin v. California, 342 U.S. 165 (1951), where police officers obtained evidence by extracting the contents of a suspect's stomach. Johnson, 481 F.2d at 1033. The Court overruled a lower court finding and pronounced the police practice unconstitutional because it "shocks the conscience." Rochin, 342 U.S. at 172.


46. Id. at 394. For a further discussion of the Graham standard, see supra notes 2-6 and accompanying text. "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.' " Graham, 490 U.S. at 395 n.10 (quoting Terry, 392 U.S. at 19 n.16) (alterations in original); see Brower v. County of Inyo, 489 U.S. 593, 596 (1989) ("A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful. This is explicit in the word 'seizure,' which can hardly be applied to an unknowing act." (citations omitted)); Byars v. United States, 273 U.S. 28, 33 (1927) (stating that Fourth Amendment addresses "misuse of power"). After conviction, the Eighth Amendment "serves as the primary source of substantive protection ... in cases ... where the deliberate use of force is challenged as excessive and unjustified." Whitley v. Albers, 475 U.S. 312, 327 (1986); see also Estelle v. Gamble, 429 U.S. 97, 103, 106 (1976) (stating that "government ... [has] obligation to provide medical care for those whom it is punishing by incarceration"); Rochin, 342 U.S. at 172, 173 (1952). The Court has held repugnant to the Eighth Amendment, punishments which do not comply with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958); see also Gregg v. Georgia, 428 U.S. 153, 169-79 (1976) (stating that "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment"); Weems v. United States, 217 U.S. 349, 378 (1910) (stating that cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a human justice").

47. 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973).

48. Id.; see Rhodes v. Robinson, 612 F.2d 766, 772 (3d Cir. 1979) (adopting "shocks the conscience" test); Jones v. Marshall, 528 F.2d 132, 139 (2d Cir. 1975) (stating that one consideration concerns "whether force was applied in a good faith effort ... or maliciously or sadistically." (alteration in original) (quoting Johnson, 481 F.2d at 1033)). In Johnson, the Second Circuit addressed a prisoner's § 1983 damages claim that a guard had assaulted him without justification. 481 F.2d at 1033-34. The detainee brought a complaint against the prison warden alleging that, while checking into the detention house, an officer grabbed his collar, struck him in the head and threatened him by saying "I'll kill you, old man, I'll break you in half." Id. at 1029-30. The officer held the detainee in two different
In Johnson, Judge Friendly applied neither a Fourth nor an Eighth Amendment analysis to the defendant's claim. Instead, Judge Friendly adopted the "shocks the conscience" test to determine the constitutionality of police officers' actions. In Johnson, a pretrial detainee claimed that a guard had assaulted him without justification. Judge Friendly relied on the Supreme Court decision in Rochin v. California, which used the Due Process Clause to invalidate a conviction based upon evidence obtained by pumping the defendant's stomach. Judge Friendly reasoned that if a police officer's administration of force which "shocks the conscience" could justify setting aside a conviction, then the correctional officer's use of similar excessive force also supports a due process action under section 1983.

holding cells for a total of four hours before he received medical treatment by a doctor. Id. at 1030.

49. Johnson, 481 F.2d at 1030-32; see Graham, 490 U.S. at 392. The Graham Court, in analyzing the Johnson decision, found:

Judge Friendly did not apply the Eighth Amendment's Cruel and Unusual Punishments Clause to the detainee's claim for two reasons. First, he thought that the Eighth Amendment's protections did not attach until after conviction and sentence. 481 F.2d at 1032. This view was confirmed by Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions"). Second, he expressed doubt whether a "spontaneous attack" by a prison guard, done without the authorization of prison officials, fell within the traditional Eighth Amendment definition of "punishments." 481 F.2d at 1032. Although Judge Friendly gave no reason for not analyzing the detainee's claim under the Fourth Amendment's prohibition against "unreasonable . . . seizures" of the person, his refusal to do so was apparently based on a belief that the protections of the Fourth Amendment did not extend to pretrial detainees. See id. at 1033 (noting that "most of the courts faced with challenges to the conditions of pretrial detention have primarily based their analysis directly on the due process clause").

Graham, 490 U.S. at 392 n.6.

50. Johnson, 481 F.2d at 1033; see Graham, 490 U.S. at 393. The Johnson court created a test to gauge police conduct:

In determining whether the constitutional line has been crossed, a court must look to such factors as 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 force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson, 481 F.2d at 1033 (emphasis added). For a discussion of another court adopting the "shocks the conscience" test, see supra note 48.

51. Johnson, 481 F.2d at 1029-30.

52. 342 U.S. 165 (1952).

53. Johnson, 481 F.2d at 1032-33.

54. Johnson, 481 F.2d at 1032-33.
The Graham Court, however, rejected the standard utilized by Judge Friendly. The Court explicitly adopted the "objective reasonableness" standard it had implicitly embraced in previous cases. The Court also emphasized that the Due Process Clause represented an inappropriate standard. In Graham, the plaintiff commenced an action under § 1983, alleging that the police used excessive force while making the investigatory stop, in violation of his rights under the Fourteenth Amendment. Graham, 490 U.S. at 390. Graham, a diabetic man, asked a friend to drive him to a local convenience store in order to buy orange juice to counteract an insulin reaction. Id. at 388. When he arrived at the store, he noticed a long line at the check-out counter. Id. at 388-89. Based on this potential delay, he ran quickly out of the store and asked his friend to drive him to a friend's house to get orange juice. Id. at 389. A police officer saw Graham hastily enter and leave the store. Id. Acting on these suspicions, the officer pulled the car over and called for backup. Id. Graham's driver told the officer that Graham had suffered from a sugar reaction. Id. Graham then briefly passed out. Id. Ignoring Graham's explanation, one officer rolled him over and cuffed his hands tightly behind his back. Id. Another officer said, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up." Id. The officers refused to check Graham's wallet for a diabetic decal, shoved his face down against the car, threw him headfirst into the police car and prevented Graham's friend from giving him orange juice. Id. During the encounter, Graham suffered "a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day." Id. at 390. For a further discussion of the Graham decision, see supra notes 2-6.

