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Zap! Should the State Keep Shocking Citizens to Enforce Minor Laws?

By *Conor Friedersdorf*

While jogging near his home in San Mateo County, California, Gary Hesterberg, a 50-year-old electrician, felt sharp metal barbs strike him in the back. He fell forward, his face hitting broken asphalt, as thousands of volts of electricity surged through him. The current caused his nervous system to fail and his muscles to seize. He lay on the ground, momentarily paralyzed, in pain he later described as the most intense he'd felt—worse than breaking his collar bone or having his hips replaced. Due to a heart condition, he feared he would die as he writhed on the ground.

The person who propelled steel-tipped barbs into his back at 160-feet-per-second, sending five seconds of electric current through his body, was not a deranged serial killer or a robber or a romantic partner's jealous ex. It was Sarah Cavallaro, a park ranger patrolling the Golden Gate National Recreation Area. She deployed her taser in the jogger's back to stop him from leaving a crime scene.

He'd been jogging with his rat-terrier off leash.

Tasers have been purchased for law-enforcement agencies all over the United States by policymakers who imagined they'd facilitate protecting the public with *less* force. Their rise has instead led to an epidemic of cases—a sample is on YouTube*—where officers deploy the debilitating weapon in instances they regard as justified, but that strike many citizen observers as unjustified, draconian, and immoral. Officers in these cases appear to believe that they're justified in brutally shocking anyone who disobeys them, even if the person poses no danger to the public.

In the civil-rights lawsuit *Gary Hesterberg v. United States of America*, the electrician sought damages for his treatment at the hands of the National Park Service. In response, the federal government explicitly defended the notion that it is permissible to tase an unarmed citizen in the back while enforcing something as trivial as an off-leash violation (in a wilderness area where off-leash dogs were tolerated for years). During testimony, Hunter Bailey, the deputy chief of law enforcement for the National Park Service, maintained that a park ranger would be legally justified in tasing even "a 9-year-old girl" or "a pregnant woman" if they were caught walking a dog off leash and tried to leave the scene against a ranger's orders, as Hesterberg did. This institutional mindset leads directly to violent civil-rights violations, as a federal court ultimately ruled in this important suit. The National Park Service now owes the jogger that it victimized \$50,000 in damages. And law enforcement is on notice that the

Constitution forbids tasing so needlessly.

* * *

Prior to 2012, the Rancho Corral de Tierra, a 4,000-acre recreation area on the Northern California coast, was managed by San Mateo County. On paper, that jurisdiction forbids walking dogs off leash, but in practice, dog owners were permitted to do so on the relatively quiet, remote trails near Gary Hesterberg's house. In recognition of that fact, the National Park Service decided that after taking control of the area, it would assign rangers to go out on the trails and issue informational warnings to offending dog owners rather than issuing them citations. Cavallaro was deployed to carry out these orders on the very first day that federal authorities were patrolling the land they'd recently acquired. It was January 29, 2012.

Late that afternoon, Hesterberg was jogging in the Rancho Corral de Tierra with his pet beagle, leashed because it didn't always obey his voice commands, and his unleashed rat terrier, JoJo, an obedient dog that always stayed within 15 feet of him. They set off down a lightly used single-lane road paved with broken asphalt. A mile and a half into his jog, Hesterberg saw a woman in a green uniform in the distance. He instinctively leashed his dog even before she approached.

Cavallaro wore a jacket with a National Park Service patch and a duty belt outfitted with a gun, a taser, a baton, and a radio. She told Hesterberg that she wouldn't be issuing him a citation for failing to leash one of his dogs during their jog. Rather, she'd give a warning as "this is going to be an educational experience for the local residents." One might expect that having delivered this information she'd regard herself as having discharged her duties and permit man and leashed dogs to be on their way. Instead, she insisted that Hesterberg provide her with his identification.

Hesterberg was annoyed and a bit confused. He accepted that it was unlawful to jog with his dog off leash. But he says he was uncertain about the identity of the woman in the green uniform and whether she had the authority to question and detain him. He testified that he initially regarded her as the equivalent of a state park ranger, someone who could perhaps give him a ticket, but wasn't like a police officer who could interrogate or detain him. In any case, he didn't have an ID on him. Pressed for identifying information, he gave his real birth date and address, as well as his real first name, but made a split-second decision to give a false last name because he didn't want to end up on a government list or something. If mere educational warnings were being offered, why did she need his name anyway?

Cavallaro's reasoning will be known to those familiar with the law-enforcement mindset, wherein any infraction, no matter how minor, is used as a pretext to detain someone while checking whether there are any warrants out for their arrest, even when there is no reason or probable cause to imagine that might be the case. At trial, Cavallaro testified that she sought to establish Hesterberg's identity for several reasons: 1) to check for outstanding warrants; 2) to put the offender's name on a government list of leash-law violators in order to identify repeat offenders; 3) to collect information pertaining to ongoing litigation about leash laws; 4) to increase officer safety by establishing the identity of an on-duty contact.

As Cavallaro radioed the name, address, birthdate, and fake last name to law-enforcement colleagues, a young married couple happened upon the scene. The husband, James Babcock, approached to ask why a park ranger was there, as "it was such an unusual circumstance." He too expressed uncertainty,

asking, "What is your authority here?" At no point did Cavallaro say, "I am a park ranger, a sworn federal officer of the National Park Service. As of this month, we're the agency that lawfully patrols here. I have every bit as much authority as a police officer has." In court, she offered this description of her mindset upon the couple's arrival:

I was on a law-enforcement contact with what I believed was Mr. Jones. So, that is my primary focus. I have to have a general awareness of the overall scene. Folks often try to interject themselves into law-enforcement contact. Particularly on a trail setting like that. And, so, it's—it goes back to my divided attention and everything that I need to be focusing on which is, you know, sort of the universe, so to speak, in kind of a broad term, just the—you know, the time of day, who else is on the trail, where my backup is, the radio, Mr. Hesterberg, his body language, the Babcocks, their question, Mr. Babcock, Mr. Hesterberg's questions, all of that was stuff that I was now having to focus on.

Babcock's skeptical questions reinforced Hesterberg in his own skepticism, and he persisted in pressing Cavallaro for information about her role and authority in the park. Unsatisfied with her answers, he announced that he was going to continue his jog. She replied "What?" ("As if in disbelief," she later explained, "not that I didn't hear him.") In subsequent testimony, she counterintuitively explained that her confused incredulity was a result of Hesterberg's straight-forwardness:

... we talk about people are going to telegraph what they're going do. You're watching for their body language. You know, if someone kind of keeps looking in a particular direction, that's typically an indicator that something in that direction is of interest to them, or they might be heading in that direction. If someone drops their shoulder it might mean they're cocking back to maybe swing at you. So, you're—so, you're looking for different things. So when we talk about telegraphing, it's usually minor things, the nuances of people. You're not expecting that telegraph to actually be an announcement that someone is leaving.

