RECOMMENDATION xx: MPD should publicize to its officers and its community its commitment and willingness to go beyond the *Graham v. Connor* standards when it further refines its policies relating to the use of force. [OIR 90]

Graham v. Connor is a 1989 U.S. Supreme Court case wherein the court specified that excessive force claims should be judged in terms of the 4th Amendment ban against "unreasonable searches and seizures", using a standard of "objective reasonableness." The *Graham v. Connor* standard provides a floor, determining when police conduct violates minimal U.S. constitutional standards, and, hence, criminal and civil law (since most states, including Wisconsin, do not set a more restrictive legal standard). *Graham v. Connor* only outlines broad principles on how police use of force is to be judged; it sketches the outer limits of police force that is permissible under the Constitution. But the Constitutional standard itself is not a use-of-force policy; it only sets a constitutional line beyond which no considered use-of-force policy can go. There is no prohibition in the U.S. Constitution, or anywhere else, to providing a more restrictive internal standard for when force is to be used, and many police departments, including the MPD, have done so in various ways – adopting detailed policies and training standards that go beyond the bare requirements of *Graham v. Connor*. For example, MPD SOPs include a De-Escalation SOP, prohibitions on warning shots, restrictions on shooting at vehicles, limitations on electronic control device use, etc.

Nonetheless, prior to the commencement of the OIR review, MPD insisted that it could not adopt a policy that goes beyond *Graham v. Connor*. However, it has more recently indicated that it has flexibility to adopt more stringent standards to further guide officers and help keep officers and the community safer by reducing the number of force incidents. The Ad Hoc Committee commends the Department on this. It is consistent with the Police Executive Research Forum recommendation that "Agencies should continue to develop best policies, practices, and training on use-of-force issues that go beyond the minimum requirements of *Graham v. Connor."* As OIR notes, "However, because of the earlier public pronouncements to the contrary, clarification of the Department's philosophical shift in this arena would help eliminate any residual confusion."

The City Attorney's response to the OIR report states that it is "aware of no police department in the United States who subjects its officers to a more stringent standard for using deadly force." Attorney Seth Stoughton (Associate Professor at University of South Carolina School of Law), one of the subject-matter experts consulted by OIR during its review of MPD (and himself a former police officer), notes in response:

> The assertion that the City attorney may not be aware of any agency that has done so may be true, but the implication that no agency actually has done so is not. Agencies commonly exceed the bare constitutional standard. My research has included reviewing use-of-force policies at the largest police agencies in the country (see Brandon L. Garrett & Seth W. Stoughton, A Tactical Fourth Amendment, 103 VA. L. REV. 211 (2017)). I and others have found that while most police agencies do include the Graham standards in their training and in the administrative regulations that govern the use of force, many agencies also go beyond the Graham standard.

Stoughton furnishes numerous concrete examples of police department policies more restrictive than *Graham v. Connor*. He also notes that use of *deadly* force is governed primarily by *Tennessee v. Garner* (a Supreme Court case that predated *Graham*), such that the Supreme Court's own standard for use of

deadly force in certain ways imposes requirements beyond the "objective reasonableness" standard in *Graham*.

The City Attorney also expresses concern that more restrictive policy might increase liability risk for the city ("as claims might be made that failure to meet the City's new self-imposed standard was actionable"). However, for multiple reasons, such policy changes are unlikely to impact liability risk adversely:

1. As Michael Gennaco of OIR notes:

> The City Attorney is exclusively viewing the question through the lens of after the fact legal liability…. [H]e doesn't want the City to hold officers to a more stringent standard or hold them accountable administratively so that he is better positioned to argue that whatever the officers did was "justified" in court; even if it was inconsistent with what should be the City's expectations of officer performance…. [W]hat the City Attorney ignores in his calculus is the likelihood that adopting a more stringent standard, instituting training consistent with those standards, and holding officers accountable when they perform inconsistent with those standards will reduce deadly force incidents prospectively…. I would feel comfortable arguing that from a pure liability perspective that a stringent standard, training, and accountability program that reduces shootings results in less overall liability for the City than a lenient standard that results in more shootings to defend where lawyers and juries then argue about whether what the officer did was "reasonable."

2. In addition, as Michael Gennaco also notes, instituting such standards can help defend against suits brought against the city and city officials acting in their official capacity under the U.S. Supreme court's 1978 decision, *Monell v. Department of Social Services of New York.* Under *Monell*, local governing bodies (and local officials sued in their official capacities) can be sued for constitutional violations where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by policy-makers. Under this principle, local government's and officials may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decision-making channels. Hence, failure to adopt policies and training that adequately guard against unwarranted uses of force can itself create liability for the city and city officials. Gennaco explains:

> [C]reating rigorous standards and accountability for officers mitigates the likelihood of plaintiffs successfully proceeding under a *Monell* claim (a jurisdiction is deliberately indifferent to officer conduct).

3. Moreover, adopting more stringent departmental policies would not disadvantage Madison in federal court given the irrelevance of such policies to claims of constitutional violations. The major financial losses incurred by the City of Madison in policing-related lawsuits have been in federal civil rights suits claiming constitutional violations, pursuant to 42 U.S.C. § 1983. Risk of losses under state law claims is far more limited (given various restrictions in state law – general discretionary act immunity, strict caps on damages, strict notice deadlines, etc.).

Wisconsin falls in the Seventh Federal Circuit. The precedent in the Seventh Circuit (binding federal courts within the Circuit's jurisdiction) is set by *Thompson v. City of Chicago* (2006), which affirmed that police policies, practices, and procedures are irrelevant to civil rights (section 1983) excessive force claims (and can be excluded from evidence). This is grounded in the U.S. Supreme Court decision *Whren v. United States* (1996). As the decision in *Thompson* states:

> The fact that excessive force is "not capable of precise definition" necessarily means that, while the CPD's General Order may give police administration a framework whereby commanders may evaluate officer conduct and job performance, it sheds no light on what may or may not be considered "objectively reasonable" under the Fourth Amendment….. [T]he violation of police regulations or even a state law is completely immaterial as to the question of whether a violation of the federal constitution has been established.

Thus, in Wisconsin, evidence that an officer violated a policy is not evidence that the officer violated the 4th Amendment. Though, as held in *Lynn v City of Indianapolis* (2015), evidence that an officer complied with a departmental policy can be used to help establish that an officer's actions were "objectively reasonable."

Given the huge human and societal costs of officer-involved shootings, it is desirable to promulgate policies that provide guidance beyond *Graham v. Connor*. The Ad Hoc Committee thus endorses this recommendation and welcomes the flexibility recently shown by MPD on this matter.