55. Graham v. Connor, 490 U.S. 386, 388 (1989); see also Tennessee v. Garner, 471 U.S. 1, 7 (1985) (stating that reasonableness requirement of Fourth Amendment applies to seizure of deadly force); Terry v. Ohio, 392 U.S. 1, 29 (1968) (ruling that parties may not introduce evidence discovered by seizures and searches not reasonably related in scope to justifying their initiation). In Graham, the plaintiff commenced an action under § 1983, alleging that the police used excessive force while making the investigatory stop, in violation of his rights under the Fourteenth Amendment. Graham, 490 U.S. at 390. Graham, a diabetic man, asked a friend to drive him to a local convenience store in order to buy orange juice to counteract an insulin reaction. Id. at 388. When he arrived at the store, he noticed a long line at the check-out counter. Id. at 388-89. Based on this potential delay, he ran quickly out of the store and asked his friend to drive him to a friend's house to get orange juice. Id. at 389. A police officer saw Graham hastily enter and leave the store. Id. Acting on these suspicions, the officer pulled the car over and called for backup. Id. Graham's driver told the officer that Graham had suffered from a sugar reaction. Id. Graham then briefly passed out. Id. Ignoring Graham's explanation, one officer rolled him over and cuffed his hands tightly behind his back. Id. Another officer said, "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up." Id. The officers refused to check Graham's wallet for a diabetic decal, shoved his face down against the car, threw him headfirst into the police car and prevented Graham's friend from giving him orange juice. Id. During the encounter, Graham suffered "a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day." Id. at 390. For a further discussion of the Graham decision, see supra notes 2-6.
constitutional provision for analyzing excessive force claims. Further, the Court examined all of the circumstances to determine the reasonableness of an officer's conduct. Accordingly, the Court implied that the facts of each case significantly impact a decision involving this question.

violation of the Fourth Amendment." *Id.* For more cases that have analyzed excessive force claims under the Due Process Clause, see Franklin v. Aycock, 795 F.2d 1253, 1258-59 (6th Cir. 1986) (concluding that unjustified beatings by prison officials violate substantive due process rights); McRorie v. Shimoda, 795 F.2d 780, 784-86 (9th Cir. 1986) (concurrently analyzed under Eighth Amendment); Burton v. Livingston, 791 F.2d 97, 99-101 (8th Cir. 1986) (holding that prison guard's use of unprovoked death threats and racial epithets violated prisoner's rights under Due Process and Equal Protection Clauses); Bates v. Jean, 745 F.2d 1146, 1151-52 (7th Cir. 1984) (concurrently analyzed under Eighth Amendment); Freeman v. Fanzen, 695 F.2d 485, 491-92 (7th Cir. 1982) (stating that Due Process Clause provides prisoners cause of action for physical injury inflicted by prison guard's use of excessive force), *cert. denied*, 463 U.S. 1214 (1983); Martinez v. Rosado, 614 F.2d 829, 831-32 (2d Cir. 1980) (utilizing Due Process Clause in assessing action against prison guard for alleged beating of inmate); Meredith v. Arizona, 523 F.2d 481, 482-84 (9th Cir. 1975) (holding that Due Process Clause provides cause of action for prison guard's unprovoked assault and battery upon prisoner). For cases which have analyzed excessive force claims without identifying any specific constitutional provision, see Massop v. Coughlin, 770 F.2d 299, 301 (2d Cir. 1985) (analyzing claim of intentional infliction of injury under 42 U.S.C. § 1983); Hodges v. Stanley, 712 F.2d 34, 36 (2d Cir. 1983) (reversing dismissal of alleged excessive force under *Johnson* standard); King v. Blankenship, 636 F.2d 70, 72-73 (4th Cir. 1980) (analyzing claim of unjustified infliction of bodily harm under 42 U.S.C. § 1983); Furtado v. Bishop, 604 F.2d 80, 95-96 (1st Cir. 1979) (analyzing prisoner's claims of excessive force by prison guards under "reasonable guard" standard), *cert. denied*, 444 U.S. 1035 (1980). In all of these categories of cases, the circuits applied the *Johnson* factors in the same manner. R. Wilson Freyermuth, *Rethinking Excessive Force*, 1987 DUKE L.J. 692, 696. "[C]areful analysis of the Supreme Court's decisions in *Whitey* [v. Albers, 475 U.S. 312 (1986)] and [Tennessee v. *Garner* [471 U.S. 1 (1985)] compels the conclusion that the continued application of the *Johnson* standard in all excessive force cases is incorrect." *Id.* In *Whitey*, the Court addressed the limitations that the Eighth Amendment places on an official's use of force against a prisoner. 475 U.S. at 314-28. The case involved the shooting of a prisoner by prison officials attempting to free hostages taken during a prison riot. *Id.* at 316. The Court rejected the prisoner's claim that the shooting violated the Eighth Amendment, because the central requirement in an Eighth Amendment violation involves the "unnecessary and wanton infliction of pain." *Id.* at 324. Additionally, this standard applies to all Eighth Amendment cases. *Id.* at 319.

58. *Graham*, 490 U.S. at 393-94.

59. *Id.* at 396. Determining whether the particular force used to make an arrest "is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). "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." *Id.* at 396-97.

60. *Id.*
B. Graham’s Balancing Approach

The Graham Court articulated several factors to consider when gauging the reasonableness of police conduct in the arrest context. These factors break down into five categories: (1) individual rights; (2) the countervailing governmental interests at stake; (3) the totality of the circumstances; (4) the on-the-scene perspective; and (5) an objective appraisal regardless of subjective motive. This rule of objective reasonableness considers, among other factors, the nature and severity of the crime, the degree of resistance, and the split-second nature of on-the-scene decision-making. The Ninth Circuit does not require the subjective and difficult-to-prove element of malice. By eliminating the required showing of malice or intent, a defendant will more likely sustain an excessive force claim pursuant to Graham than under the old Johnson v. Glick standard.

III. FACTS: FORRESTER V. CITY OF SAN DIEGO

In Forrester, the San Diego police department discovered that Operation Rescue planned to stage several anti-abortion demonstrations in the city. Based on the nature of these demonstrations, San Diego Police Chief Burgreen adopted a policy for dispersing and arresting the demon-
strators who trespassed on the medical clinics. Specifically, the policy guidelines required the police first to verbally warn the demonstrators that they could avoid arrest by leaving the premises. After this verbal warning, the police would arrest those refusing to disperse and provide them with another opportunity to move voluntarily. Finally, if these steps

tion.” Id. at 759 (quoting Griffen v. Breckenridge, 403 U.S. 88, 102 (1971)). Section 1985(3) provides:

[i]f two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constitute authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his [or her] support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his [or her] person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.


Justice O'Connor dissented in Bray and stated that “[t]he purpose of these ‘rescue’ demonstrations is to disrupt operations at the target clinic and . . . ultimately to cause the clinic to cease operations.” Bray, 113 S. Ct. at 780 (O'Connor, J., dissenting). To achieve this goal, the demonstrators “trespass on clinic property and physically block access to the clinic, preventing patients, as well as physicians and medical staff, from entering the clinic to render or receive medical or counseling services.” Id. (O'Connor, J., dissenting).

“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.” Whipple, supra note 9, at 182 n.31 (quoting Allegations, supra note 39, at 32 (testimony of Mr. Chet Gallagher)).

67. Forrester, 25 F.3d at 805. This apparently represented the first time in American police history that the San Diego Police Department used nunchakus against nonviolent participants in a peaceful demonstration. Skolnick & Fyfe, supra note 9, at 166. By using nunchakus, the police broke one demonstrator’s arm and injured four or five others. Id. “In June [of that same year, the Los Angeles Police Department] went . . . one better by using nunchakus against Rescuers vigorously enough to break bones and cause sprains and nerve, tendon, ligament, and soft tissue damage to several Rescue demonstrators.” Id. For a further discussion on nunchakus, see Skolnick & Fyfe, supra note 9, at 166-71.