Cavallaro responded that he was not free to go, causing Hesterberg to resume his questions about her authority to detain him. She did not respond to those questions, and meanwhile ordered the Babcocks to vacate the scene. They watched from a few dozen feet away. Around the same time, dispatch radioed back that they didn't have any record of a Gary Jones in the city Hesterberg provided.

Cavallaro responded by asking for backup, knowing that "the closest ranger to her was north in San Francisco, which is about a 25-minute drive away. Dispatch summoned San Mateo County Sheriffs, who were much closer, along with two rangers from San Francisco and one ranger from Marin County, who was even farther away from Cavallaro." At that point, the dog-leash violation commenced to occupy at least some of the attention of law enforcement in three different counties!

At trial, Cavallaro explained why she called backup for an encounter with an unarmed, middle-aged man in jogging shorts with two docile dogs in tow:

... it was the managing of the three people instead of two, the barrage of questioning that was, you know, challenging of my authority. And, the fact that I'm now getting further information with the 10-74 not on file, which means negative, there are no wants or warrants for a Mr. Gary L. Jones with that date of birth. But, that there's no Gary L. Jones on file in the entire California,

the CLETS system. So, there's no warrants for that person, but this person doesn't exist ... with that date of birth So, those are some red flags starting to go off.

At some point, Hesterberg again announced that he was leaving and started to jog away. Cavallaro grabbed his arm to stop him. "Hesterberg stopped, pulled his arm away from Cavallaro, asked if he was under arrest, and expressed incredulity that Cavallaro would not let him go," the court found. "Cavallaro did not answer Hesterberg's question." Shortly after, Cavallaro told dispatch, "This guy's tried to run on me twice." Hesterberg again announced his intention to be on his way.

The court says of the climactic moment:

In response, Cavallaro drew her taser, pointed it at the center of Hesterberg's chest, and ordered him to put his hands behind his back. Hesterberg did not put his hands behind his back and instead asked her sarcastically and in disbelief, "What, you're going to tase me now?" Hesterberg also told Cavallaro something close to, "Don't tase me, I have a heart condition." Cavallaro responded, "Well, then turn around and put your hands behind your back."

Hesterberg again did not put his hands behind his back. Mr. Babcock, who was with his wife 20 to 30 feet away, commented something along the lines of, "Don't you think this is a little excessive?" Hesterberg remained at taser point for approximately the next four minutes. Cavallaro and Hesterberg were facing each other on opposite sides of the trail—Cavallaro facing west and Hesterberg facing east—and approximately 12 feet apart. During this time, Cavallaro was on her radio giving directions to her location. Hesterberg was also repeating his questions to Cavallaro regarding her authority to detain him. Cavallaro eventually answered that her authority was "the Constitution."

Hesterberg responded: "that is no kind of answer. Come on, dogs, we're leaving." Hesterberg turned to his right and began a slow jog south on the trail and got two to three strides into his jog when Cavallaro fired her taser in dart mode, striking Hesterberg in the back and buttock. Cavallaro did not give any verbal warning just before tasing Hesterberg, though she did order him to stop.

Cavallaro was prepared to tase him again if he tried to leave, having judged it better to shock a rogue dogwalker than to let him leave the scene. But he didn't flee again:

Besides eliciting a cry of agony, the taser incapacitated Hesterberg, causing him to fall face first on the trail's degraded asphalt. Hesterberg testified that on a scale of one to ten, the pain from the taser was a ten. Hesterberg hoped that he would not die.

After the taser's five second cycle, Hesterberg was on his back, eyes closed. Cavallaro checked for signs of extreme distress, including whether Hesterberg was breathing (he was). Cavallaro then ordered Hesterberg to roll onto his stomach so she could handcuff him, but Hesterberg was unable to immediately comply. Cavallaro, however, believed Hesterberg was intentionally refusing to comply and stated over the radio, less than a minute after she fired her taser, that Hesterberg was "refusing commands to turn around and get on his stomach." Cavallaro testified that she believed Hesterberg's inaction was willful because he eventually did get up and because

“after the five-second burst of the Taser, there would be no further neuromuscular interruption.”

She'd shot steel barbs into his back and sent through his body an excruciating electric current that overrode his muscles and temporarily paralyzed him, *but that had ended several seconds before*. What excuse could there be for not promptly rolling over? By then, another passerby had stopped to witness the scene. He assessed it differently. "I've never seen anything like it," local resident John Bartlett would later tell the press. "I'm 77 years old, never had such an emotional reaction to something. I didn't know if the guy was dying—for a leash on a dog."

When police arrived, Hesterberg informed them of his real last name, saying that he'd have given it from the beginning had he understood that Cavallaro was a duly empowered law-enforcement officer who was legally entitled to ask for ID. He was handcuffed and taken to jail. The witnesses agreed to take his dogs home and notify his wife. "Cavallaro cited Hesterberg with three violations, all under state law," the court notes, "1) failure to obey a lawful order; 2) providing false information; and 3) walking dog off-leash. The first two violations are misdemeanors, while the off-leash violation is merely an infraction. The San Mateo County district attorney declined to pursue any charges against Hesterberg." The NPS was pilloried in the local press, but its Office of Professional Responsibility declined to take disciplinary action against Cavallaro.

Hesterberg sued, alleging battery and negligence (along with other allegations like false imprisonment that were summarily dismissed). As the court would explain in its ruling, "the test for whether force was excessive in violation of the Fourth Amendment is 'objective reasonableness.'" Did Cavallaro act reasonably when she tased Hesterberg? It isn't exactly right to say the NPS was enthusiastic about its employee's behavior. It couldn't help but see how counterproductive it was to raise the ire of a community's residents just as it were beginning to patrol in their area, and a supervisor told Cavallaro that it would be better to let someone leave if similar circumstances ever recurred. At the same time, they zealously defended Cavallaro's behavior in federal court, using legal arguments that would arguably set problematic precedents.

"While Plaintiff would soon have been free to continue with his jog if he had answered Ranger Cavallaro's request for information truthfully, Plaintiff instead single-handedly and unnecessarily manufactured a confrontation by lying about his identity," the government argued. "By lying about his identity, Plaintiff transformed a routine law enforcement contact into a cause for serious concern by law enforcement, which is reflected in the fact that Ranger Cavallaro immediately radioed for backup after receiving her dispatcher's no-match. Having gotten trapped in his lie, and thereby put himself at risk that Ranger Cavallaro would realize his second and more significant crime of lying to a law enforcement officer, Plaintiff sought to avoid detection, alternatively by trying to leave the scene or by badgering Ranger Cavallaro about the basis for her lawful authority to detain him."

