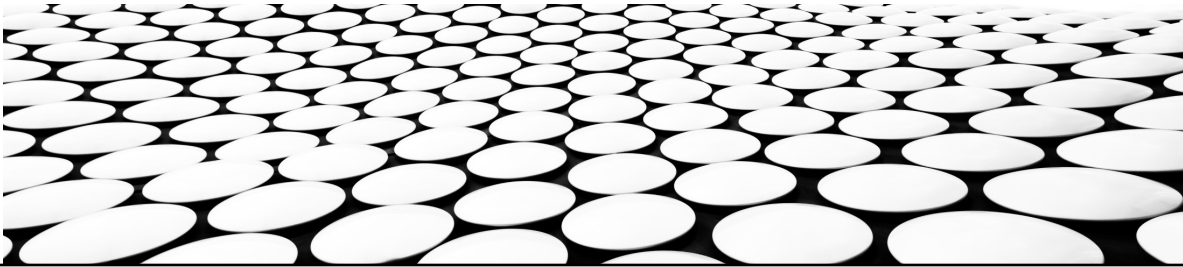

"OFFICER CREATED JEOPARDY" AND HOW IT RESULTS IN DEADLY FORCE INCIDENTS

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NACOLE ANNUAL CONFERENCE, OCTOBER 2025



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4/28/2016 SHOOTING OF ASHTIAN BARNES BY OFFICER FELIX ON BELTWAY 8 IN HOUSTON, TEXAS



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IS THE USE OF DEADLY FORCE BY OFFICER FELIX UNCONSTITUTIONALLY UNREASONABLE?

Analysis: Graham v. Connor
(Totality of Circumstances)

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GRAHAM V CONNOR: RELEVANT FACTORS: EVALUATING LEVEL OF THREAT

- Reason for stop
- Knowledge about subject (criminal history?)(armed?)
- Stopped person's conduct
- Tactics of officer (decision to jump onto sill)
- Warnings
- Shooting w/o target acquisition

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MOMENT OF THREAT DOCTRINE: FIFTH CIRCUIT

Any prior events “leading up to the shooting,” including actions the officer took, were simply “not relevant.” The “precise moment of the threat” was the “two seconds” when Officer Felix was clinging to a moving car. Because Felix could then have reasonably believed his life in danger, the Fifth Circuit concluded, his decision to shoot “did not violate Barnes’ constitutional rights.”

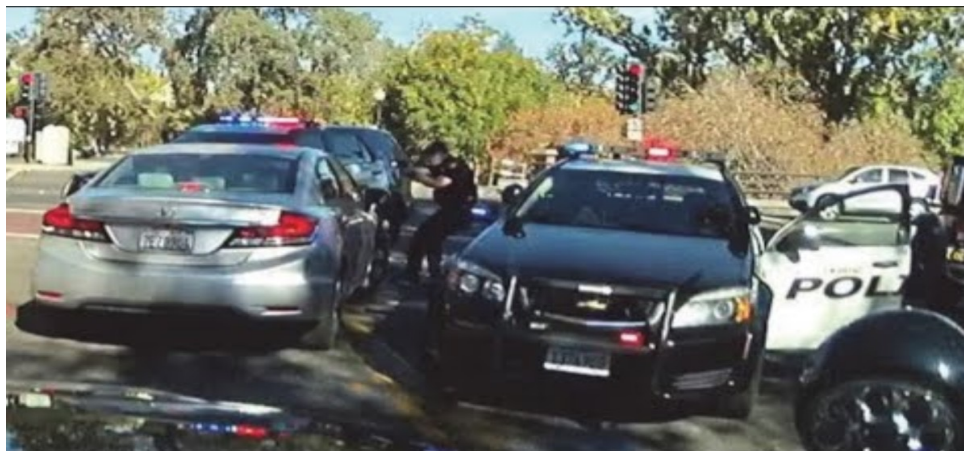
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“MOMENT OF THREAT” DOCTRINE ***BARNES V. FELIX, US SUPREME COURT (UNANIMOUS)***

[Under the moment of threat rule], a court looks only to the circumstances existing at the precise time an officer perceived the threat inducing him to shoot. Today, we reject that approach as improperly narrowing the requisite Fourth Amendment analysis. To assess whether an officer acted reasonably in using force, a court must consider all the relevant circumstances, including facts and events leading up to the climactic moment.