68. Forrester, 25 F.3d at 805.

69. Id.
failed, the police would remove the remaining demonstrators with "pain compliance techniques" involving the application of enough pain to coerce movement.

Pursuant to these instructions, the police officers attempted to remove the demonstrators. Nevertheless, the demonstrators remained seated, refused to move and refused to bear weight. The court labeled this type of activity as "passive resistance." At the first demonstration, the officers first used the "drag and carry" approach. After the "pain compliance unit" arrived, however, the police officers employed the pain compliance techniques exclusively. All arrestees made complaints of

70. For a further discussion of pain compliance techniques, see supra note 9.
71. *Forrester*, 25 F.3d at 805. "Although San Diego police officers generally have discretion either to use pain compliance or to drag and carry arrestees, [Chief] Burgreen’s policy absolutely prohibited officers from using the drag and carry method." *Id.* Chief Burgreen changed the policy for two reasons: (1) "he wanted to prevent the back injuries that multiple dragging and carrying causes to police and arrestees", and (2) "he wanted to maximize police control over the large crowds he anticipated." *Id.*
72. *Id.*
73. *Id.*
74. The California legislature has enacted statutes which make "passively resisting" arrest, by going limp, a violation of the Penal Code. Cal. Penal Code § 148(a) (1988 & Supp. 1995) ("[E]very person who willfully resists, delays, or obstructs any public officer or peace officer or an emergency medical technician . . . in the discharge or attempt to discharge any duty of his or her office . . . is punishable . . . "). Courts have construed "willful resistance" to include "passive resistance." See, e.g., People v. Schehr, 232 N.E.2d 566, 568-69 (Ill. App. Ct. 1967) (finding "sit-in" participant guilty of resisting police officer by refusing to walk upon being arrested); People ex rel. Howell v. Knight, 228 N.Y.S.2d 981, 985-86 (1962) (holding that defendant who resisted arrest by laying on sidewalk and refusing to move violated penal law). In *In re Bacon*, 49 Cal. Rptr. 322 (1966), the court held that the University of California at Berkeley students participating in a political demonstration violated § 148. *Id.* at 333. The court held 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 a lawful arrest as to constitute the offense of resisting an officer as defined in Section 148." *Id.* "In . . . the LAPD’s own tape of eighteen numbered uses of nunchakus against demonstrators was shot with the advantage of closer proximity to its subjects and shows that most demonstrators apparently resisted only by writhing and screaming in pain." Skolnick & Fyfe, supra note 9, at 167.
75. *Forrester*, 25 F.3d at 805-06.
76. *Id.* at 806. In *John v. City of Los Angeles*, No. 89-4766 AWT (C.D. Cal. July 17, 1991), police applied pain compliance to Operation Rescue demonstrators. In that case, Rescue’s attorneys were convinced that their clients were singled out by the LAPD for especially brutal treatment and that nunchakus were used to teach their clients a painful lesson rather than to serve any legitimate police purpose. The attorneys were correct. Rescue certainly was singled out: Despite subsequent demonstrations by other groups for other causes, nunchakus have been used only against Rescue in Los Angeles (and in San Diego as well). . . . Several Rescuers claim that arresting officers expressed the hope that causing them great pain with the nunchakus would convince them that martyrdom was not worth the agony.
various injuries to their hands and arms including bruises, a pinched nerve and a broken wrist.\textsuperscript{77}

After the anti-abortion demonstrators filed suit against the city, a magistrate judge upheld the constitutionality of the pain compliance techniques and granted summary judgment in favor of the city.\textsuperscript{78} The judge, however, allowed the case to proceed to the jury to determine whether any particular uses of force violated the Fourth Amendment.\textsuperscript{79} After viewing the videotaped arrests, the jury concluded that none of the arrests involved excessive force and therefore found in favor of the city.\textsuperscript{80} After denying a JNOV\textsuperscript{81} motion, the court entered judgment on the verdict for the city.\textsuperscript{82} The demonstrators, then, filed a timely appeal.\textsuperscript{83}

On appeal, the Ninth Circuit affirmed the trial court's verdict.\textsuperscript{84} The court determined that ample evidence supported "the jury's conclusion

\textsuperscript{77} Forrester, 25 F.3d at 806. For a further discussion of the injuries sustained, see infra note 104 and accompanying text.

\textsuperscript{78} Id.

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} JNOV is the abbreviation for \textit{judgment non obstante veredicto}. "Judgment notwithstanding the verdict is defined as judgment entered by order of court for the plaintiff (or defendant) although there has been a verdict for the defendant (or plaintiff)." \textit{Black's Law Dictionary} 1055 (6th ed. 1990). \textit{See, e.g.}, \textit{Fed. R. Civ. P. 50}.

\textsuperscript{82} Forrester, 25 F.3d at 806.

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 807. The jurors not only heard testimony from the numerous officers and demonstrators, but also watched the entire videotape of the arrests and repeatedly observed excerpts of the tape throughout the trial. \textit{Id.} The district court noted:

the videotape created an extensive evidentiary record: "Thanks to videotaped records of the actual events, plus the testimony of witnesses on both sides, the jury had more than a sufficient amount of evidence presented to them from which they could formulate their verdicts. . . . The extensive use of video scenes of exactly what took place removed much argument and interpretation of the facts themselves."

\textit{Id.} (citation omitted)

In Barlow v. Ground, 943 F.2d 1132 (9th Cir. 1991), \textit{cert. denied}, 505 U.S. 1206 (1992), the Ninth Circuit ruled that "whether the amount of force used was reasonable is usually a question of fact to be determined by the jury." \textit{Id.} at 1135
that the officers acted reasonably in using pain compliance techniques to arrest the demonstrators.\textsuperscript{85} While affirming the jury's verdict in favor of the city, the Ninth Circuit left open the question of the constitutionality of the city's "pain compliance" policy.\textsuperscript{86}

IV. ANALYSIS.

A. Majority Opinion

In \textit{Forrester}, a majority of the court concluded that ample evidence existed to support the jury's verdict that the officers did not use excessive force when arresting the demonstrators.\textsuperscript{87} The court arrived at this conclusion by employing the \textit{Graham} Court's Fourth Amendment reasonableness test.\textsuperscript{88} This test states that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them."\textsuperscript{89} This inquiry necessarily involves balancing the individual's interest in freedom from unreasonable seizure against the government's interest in effective law enforcement.\textsuperscript{90}

Applying this test, the Ninth Circuit ruled that the evidence favored the city of San Diego for two reasons.\textsuperscript{91} First, as compared to most other excessive force claims, the nature and quality of the intrusion did not sig-

\textsuperscript{85} (citing White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986)). Thus, the \textit{Forrester} court reviewed the jury's verdict to determine "whether it is supported by substantial evidence, that is, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." \textit{Forrester}, 25 F.3d at 806 (quoting Eberle v. City of Anaheim, 901 F.2d 814, 818 (9th Cir. 1990)).