The state's trial brief, signed by U.S. Attorney Melinda Haag, continues (emphasis added):

Through his defiant and increasingly belligerent behavior during the encounter, **Plaintiff gradually exhausted all of Ranger Cavallaro's less forceful efforts to detain him ...** Now faced with a suspect who had lied about his identity, disobeyed repeated verbal orders, and physically resisted her attempts to detain him with hands-on techniques, Ranger Cavallaro

elected, reasonably, to display her Taser to Plaintiff, in order to communicate, once again, that she was unwilling to let him flee the scene before she had established who he was—as she was lawfully entitled to do ...

Plaintiff forced her hand. He turned, once again, to leave the scene. Ranger Cavallaro responded, predictably, by deploying the Taser she had been point at Plaintiff for several minutes. Her decision to do so was not knee-jerk, and it was not punitive. Rather, having exhausted other efforts to detain Plaintiff through less forceful means, Ranger Cavallaro made a reasonable choice to apply force, defuse the situation, and finally overcome Plaintiff's active resistance ...

In this telling, Hesterberg alone was responsible for needlessly escalating a stop for a minor infraction and "forced" Cavallaro to shock him with metal barbs and wires.

The case turned, in part, on how much of an interest the state has in compelling citizens to comply with the orders of law enforcement in stops for minor infractions. The state's position: the interest is significant enough to justify electrical shocking. Its argument at trial presented the altercation as a National Park Service success! "The Taser worked as intended—immobilizing Plaintiff, gaining his compliance, achieving his detention and arrest, and all with minimal injury and without increasing the physical risks to Ranger Cavallaro from further hands-on confrontation," the state's trial brief states. "As the evidence will establish, given the limited options available to Ranger Cavallaro under the circumstances, deploying the Taser was a reasonable decision, properly made in order to keep a resistive suspect in custody and, finally, to resolve the question of his identity."

Another passage in the state's trial brief suggests that an aversion to telling a park ranger one's identity is itself reason to suspect someone is guilty of a serious crime:

Plaintiff's failure to identify himself created a very significant law-enforcement problem, and Ranger Cavallaro's actions reflect her reasonable judgment that it was important for her to figure out the identity of someone who had given a false name and tried repeatedly to flee detention over something as unremarkable as a leash-law violation. Of course, this Court is able to look back on the encounter with a full evidentiary record and to discern that the Plaintiff is, in fact, Gary Hesterberg—someone who actually was not trying to avoid apprehension under an outstanding criminal warrant, but instead was simply being disagreeable and hostile about a routine leash-law contact. But Ranger Cavallaro did not and could not have known that at the time when she was faced with a decision about whether either to deploy her Taser or, in effect, to let Plaintiff escape.

This chain of reasoning is common among law enforcement—a stop for any infraction, no matter how minor, warrants temporary detention to check for warrants; an aversion to that process is itself reason to presume that a citizen is hiding serious wrongdoing; it is imperative to prevent such a "suspect" from fleeing. That's the chain of reasoning that makes many officers think it is reasonable to shock a man in a stop over walking a dog on a trail without a leash. The significant of this case: A court, assessing the same fact pattern, declared that the National Park Service violated this man's Fourth Amendment rights.

The state declared: "The Fourth Amendment must be construed to allow a law enforcement officer to use intermediate force to detain an unidentified, disobedient, and resistant fugitive." Perhaps surprisingly, the court strongly disagreed.

* * *

U.S. Magistrate Judge Jacqueline Scott Corley wrote the opinion sustaining Hesterberg's battery and negligence claims and awarding him damages of \$50,000. In doing so, she enumerated a number of factors that she regarded as cutting in favor the state's arguments. Some afford an interesting glimpse at the contestable assumptions judges make about citizen encounters with law enforcement.

"Hesterberg's action in pulling his arm away from Cavallaro, though a single instance of physical resistance ... and his attempt to flee generally weighs in favor of some use of force," Corley wrote. "Further, the Court again rejects Hesterberg's revived argument that his flight cannot be considered because he was not fleeing from a detention, not an arrest." All that sounds reasonable enough.

She is on less solid ground in the following finding:

To the extent Hesterberg argues that the false name can be justified because Cavallaro failed to identify herself as a law enforcement officer, the Court is not persuaded. As an initial matter, the Court notes that the salient question is not whether Hesterberg knew that an NPS park ranger has the same authority as a police officer; rather, what matters are the facts relevant to Hesterberg's knowledge of Cavallaro's general authority to enforce the law. On that measure, Hesterberg testified that had he known Cavallaro was a law enforcement officer, he would not have lied to her and he would have corrected his lie once he found out who she was. To Hesterberg, Cavallaro was simply someone in a green uniform.

The Court does not find Hesterberg credible on this issue. On the day in question, Cavallaro wore her green duty uniform, which includes a duty belt that contains a multitude of law enforcement tools, including a gun and, of course, a taser. A reasonable person who sees this belt would understand that Cavallaro was highly likely to be some kind of law enforcement officer. The duty belt is also large, rather bulky, and easily visible. It strains credulity to believe that Hesterberg did not see it at any point in the 15-minute encounter with Cavallaro. Her uniform that day also included a jacket that had an NPS patch badge and Cavallaro's embroidered name. Although Cavallaro's medal badge was concealed under the jacket, the patch badge was nevertheless consistent with the signs pointing to Cavallaro's law enforcement role.

A person with a uniform, a patch, and a utility belt may well be a law-enforcement officer. Then again, he or she might be a private security guard of the sort we've all encountered at shopping malls or patrolling guard-gated communities. Even knowing that Cavallaro was a "park ranger" of some sort, countless "reasonable Americans" would be confused as to how much authority such a position confers. Approaching several strangers on the street near my house and asking whether a park ranger has more, less, or the same authority as an LAPD officer, I got a wide range of uncertain answers. "I'd guess they have more authority than a lifeguard but not as much as, like, an FBI agent," one woman told me. I then asked her what authority she believes a lifeguard to possess. "Actually, I have no idea," she said.

It's also relevant that law-enforcement officers routinely mislead citizens by giving them the

impression that they're not free to leave an encounter when, in fact, saying the magic words, "Am I being detained?" would result in a "no." More broadly, people in uniforms, from shopping-center security guards to officers of public-transportation systems, routinely give unlawful orders (for example, "You're not allowed to take photographs here,") sometimes because they're ignorant of the law, other times because they assume others are ignorant of the law. Remember, law-enforcement officers are legally permitted to lie to citizens.