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OFFICER CREATED JEOPARDY



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OFFICER CREATED JEOPARDY

- Officer-created jeopardy, is a legal concept where an officer's own unjustified actions or poor tactical decisions create or increase the risk of a deadly confrontation, potentially leading to liability when force is used.

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EXAMPLES OF OFFICER-CREATED JEOPARDY

- Running into path of oncoming vehicle
- Running into building of barricaded subject
- Leaving cover and closing the distance of an armed subject
- Reaching into occupied vehicle
- Continuing foot pursuit of armed subject after losing sight of the person

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- “One of the most troubling aspects of officer-created jeopardy is the increasing effort to criminalize officers’ discretionary tactical decisions. Officers are trained to rely on their admittedly imperfect judgment in chaotic and evolving situations. Yet, this controversial theory opens the door to criminal prosecution if, in hindsight, different tactics could have arguably de-escalated the situation. This trend shifts accountability from the suspect, who should be held responsible for their violent or threatening behavior, to the officer, who is now expected to predict and mitigate the suspect’s unpredictable actions and escalating threats.”

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OFFICER CREATED JEOPARDY: SHOOTING AT MOVING VEHICLES

LEXIPOL POLICY

- 300.4.1 SHOOTING AT OR FROM MOVING VEHICLES Shots fired at or from a moving vehicle are rarely effective and involve considerations and risks in addition to the justification for the use of deadly force. When feasible, officers should take reasonable steps to move out of the path of an approaching vehicle instead of discharging their firearm at the vehicle or any of its occupants. An officer should only discharge a firearm at a moving vehicle or its occupants when the officer reasonably believes there are no other reasonable means available to avert the imminent threat of the vehicle, or if deadly force other than the vehicle is directed at the officer or others (Government Code § 7286(b)).

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SHOOTING AT MOVING VEHICLES: MORE RESTRICTIVE POLICIES: SFPD GENERAL ORDER

(e.) **MOVING VEHICLES.** An officer shall not discharge a firearm at the operator or occupant of a moving vehicle unless the operator or occupant poses an immediate threat of death or serious bodily injury to the public or an officer by means other than the vehicle. Officers shall not discharge a firearm from his or her moving vehicle.

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BUT WHAT ABOUT OTHER OFFICER DECISION-MAKING THAT CREATES JEOPARDY?

- Reaching into or jumping into occupied vehicles
- Foot pursuit of an armed subject
- Leaving cover and closing distance on an armed subject
- Failing to provide commands
- Failing to summon or wait for backup
- Other “escalatory” behavior

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LINK BETWEEN OFFICER-CREATED JEOPARDY AND PRINCIPLES OF DE-ESCALATION

Penal Code § 835a (AB 392):

- This law requires that officers only use deadly force when necessary to defend human life and that they evaluate the specific circumstances of a case to determine if other resources and techniques, such as de-escalation, can be used when reasonably safe and feasible.
- SB 230:
- This bill established minimum standards for use-of-force policies for all California law enforcement agencies, requiring them to include evidence-based guidelines for de-escalation, crisis intervention, and alternatives to deadly force.

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FAILURE TO EMPLOY DE-ESCALATION TECHNIQUES LEADING TO OFFICER CREATED JEOPARDY

- Time
- Distance
- Cover
- Warnings
- Waiting for backup

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SAMPLE POLICY: OFFICER CREATED JEOPARDY

- In evaluating the appropriateness of deadly force incidents, factors to be considered, consistent with *Graham v. Connor*, are whether the event indicates that the involved officer engaged in decision-making that created jeopardy to the officer and/or third parties by engaging in escalatory and/or unsafe tactics.

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