\textsuperscript{86} \textit{Id.} at 809. The court also refused to grant each party's request for attorney's fees pursuant to 42 U.S.C. § 1988 (1988). \textit{Id.} at 809-09 (stating that "[b]ecause the demonstrators have not procured relief modifying the city's behavior, they are not prevailing parties. The demonstrators' action, however, is not so meritless as to justify an award of fees to the city"); see Farrar v. Hobby, 113 S. Ct. 566, 573 (1992) (specifying that plaintiff must obtain enforceable judgment against defendant from whom plaintiff seeks fees); Hewitt v. Helms, 482 U.S. 755, 760 (1987) (same); Maher v. Gagne, 448 U.S. 122, 129 (1980) (finding that consent decree or settlement representing relief comparable to judgment for purposes of obtaining attorneys); Elks Nat'l Found. v. Weber, 942 F.2d 1480, 1485 (9th Cir. 1991) (stating that court may award fees against unsuccessful plaintiff only if action is "meritless"), \textit{cert. denied}, 505 U.S. 1206 (1992). For a further discussion of the court's rationale for not deciding the constitutionality of the pain compliance policy, see \textit{supra} note 15 and accompanying text.

\textsuperscript{87} \textit{Forrester}, 25 F.3d at 807. The court noted that "[i]n addition to hearing the testimony of numerous officers and demonstrators, the jury watched the entire videotape of the arrests (and watched excerpts on repeated occasions)."). \textit{Id.}

\textsuperscript{88} \textit{Id.} For a discussion of the \textit{Graham} inquiry of reasonableness, see \textit{supra} notes 2-6 and accompanying text.

\textsuperscript{89} \textit{Id.} at 806 (quoting \textit{Graham} v. Connor, 490 U.S. 386, 397 (1989)). For a further discussion of this standard, see \textit{supra} notes 2-6 and accompanying text.

\textsuperscript{90} \textit{Graham}, 490 U.S. 396-97; Tennessee v. Garner, 471 U.S. 1, 8-9 (1984). For a further discussion of this topic, see \textit{supra} notes 2-6 and accompanying text.

\textsuperscript{91} \textit{Forrester}, 25 F.3d at 807.
nificantly impact the arrestees' personal security. Second, the city had a legitimate interest in quickly dispersing and removing lawbreakers with a minimal risk of injury to police and others. The court reasoned that "[a]lthough many of these crimes were misdemeanors, the city's interest in preventing their widespread occurrence was significant." Consequently, the court concluded that the city's substantial interest in preventing organized lawlessness justified the measures that the police employed in protecting themselves and others from potential injury.

The Forrester court also dismissed the demonstrators' contention that the pain compliance techniques represented an excessive use of force because "the drag and carry" method more reasonably accomplished the city's goals. The court maintained that the police officers need not use the least intrusive degree of force necessary to control a crowd. Instead, the court determined reasonableness by "viewing the facts from the perspective of a reasonable officer on the scene." Officers

92. Id. The court reasoned that "[t]he police did not threaten or use deadly force and did not deliver physical blows or cuts. Rather, the force consisted only of physical pressure administered on the demonstrators' limbs in increasing degrees, resulting in pain." Id.

93. Id.

94. Id. The court cited the concurrence in Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993), where Justice Kennedy stated that "[t]he wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, persistent, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of its citizens." Id. at 769 (Kennedy, J., concurring).

95. Forrester, 25 F.3d at 807. The court also noted that the police were "justifiably concerned about the risk of injury to the medical staff, patients of the clinic, and other protesters." Id. (citing Bray, 113 S. Ct. at 780 (O'Connor, J., dissenting)).

96. Id.

97. Id.

98. Id. at 807-08. According to the court, "[w]hether officers hypothetically could have used less painful, less injurious, or more effective force in executing an arrest is simply not the issue." Id. at 808; see Graham v. Connor, 490 U.S. 386, 396 (1989) (same); Hammer v. Gross, 932 F.2d 842, 846 (9th Cir. 1991) (stating that courts must judge reasonableness from perspective of reasonable officer on scene rather than with 20/20 vision of hindsight). The Forrester court disagreed with the demonstrators' contention that "actions of the subsequently arriving officers who implemented the pain compliance policy are not relevant because those officers could not have used the drag and carry method even if they thought it best to do so." Forrester, 25 F.3d at 807 n.3. Moreover, the court stated:

Although Burgreen was not "on the scene" when he decided to implement the pain compliance policy, he based his decision on the anticipated circumstances of the demonstrations, which corresponded to the actual circumstances the officers encountered. On the videotape, the jury was able to observe the presence of factors indicating that pain compliance techniques were in fact reasonable, including the demonstrators' conduct, the officers' conduct, the size of the crowd, the presence of other protesters, the manner in which force was applied, and the consequences of that force.
have the discretion to use force and determine the degree of force to employ. 99

With respect to pain compliance, the court concluded that these officers used "minimal and controlled force in a manner designed to limit injuries to all involved." 100 As a result, the majority concluded that the evidence supported the jury's verdict in favor of the city. 101 Additionally, the court concluded that it need not further inquire into the constitutionality of the city's pain compliance policy. 102

B. Dissenting Opinion

In a dissenting opinion, Judge Kleinfeld disagreed with the majority's holding that these pain compliance techniques constituted a reasonable seizure. 103 Judge Kleinfeld stated that the use of nunchakus against passive demonstrators represented conduct "unconstitutional as a matter of law, because [the technique] was both ineffective and unnecessarily brutal." 104 Judge Kleinfeld concluded that these facts satisfied the objective

If this evidence were not sufficient, police departments could never develop general policies for handling arrests. Neither Graham [v. Connor, 490 U.S. 386 (1989)] nor the Fourth Amendment compels us to reach such an illogical conclusion.

99. Forrester, 25 F.3d at 808. The majority criticized the dissent's argument that use of nunchakus represented unreasonable use of force, because it "inflicted great pain and subsequent disability without directly accomplishing the purpose" of forcing the demonstrators to walk. Id. at 808 n.4. The majority criticized this reasoning, stating that an "after-the-fact analysis violates the fundamental precept of Graham; namely, '[t]he '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.'" Id. (quoting Graham, 490 U.S. at 396) (alterations in original).

100. Id. at 808 (emphasis added). The majority rejected the dissent's comparison of the pain compliance techniques to a hypothetical torture-by-lighted-cigarette method. Id. at n.5. The court stated that such an analogy demonstrates a misunderstanding of the pain compliance technique. Id. "Unlike the use of a lighted cigarette, which would create immediate and searing pain, the discomfort produced by the OPNs was gradual in nature. . . . [T]he dissent trivializes the risk of injury (to both officers and demonstrators) inherent in 'drag and carry' removal techniques . . . ." Id. Additionally, the jury's verdict "reflects the fact that a major motivating factor . . . of the pain compliance policy was prevention of injury to existing officers." Id.