Hesterberg's true mindset is impossible for us to know. But it is certainly plausible that he was genuinely skeptical that Cavallaro, an unknown person in an unfamiliar uniform from an agency that had just taken jurisdiction in the park, had the lawful authority to interrogate and detain him for walking a dog off leash. Indeed, another passerby who stumbled onto the scene expressed identical skepticism, and Cavallaro's statement that she was empowered to detain Hesterberg by "the Constitution" gave him an additional reason to be skeptical of her truthfulness. After all, that explanation both sounds like and actually is bullshit.

Corley also writes:

Hesterberg was likely aware of Cavallaro's authority when Cavallaro took Hesterberg's partially false identifying information, radioed it to her dispatch, and waited several minutes for verification from dispatch. While Hesterberg admits that he assumed that the ensuing delay was because Cavallaro was waiting for a response from the dispatcher, he denies that he had any inkling why the response was delayed. The Court, however, finds it difficult to credit Hesterberg's denial. The reason for the delay should have been obvious to him—he gave a false name to avoid his real name being put into a database, Cavallaro radioed his information to dispatch prior to putting it into the database (which he may not have expected when he lied), and dispatch could not match the partially false identifying information with law enforcement records. The Court fails to conceive of any other logical reason that could have explained the delay under the circumstances known to Hesterberg.

It seems to me that a reasonable person who falsely gave the name "Gary Jones" to a park ranger would only expect it to result in trouble if, upon radioing the name in, there was an outstanding warrant for a Gary Jones. Put another way, the typical 50-year-old citizen with no arrest record does not think, "There is a comprehensive database out there that permits law enforcement to verify anyone's identity based on name and birthdate." Rather, they think, "law enforcement keeps a list of bad guys, but not a list of everyone. They get suspicious when you seem to be a bad guy, not when your name isn't in their system." This may be naive in our era of overzealous surveillance and big data, but reflects the belief of many, the impression that law enforcement gives when discussing its activities, and the way a majority would want law enforcement to operate.

Even if these assumptions are unduly friendly to the state's case, however, the final outcome was unaffected, for Corley's more significant findings were as follows:

"This case involves an almost imperceptibly low government interest in apprehending Hesterberg ... Cavallaro had probable cause to arrest Hesterberg for only the dog-leash violation and disobeying her lawful orders to stay and to put his hands behind his back ... these are non-serious offenses on their face."

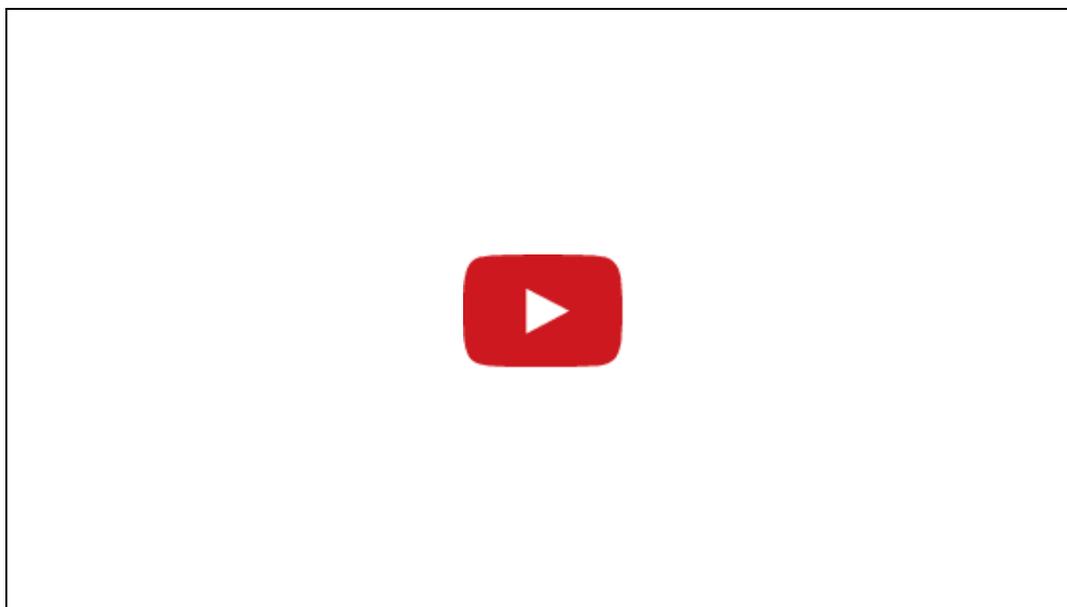
"Cavallaro and her superiors viewed leash-law violations on January 29, 2012 as not meriting even a citation the Court fails to see how the government can now plausibly claim its interest in pursuing such violations was so high as to necessitate Hesterberg's capture with near-maximum non-deadly force."

"Hesterberg was nonviolent and posed no threat to Cavallaro or anyone else; thus, the government had no interest in capturing him because of a danger he posed."

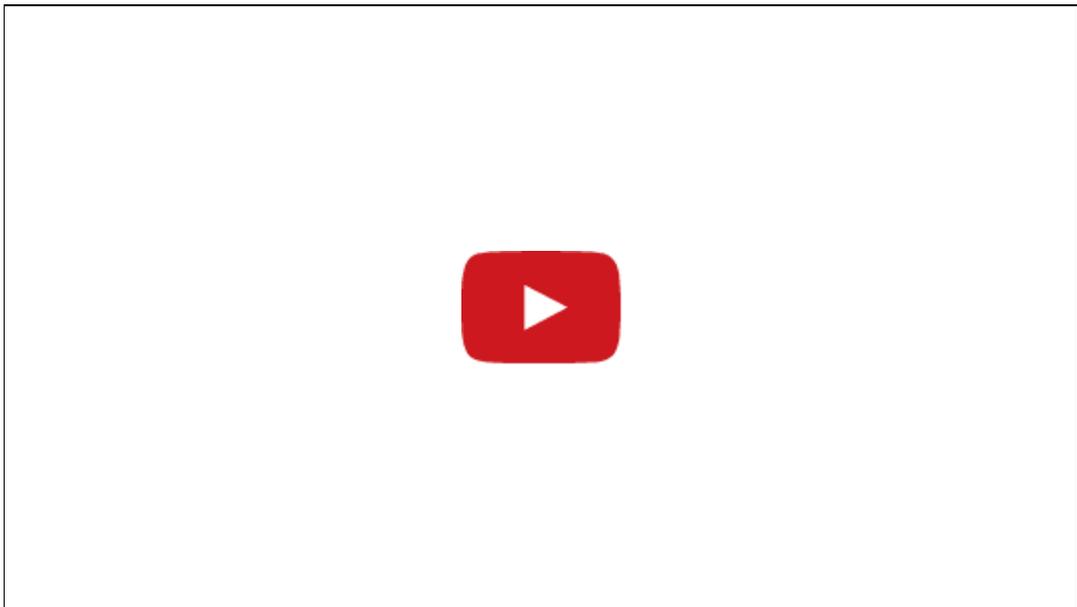
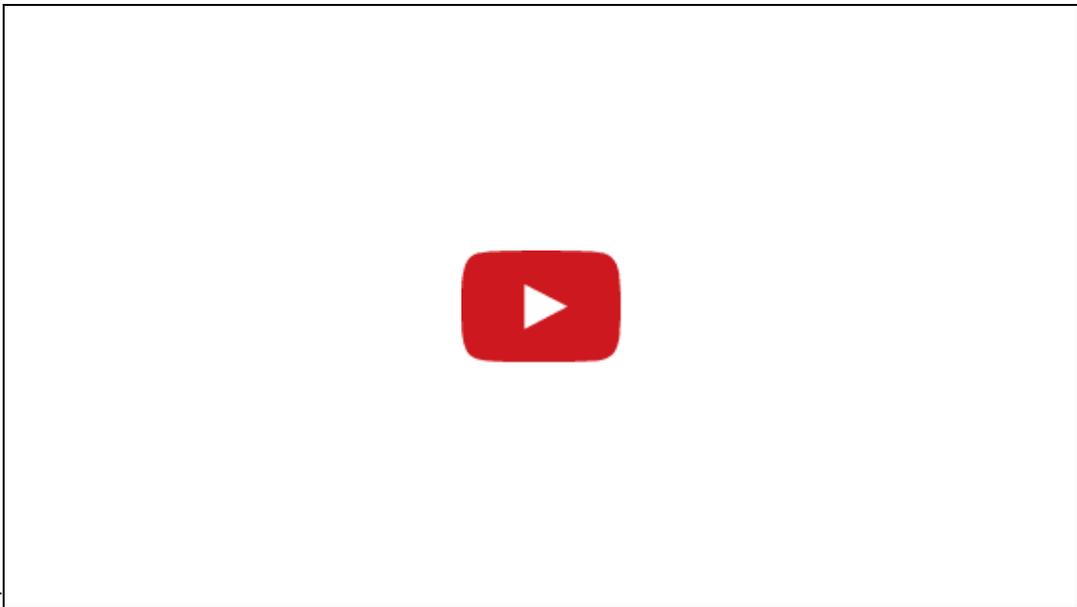
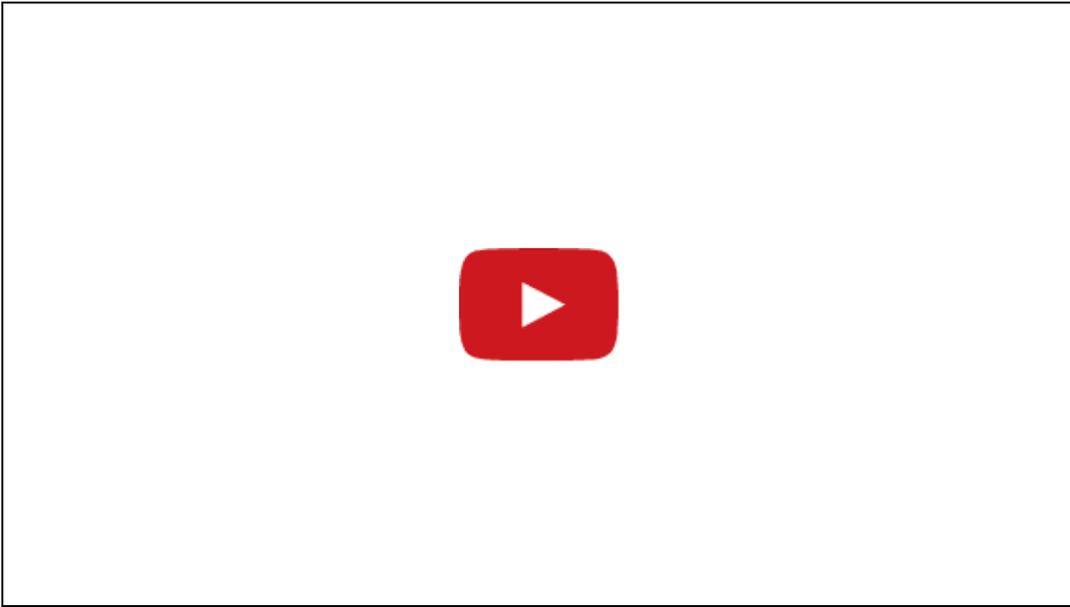
The bottom line: "the intrusion on Hesterberg's Fourth Amendment interest to be free from being tased," the court ruled, "greatly outweighs the minimal governmental interest in apprehending him for his violations of the law." The ruling goes on to declare, in what is arguably the most important passage that Corley published, "The government's primary contention is that, outside of the deadly force context, a law enforcement officer is never required to let a suspect flee and may always use intermediate force to apprehend a fleeing suspect if the officer exhausts her use-of-force options. But there is no rule that using non-deadly force to capture an unidentified law-breaker is per se reasonable."

In an era of Taser-happy police, that corrective is long overdue.