101. Id. at 809.

102. Id.

103. Id. (Kleinfeld, J., dissenting).

104. Id. (Kleinfeld, J., dissenting). Judge Kleinfeld explained that the majority opinion did not decide some important issues. Id. (Kleinfeld, J., dissenting). First, the court did not decide the constitutionality of the pain compliance policy. See id. (Kleinfeld, J., dissenting) (indicating that court did nothing but affirm jury verdict below because enough evidence existed on which rational jurors could have based verdict and that identical facts could have resulted in substantial damage awards to demonstrators). Second, the court did not decide whether such a policy infringed on the demonstrators' First Amendment rights. Id. (Kleinfeld,
criteria in *Graham*. Judge Kleinfeld further asserted that, although the demonstrators broke the law and the police rightfully arrested them, they possessed the right to constitutional protection against unreasonable force. Judge Kleinfeld methodically examined the case, applied the *Graham* factors and concluded that the police did not use reasonable levels of force against the demonstrators.

With regard to excessive force, "[i]n one incident, a demonstrator . . . is heard to plead with officers who are using the device to apply pressure to his wrists that his passive resistance to them has ceased: 'I'm not limp any more . . . I'm not limp any more . . . I can't move my arm.' " *Skolnick & Fyfe*, *supra* note 9, at 167. In another incident,

[a] slight young man is brought to his feet by officers who have his armed [sic] trapped at an awkward rear-facing angle. Suddenly, a crack is heard and the man winces as his arm suddenly jerks skyward. A female voice . . . is then heard to shout, "Oh, my God! They broke that guy's arm!"

*Id.* at 166-67.

"In 1982," according to an LAPD training syllabus, the sixty-seven-member "Thornton Police Department initiated a comprehensive one year study implementing the OPN. With the successful completion of the Thornton study, the Thornton Police Department adopted the OPN as its primary and standard intermediate defensive and controlling instrument in 1984."

Nowhere, however, does any document indicate that Thornton's police have ever used nunchakus on peaceful demonstrators. Nor, despite selling the nunchakus to both the LAPD and San Diego and training a group of LAPD instructors in their use, did Kevin Orcutt appear in court to testify that using them against peaceful demonstrators was appropriate or reasonable.

*Id.* at 166 (quoting Los Angeles Police Department, Orcutt Police Nunchaku Arrest Control Tactics Course, Apr. 26, 1989, at 3). For a further discussion of nunchakus, see *supra* note 9 and accompanying text.

105. *Forrester*, 25 F.3d at 809 (Kleinfeld, J., dissenting). Although courts should not mechanically apply the *Graham* factors, courts cannot ignore these factors. *Id.* at 810 (Kleinfeld, J., dissenting) (citing *Graham* v. Connor, 490 U.S. 386, 396-97 (1989)); see White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986) ("The reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted."). Judge Kleinfeld also asserted that "[t]he force used to hurt the demonstrators was not reasonable for the severity of the crimes being committed, threat to safety, or risk of flight." *Forrester*, 25 F.3d at 810 (Kleinfeld, J., dissenting). Judge Kleinfeld noted that the police did not expect the infliction of pain to work effectively in removing the demonstrators on their own power. *Id.* (Kleinfeld, J., dissenting). For a further discussion of the *Graham* test of objective reasonableness, see *supra* notes 2-6 and accompanying text.

106. *Forrester*, 25 F.3d at 810 (Kleinfeld, J., dissenting); see also *Terry* v. Ohio, 392 U.S. 1, 9 (1968) (stating that "petitioner was entitled to the protection of the Fourth Amendment as he walked down the street"). For a further discussion of the rights protected under the Fourth Amendment, see *supra* notes 2-6 and accompanying text.

1. **Split-Second Judgment**

Judge Kleinfeld maintained that judging a split-second decision as strictly as one made prior to the encounter results in unfairness. None-theless, the converse does not follow this rationale. "Police are not allowed to use force which, 'judged from the perspective of a reasonable officer on the scene,' is unreasonable, because of a policy adopted without the benefit of on-the-scene knowledge." Judge Kleinfeld compared the pain compliance technique with the deadly force used in *Tennessee v. Garner*. He noted that *Garner* prohibited the use of deadly force against a fleeing, unarmed felon. Though *Forrester* did not involve the use of deadly force, it did, according to Judge Kleinfeld, involve the use of "unreasonably disproportionate force." Thus, Judge Kleinfeld concluded that "[t]he use of intensely painful yet ineffective force against demonstrators engaged in completely passive resistance is always unconstitutional."

2. **Severity of the Crime**

Based on the facts surrounding this crime, Judge Kleinfeld asserted that the use of relatively less force would support a reasonable level of force. The amount of force used coincides with the level of force necessary to combat more serious crimes. Judge Kleinfeld also attacked the

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108. *Forrester*, 25 F.3d at 810 (Kleinfeld, J., dissenting).
109. *Id.* (Kleinfeld, J., dissenting).
110. *Id.* (Kleinfeld, J., dissenting) (quoting *Graham*, 440 U.S. at 347). Judge Kleinfeld drew an analogy with a hypothetical case in which "a police chief reasonably, in light of what was then known to him, instructed his officers with regard to a hostage taker, 'if you get a clear shot, shoot to kill—he is armed and extremely dangerous.'" *Id.* (Kleinfeld, J., dissenting). If an officer saw the suspect and before shooting, ascertained with certainty that the suspect was not armed and dangerous, that officer "could not reasonably shoot the suspect dead, despite the policy decision made in advance." *Id.* (Kleinfeld, J., dissenting); see *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (stating that statute authorizing police to use deadly force to stop fleeing felon violated his constitutional rights if that suspect was unarmed and nondangerous). The *Garner* Court rejected the notion that shooting nondangerous fleeing suspects outweighs the suspect's interest in his own life. *Id.*
111. *Forrester*, 25 F.3d at 810-11 (Kleinfeld, J., dissenting). For a further discussion of *Garner* and the reasonable force analysis, see supra notes 2-6 and accompanying text.
112. *Id.* (Kleinfeld, J., dissenting).
113. *Id.* at 811 (Kleinfeld, J., dissenting).
114. *Id.* (Kleinfeld, J., dissenting).
115. *Id.* (Kleinfeld, J., dissenting).
116. *Id.* (Kleinfeld, J., dissenting). Kleinfeld buttresses this statement with Chief Burgreen's testimony that all the crimes involve misdemeanors. *Id.*
majority's use of appellate decisions to bolster its contentions. Judge Kleinfeld reasoned that by citing certain opinions, "the majority suggests a higher degree... of... crime." Judge Kleinfeld stated that the record obligated the court to make a decision based on what the demonstrators and the police did in this specific encounter.

3. Resistance to Arrest

Judge Kleinfeld noted that "[t]he demonstrators did not 'actively' resist arrest." Rather, the demonstrators passively resisted arrest by "sitting instead of walking to the van, sometimes by crossing their legs, and in one case, a woman had tied her legs together with string." To support this view, Judge Kleinfeld maintained that the Supreme Court's use of the adverb "actively," in Graham, "could only be for the purpose of distinguishing active from passive resistance."