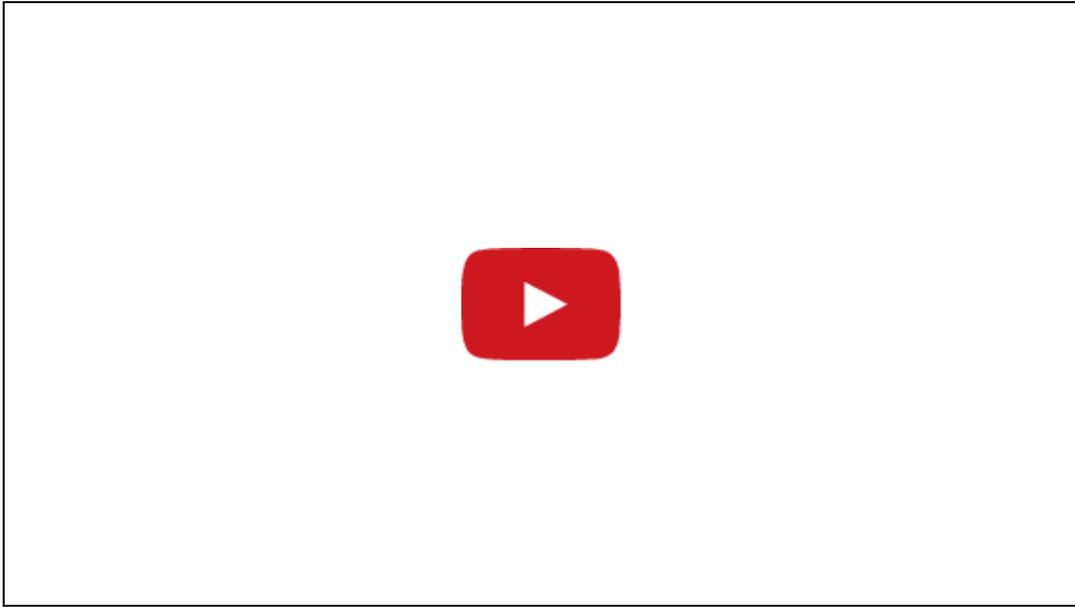
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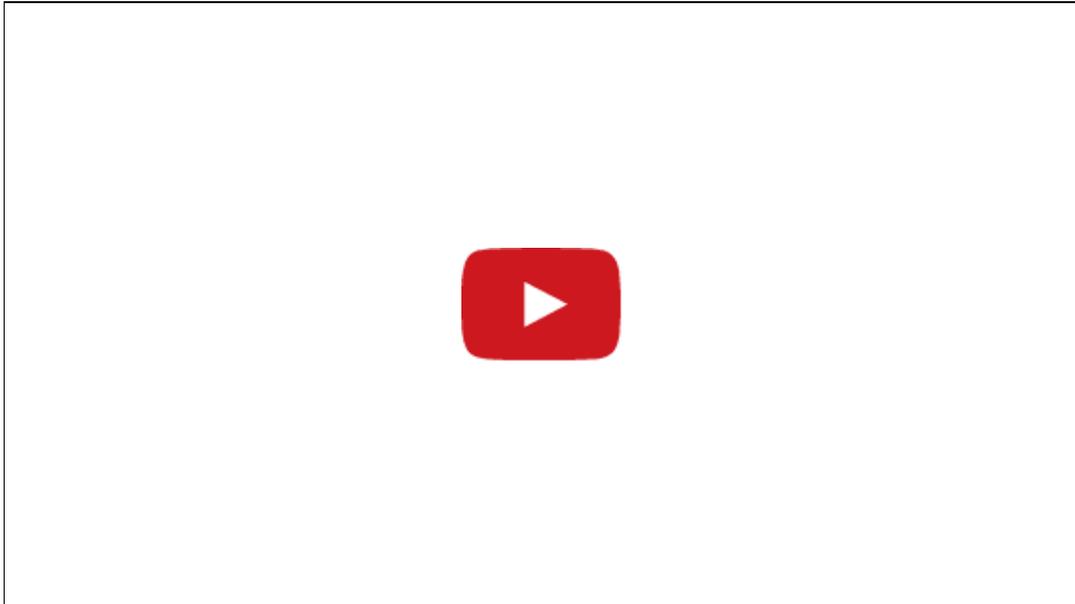
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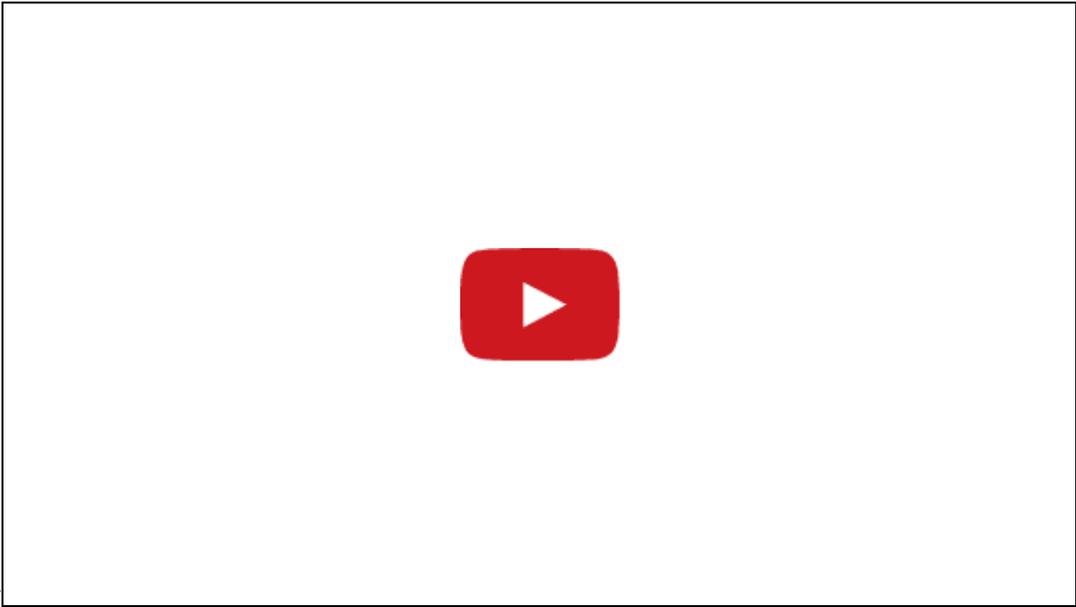