117. Id. (Kleinfeld, J., dissenting). Specifically, Judge Kleinfeld stated that the majority's use of Justice Kennedy's concurrence and Justice O'Connor's dissent in Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993), represents a "mistaken use of appellate judges' pronouncements." Forrester, 25 F.3d at 811 (Kleinfeld, J., dissenting). In Bray, Justice O'Connor, in dissent, argued that anti-abortion protesters who blockaded entrances to clinics violated federal law by preventing women from exercising their legal rights. Bray, 113 S. Ct. at 773 (O'Connor, J., dissenting). Kleinfeld believed the majority suggested a higher degree of the "severity of the crime" by quoting from other cases dealing with Operation Rescue demonstrators. Forrester, 25 F.3d at 811 (Kleinfeld, J., dissenting). For a further discussion of the cases quoted, see supra note 66 and accompanying text.

118. Forrester, 25 F.3d at 811 (Kleinfeld, J., dissenting). This perception that anti-abortion protests constitute a higher crime than other similar activities pervades the media as well. See David Shaw, Abortion Foes Stereotyped, Some in the Media Believe, L.A. Times, July 2, 1990, at A1. "When abortion opponents picketed Turner Broadcasting System [TBS] last summer to protest the showing of a film promoting abortion rights, TBS Chairman Ted Turner called the demonstrators 'bozos' and 'idiots.'" Id. Many in the anti-abortion movement feel that Turner's sentiment reflects the attitude within the media. Id. "'Opposing abortion, in the eyes of most journalists... is not a legitimate, civilized position in our society,'" says Ethan Bronner, a Boston Globe legal affairs reporter, who spent much of 1989 writing about abortion. Id. One pro-life supporter comments that "[r]eporters even try to perpetuate that stereotype... by asking [abortion foes] to make sure you look angry... when [they are] being interviewed on television." Id. Abortion opponents contend the media further stereotypes them by labeling all such protesters as conservatives. Id. David Shribman of the Wall Street Journal, who has spent about 40% of his time writing about abortion in 1990, says the anti-abortion movement represents "one of the broadest political coalitions in American history." Id. "Journalists insist they try to be fair to both sides, no matter how they feel about the people they cover. Much of the time, they are fair." Id.

119. Forrester, 25 F.3d at 811 (Kleinfeld, J., dissenting). "The parties stipulated and the jury was instructed that 'each plaintiff was arrested for trespass and/or failure to disperse from an unlawful assembly.'" Id. (Kleinfeld, J., dissenting) (citation omitted).

120. Id. (Kleinfeld, J., dissenting).

121. Id. (Kleinfeld, J., dissenting).

122. Id. (Kleinfeld, J., dissenting). In Graham v. Connor, 490 U.S. 386 (1989), the Court stated that the Fourth Amendment's
4. Immediate Threat

Judge Kleinfeld asserted that the "immediate threat" to the safety of officers or others would justify the use of force.\(^1\) Even an immediate threat, however, would not support the levels of force used by these officers.\(^2\) As stipulated, the facts illustrate the police’s expectation that "the demonstrators would likely be people who were neither dangerous nor people who would attempt to actively resist being forcibly removed from the premises."\(^1\)\(^2\) The parties also stipulated that "none of the plaintiffs threatened, struck or physically attacked any of the officers."\(^1\)\(^2\)

The most compelling evidence of "immediate threat" to the safety of the officers involved the potential danger of back and leg injuries if the officers employed the "drag or carry" method of arresting the demonstrators.\(^1\)\(^2\)

The second threat to safety entailed the need to effectuate quick arrests.\(^1\)\(^2\) Judge Kleinfeld noted that the police, however, did not carry

 proper application requires 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.

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\(^1\) Id. at 396 (emphasis added). For a further discussion of this issue, see supra notes 2-6 and accompanying text.

\(^2\) Forrester, 25 F.3d at 811 (Kleinfeld, J., dissenting); cf. Terry v. Ohio, 392 U.S. 1, 15 (1968) (ruling that "courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires").

\(^3\) Forrester, 25 F.3d at 811 (Kleinfeld, J., dissenting).

\(^4\) Id. (Kleinfeld, J., dissenting).

\(^5\) Id. (Kleinfeld, J., dissenting). Chief Burgreen also characterized the Operation Rescue demonstrators in the instant case as "people who profess to be law abiding people and are law abiding people in every other sense of the word." Id. (Kleinfeld, J., dissenting). Additionally, videotapes of the demonstrators established that they did not actively or violently resist arrest in any way. Id. (Kleinfeld, J., dissenting).

\(^6\) Id. (Kleinfeld, J., dissenting). Chief Burgreen testified that in the 1960s and 1970s, the leading cause of police disability was back injuries incurred during the operation of police ambulances. Id. (Kleinfeld, J., dissenting). He did not believe his female or small male officers could sufficiently carry demonstrators, even with four to six officers on each person. Id. at 811-12 ("We don’t have the luxury of having everybody six feet tall and 200 pounds and physically can handle themselves and carry their own weight." (statement of Police Chief Burgeen)).

\(^7\) Id. at 812 (Kleinfeld, J., dissenting). The Police Chief testified that "[w]hat we had was several types—a couple hundred people on both sides who were a very, very, volatile issue [sic]. They were very emotional and you had everything that all lined up for a nice little riot." Id. (Kleinfeld, J., dissenting) (quoting Police Chief Burgreen).
their batons and did not wear face shields or helmets. Therefore, the officers did not believe the demonstrators posed any kind of threat.

5. Ineffectiveness

Judge Kleinfeld contended that the arrests in Forrester demonstrated a "painful, yet ineffective" use of police force. The pain compliance technique did not force the demonstrators off the premises under their own power. According to Judge Kleinfeld, "[t]o be reasonable, force has to be designed to accomplish a legitimate objective efficiently." Under the circumstances, Judge Kleinfeld concluded that the police conduct did not constitute a reasonable use of force because the pain compliance technique failed to facilitate speedy arrests, failed to protect the police from back and leg injuries and caused severe pain and injuries to the individual demonstrators.

6. The Police Problem of Passive Resistance

Finally, Judge Kleinfeld articulated the reasons why a civilized society tolerates demonstrations and the concomitant law enforcement obliga-

129. Id. at 813 (Kleinfeld, J., dissenting).
130. Id. (Kleinfeld, J., dissenting); cf. Eberle v. City of Anaheim, 901 F.2d 814, 820 (9th Cir. 1990) (holding that "explosive and potentially dangerous situation" reasonably called for officer to apply fingerhold to appellant). Judge Kleinfeld stated that the threat "resembles the one among football fans in [Eberle], although it lacks the beer-throwing, kicking and pushing which exacerbated the situation in that case." Forrester, 25 F.3d at 812-13.
131. Forrester, 25 F.3d at 813 (Kleinfeld, J., dissenting). The dissent compares the situation to the one in Eberle and distinguishes the two by indicating that the force in Eberle represented effective but not painful force. Id. (Kleinfeld, J., dissenting).
132. Id. (Kleinfeld, J., dissenting). In fact, a nunchakus training officer told police that "most of the time they'll sit there and scream because it does in fact hurt but they won't move, so you'll have to follow up with some kind of control hold." Id. (Kleinfeld, J., dissenting). Evidence also existed that the technique caused permanent damage. Id. (Kleinfeld, J., dissenting). For a further discussion of pain compliance, see supra note 9 and accompanying text.

Additionally, a 125-pound female demonstrator testified that "I was trying to get up, but it hurt so much that I couldn't—at least for awhile I couldn't get up . . . I was crying and I kept feeling like I was going to pass out and it was just really difficult to walk." Id. (Kleinfeld, J., dissenting) (quoting testimony of Ms. Jenkins, demonstrator) (alterations in original). Another female commented, "the pain was so bad I couldn't see, . . . I almost lost consciousness and I fell on the other officer." Id. (Kleinfeld, J., dissenting) (alterations in original).
133. Id. (Kleinfeld, J., dissenting). Judge Kleinfeld stated that "[t]he objective was to make the demonstrators move from where they were seated to the vans. But the force was not used to move the demonstrators into the vans. It was used to punish them for refusing to get up and walk to the vans." Id. (Kleinfeld, J., dissenting).
134. Id. (Kleinfeld, J., dissenting). "Use of pain is not constitutionally prohibited, but [its use] is limited by the Fourth [Amendment] . . . ." Id. at 814 (Kleinfeld, J., dissenting). As Judge Kleinfeld stated: "[w]hether the force works bears on its reasonableness." Id. (Kleinfeld, J., dissenting).
tions flowing from this tolerance. Judge Kleinfeld placed a high degree of importance on the freedom to protest and implicitly concluded that society should not curtail its ability to express discontent.

V. THE FORRESTER COURT DID NOT PROPERLY APPLY THE REASONABLENESS STANDARD

The majority court in Forrester analyzed the case under Graham's reasonableness test. By employing this balancing test enunciated in Graham and other previous Supreme Court rulings, the Ninth Circuit weighed the competing interests of the individual and the government to determine the reasonableness of particular police actions.

135. Id. at 814-15 (Kleinfeld, J., dissenting). Judge Kleinfeld concluded, "[t]he intentional infliction of severe pain during an arrest of a passively resisting demonstrator, when it is not incidental to an efficient means of making the arrest, is inconsistent with those values." Id. at 815 (Kleinfeld, J., dissenting). "While we value law and order, we value individual liberty and compassion so profoundly that we tolerate a good deal of disorder, and are lenient, compared to many regimes, about lesser violations of law." Id. (Kleinfeld, J., dissenting).

136. Id. (Kleinfeld, J., dissenting) (stating "[p]assive resistance tests our level of civilization"). In recent years, police have displayed a growing animus toward Operation Rescue demonstrators:

In San Diego, an officer reportedly moved through the demonstrators singing: "Don't try to understand 'em, just round 'em up and brand 'em."
In Pittsburgh, women claimed they were sexually molested by officers. In West Hartford, Connecticut, officers removed their badges and name tags—purportedly to avoid cutting demonstrators—and then allegedly hauled protesters away with come-along holds, by lifting them with sharp-edged plastic handcuffs, or with "crotch carries" in which a night stick is stuck between the protester's legs. A priest testified that the police seemed to enjoy inflicting pain: "The demonic element entered in here."


137. Forrester, 25 F.3d at 806. This test provided the proper framework to determine the reasonableness of force used to effectuate an arrest. Graham v. Connor, 490 U.S. 386, 395 (1989); see Tennessee v. Garner, 471 U.S. 1, 8-9 (1985) (ruling that reasonableness must be determined by totality of circumstances); Scott v. United States, 436 U.S. 128, 136-38 (1978) (ruling that officers' actions should first be evaluated in light of facts and circumstances without regard to their underlying intent or motivation); Terry v. Ohio, 392 U.S. 1, 21 (1968) (stating that reasonableness of particular search must be judged against objective standard). For a further discussion of the Fourth Amendment's reasonableness requirement, see supra notes 2-6 and accompanying text.


139. Forrester, 25 F.3d at 807; see Graham, 490 U.S. at 396 (stating "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests." (citation omitted)); Garner, 471 U.S. at 8 (holding that one must balance nature and quality of intrusion on individual's Fourth Amendment interests against govern-
Applying this test, the Ninth Circuit incorrectly upheld the reasonableness of the pain compliance force used against the Operation Rescue demonstrators.\textsuperscript{140} The \textit{Garner} and \textit{Graham} balancing tests mandate that courts consider the totality of the circumstances in making a reasonableness determination.\textsuperscript{141} Consequently, the dissent's evaluation of the competing interests more faithfully adheres to the Supreme Court's protection of Fourth Amendment interests than does the majority's analysis of these interests.\textsuperscript{142}

1. \textit{No Immediate Threat}

In \textit{Garner}, the Court stated that "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."\textsuperscript{143} Although the police in \textit{Forrester} did not use deadly force, \textit{Garner}'s central message provides that police officers should use only that level of force commensurate with the danger threatened by the alleged crime.\textsuperscript{144} In light of \textit{Garner}, "[t]he use of intensely painful, yet ineffective, force..."
against" passively resisting demonstrators always constitutes unreasonable force. Because the demonstrators in Forrester posed no threat to the officers or others during the "sit-ins," police use of pain compliance force against the demonstrators, resulting in severe pain and injuries, violated the reasonableness requirement of the Fourth Amendment.

2. **Balancing Test Favored the Demonstrators**

The balancing test employed by the Supreme Court requires a weighing of the government's and the arrestee's competing interests. In Garner, the Court indicated that it "would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement." Accordingly, courts should consider how a prohibition on pain compliance would impact effective law enforcement. If pain compliance techniques represent the only effective means of making arrests, the use of such techniques appear reasonable. As the evidence indicates in Forrester, however, ineffective pain compliance techniques will likely inflict severe pain and injuries.

the states were authorized to use deadly force to apprehend all 'fleeing felony' suspects." SKOLNICK & FYFE, supra note 9, at 41.

145. See Forrester v. City of San Diego, 25 F.3d 804, 810-11 (9th Cir. 1994) (Kleinfeld, J., dissenting), cert. denied, 115 S. Ct. 1104 (1995). According to one reporter,

[d]emonstrators have alleged police brutality at least since Freedom Riders launched their sit-down strikes in Alabama almost 30 years ago. This time, however, the outcry—including the videotapes of police in action—comes from anti-abortion protesters with Operation Rescue, whose members tend to see themselves as law-and-order conservatives.

Sipchen, supra note 136, at A1.

146. See Garner, 471 U.S. at 11 (stating "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so"). Thus, force must match the threatened danger to the police. Id. For a further discussion of the injuries sustained by the demonstrators in facts similar to Forrester, see supra note 104 and accompanying text.