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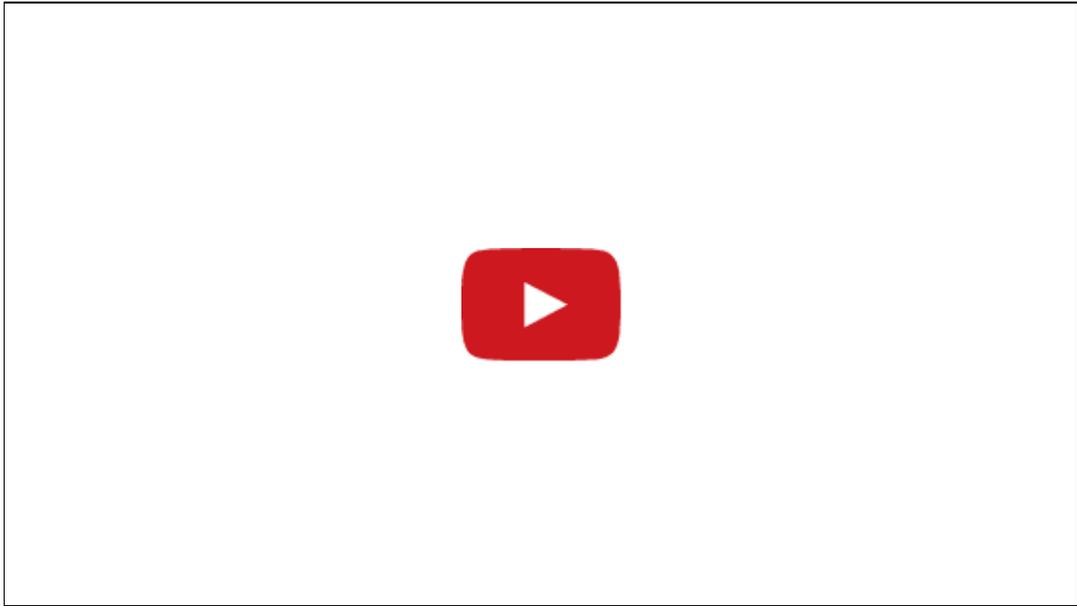
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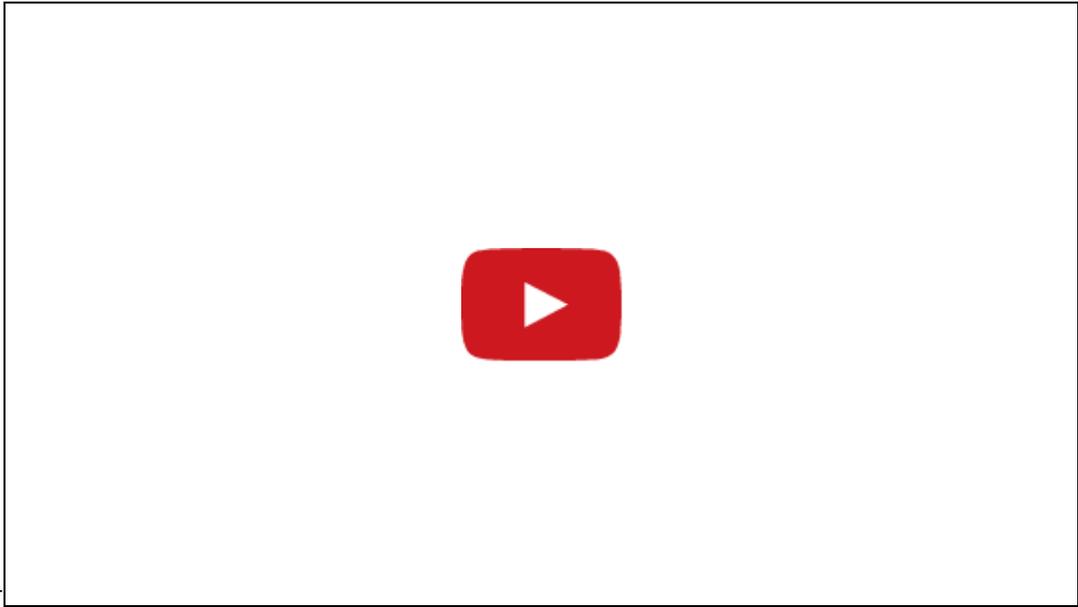




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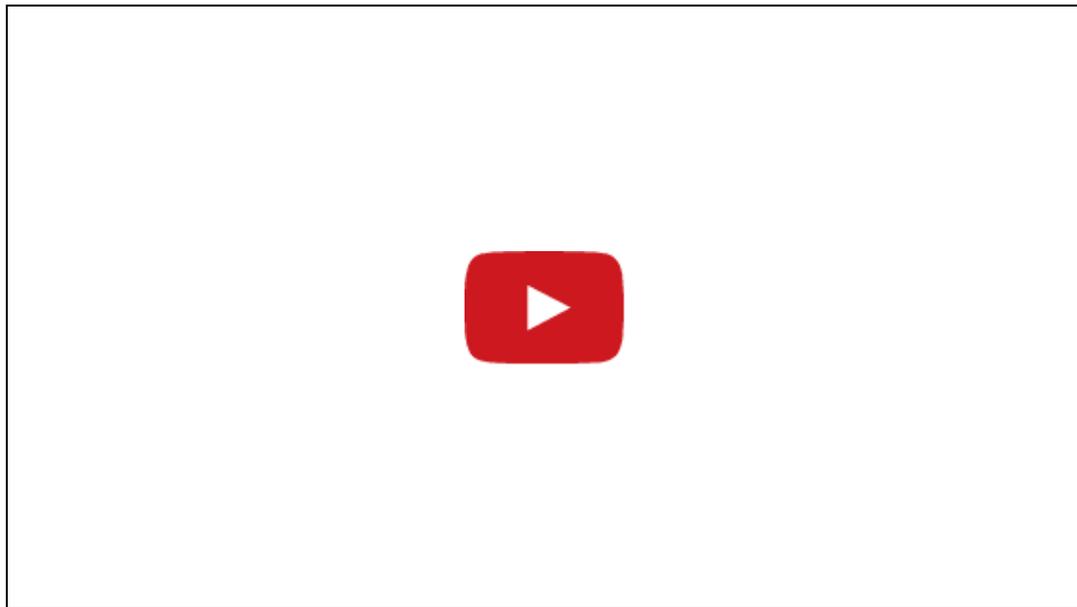
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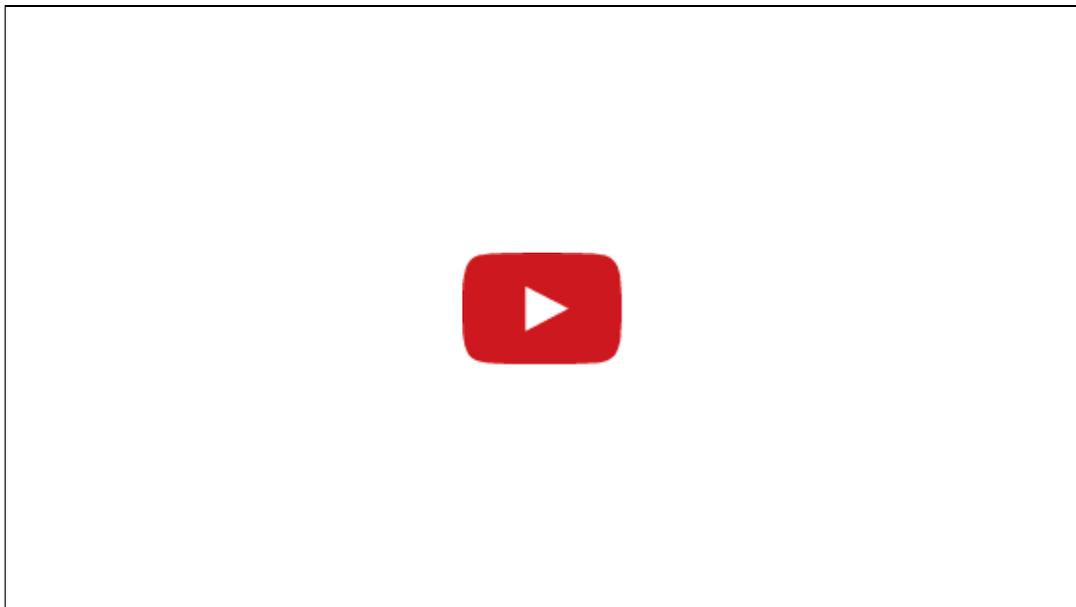