149. Id.; see SKOLNICK & FYFE, supra note 9, at 39-40 (stating "[c]ops are trained in a variety of come-along holds—hammerlocks, wristlocks, finger grips, and the like—which are very useful in breaking up bar fights and domestic battles and in arresting demonstrators whose protests have gone beyond mere passive resistance") (emphasis added). Skolnick and Fyfe comment that "[t]he primary police obligation—to protect life—dictates that they not put themselves in harm’s way to avoid using an appropriate degree of force." Id. For a discussion of federal penalties against police departments that employ excessive force, see supra notes 38-41 and accompanying text.

150. Forrester, 25 F.3d at 809 (stating that after applying pain compliance to demonstrator and realizing that it did not compel demonstrator to rise to her feet, the "police officer grabbed her by her hair and back of her pants, and pulled her to her feet"). LAPD officials have argued that nunchakus allowed for speedier removal of demonstrators. SKOLNICK & FYFE, supra note 9, at 167. "The tapes,
The court must consider "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 in evaluating the appropriate amount of police force." Although this list does not exhaust all factors which a court may consider, these factors represent the items that the Supreme Court deemed most critical. The court in Forrester did not evaluate these three factors. As Police Chief Burgreen testified, the crimes lacked seriousness, the officers did not receive verbal or physical threats and the demonstrators did not actively resist arrest.

3. Pain Compliance Constitutes Excessive Force

The Supreme Court has traditionally emphasized an individual's personal dignity interests in the context of arrests or seizures. In Terry v. Ohio, the Court stated that "it is simply fantastic to urge" that holding a suspect against a wall with his hands up constitutes "petty indignity;" rather, "[i]t is a serious intrusion upon the sanctity of the person." Similarly, pain compliance techniques represent a direct violation of a person's self-esteem in that they attempt to "overcome the composure and self-control of the arrestee and act to reduce the person to tears and often
screams of agony."\textsuperscript{159} As evidence of such indignity, pain compliance techniques have caused extreme pain, broken bones, pinched nerves and excessive humiliation.\textsuperscript{160} Prior Supreme Court decisions suggest that non-violent demonstrations should entitle an individual to nonviolent arrest techniques.\textsuperscript{161} If the police use extremely violent measures, the government's interests must override the sanctity of individual rights.\textsuperscript{162}

In \textit{Forrester}, the city's interests include effectuating arrests and preventing injuries to the police officers and to others.\textsuperscript{163} The police should only use force when it represents the most reasonable way to accomplish these objectives.\textsuperscript{164} In \textit{Forrester}, the pain compliance technique did not constitute the most efficient way to effectuate the demonstrators'
arrests successfully.165 Although the technique caused the demonstrators to suffer pain, it did not, by itself, induce the demonstrators to walk from the premises voluntarily.166 Eventually, the police officers resorted to pulling the demonstrators onto their feet.167 Because the technique lacked effectiveness and produced unnecessarily brutal results, it did not constitute a reasonable method of removing the demonstrators.168

In addition, data illustrating that other jurisdictions have successfully used other methods to deal with demonstrators contradicts the necessity of using pain compliance techniques.169 While alternative methods do not completely eliminate the need to engage in some lifting, one police department does not believe pain compliance techniques represent the best method.170 One successful way to minimize police injury involves using carrying devices similar to those used by ambulance squads.171 "The Metropolitan Police Department of Washington, D.C., . . . a force 'uniquely experienced in the handling of demonstrations,' " has successfully employed this method of removing demonstrators.172 In the hot political climate of the nation’s capital, the officers in the District of Columbia must police many demonstrations and protests. This example demonstrates that the police can effectively administer alternative removal methods while minimizing the risk of injury to arresting officers.173

165. Forrester, 25 F.3d at 809 (Kleinfeld, J., dissenting). In fact, most demonstrators could not move off the premises because they suffered from severe pain. Id. at 813 (Kleinfeld, J., dissenting).

166. Id. at 813 (Kleinfeld, J., dissenting). In one instance, the arresting officers applied nunchakus around a female demonstrator's wrists and as they began to twist the device, she moved from a sitting position to a position on her knees and began screaming. Id. at 809 (Kleinfeld, J., dissenting). The officers continued to twist, but the technique did not cause her to stand up and walk. Id. (Kleinfeld, J., dissenting). In fact, the officers had to grab her hair and the back of her pants, and pull her up on her feet to get her to walk off the premises. Id. (Kleinfeld, J., dissenting).

167. Id. at 809 (Kleinfeld, J., dissenting).

168. Id. (Kleinfeld, J., dissenting). Judge Kleinfeld noted that 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."

Whipple, supra note 9, at 194 (quoting Plaintiff's Supplemental Opening Memorandum, supra note 159, at 31-32).

169. See Whipple, supra note 9, at 194-96 (describing effective alternative methods to pain compliance).

170. Id. at 194-95.

171. Id. Whipple points out that by using safety-conscious techniques and carrying devices, police may remove demonstrators without harming them. Id.

172. Id. at 195 n.112 (quoting Allegations, supra note 39, at 16).

173. Id. at 195.
VI. CONCLUSION

Under a proper application of the reasonableness test, the Forrester court would have held that, in the context of passive demonstrations, San Diego's "pain compliance" policy violates the Fourth Amendment. The Supreme Court's strong emphasis on individual rights mandates that police employ only that level of force necessary to perfect an arrest. Anything more constitutes excessive force, which the Constitution prohibits.

By employing Graham's balancing test, the arrestee's interests outweighed the government's need to employ the pain compliance force. The severity of the pain, injury and humiliation associated with the technique also offsetted the exigencies of the situation or any overriding government interests. In other jurisdictions, alternative and less intrusive methods have produced more effective law enforcement results.

The consequences of Forrester might have far-reaching implications. For example, the decision could significantly curtail an individual's right to freedom from unreasonable force. Police officers may wield unbridled discretion in employing severe pain compliance techniques against individuals who commit minor legal infractions. Moreover, police departments across the country might apply the techniques to a wide array of arrest situations. A trend toward heightened police abuse and concomitant public disdain for law enforcement may stem from this practice.

In addition to escalating police violence, this policy may significantly impact a group's right to gather and demonstrate. The violence associated with these gatherings may deter many potential demonstrators from participating. Consequently, this potential violence would greatly reduce citizens' ability to voice their opinion, displeasure or support for causes or ideals. This chilling effect on First Amendment rights represents another factor in a complete analysis of this topic.

Ultimately, Forrester, or cases similar to Forrester, may come before the Supreme Court for review. In view of the applicable factors and the Court's historic support for individual rights, the Court will likely hold

174. For a discussion of the reasonableness test, see supra notes 2-6 and accompanying text.
175. For a further discussion of this issue of perfection, see supra notes 2-6 and accompanying text.
177. For a further discussion of the balancing test, see supra notes 2-6 and accompanying text.
178. For a further discussion of the injuries sustained by the demonstrators, see supra note 104 and accompanying text.
179. For a discussion of how alternative and less intrusive methods have proven more effective in other jurisdictions, see supra note 171.
180. For a further discussion of the injuries resulting from police use of pain compliance force, see supra note 104.
that pain compliance techniques violate the constitutional rights of passively-resisting demonstrators.

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