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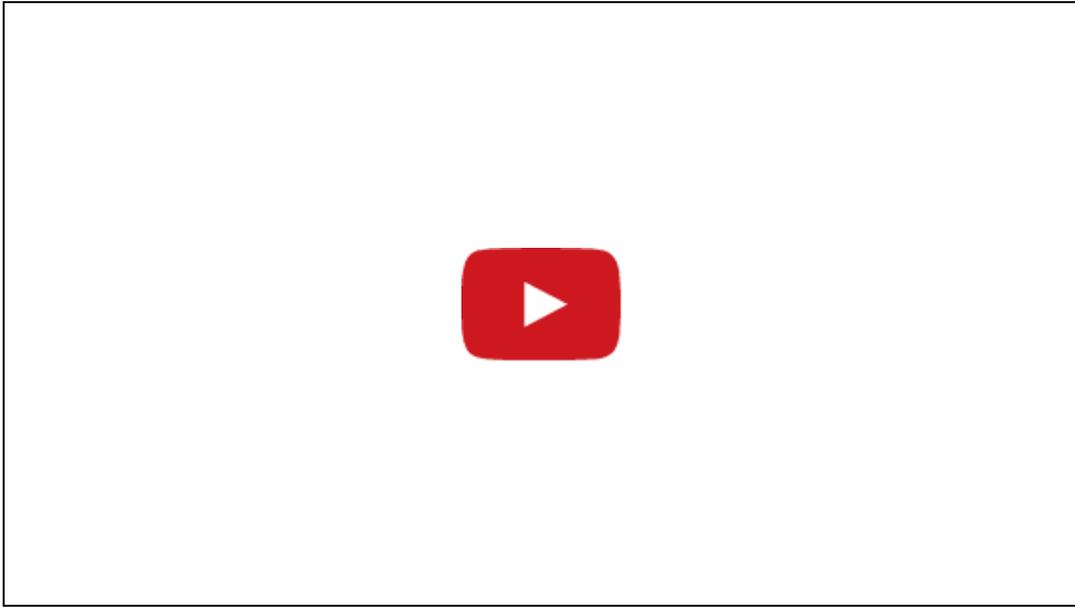
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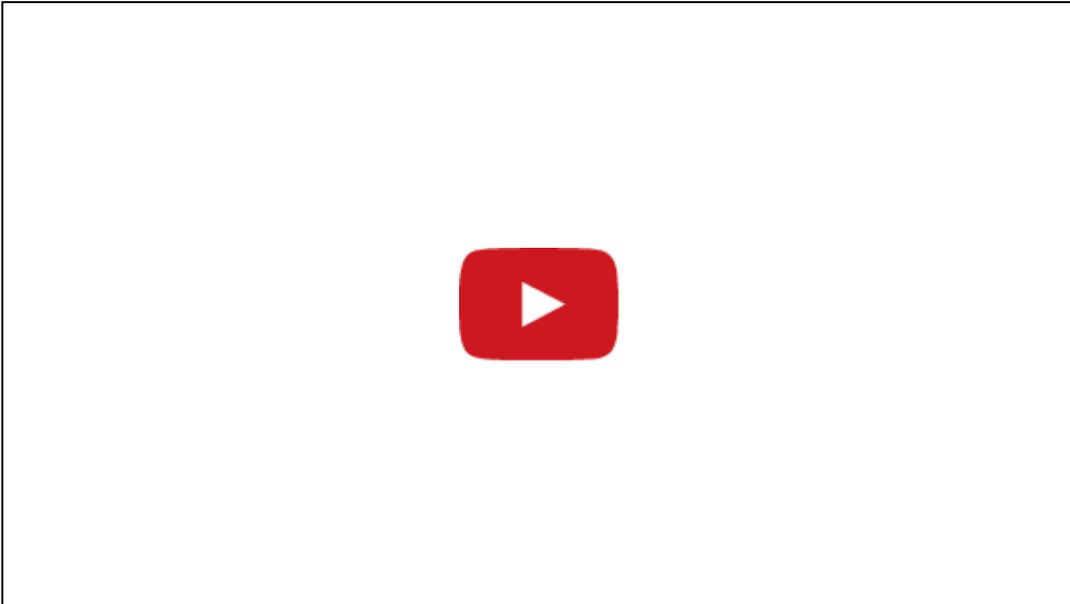
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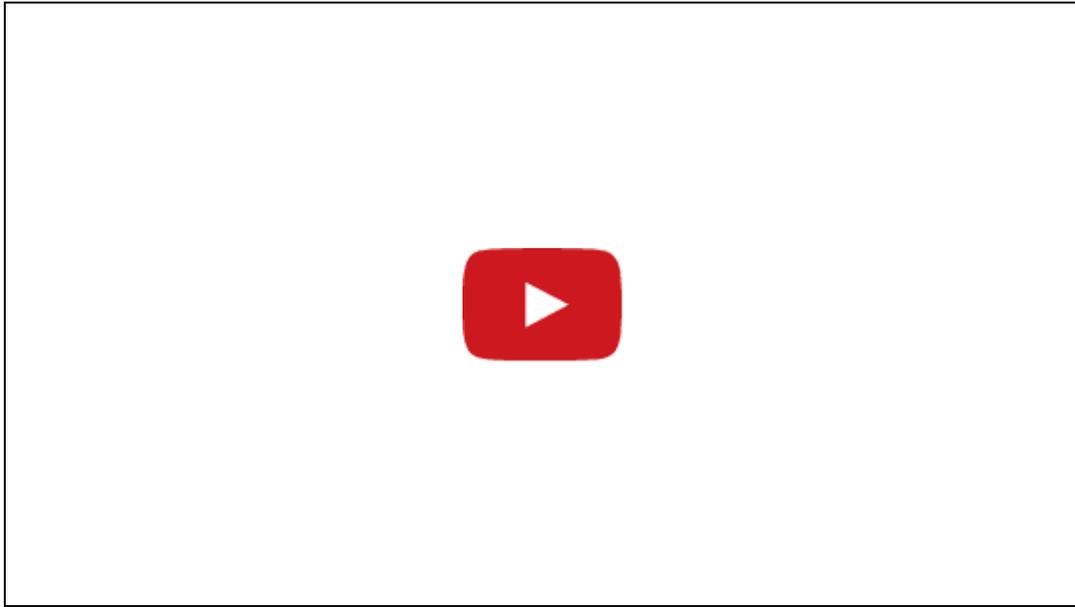
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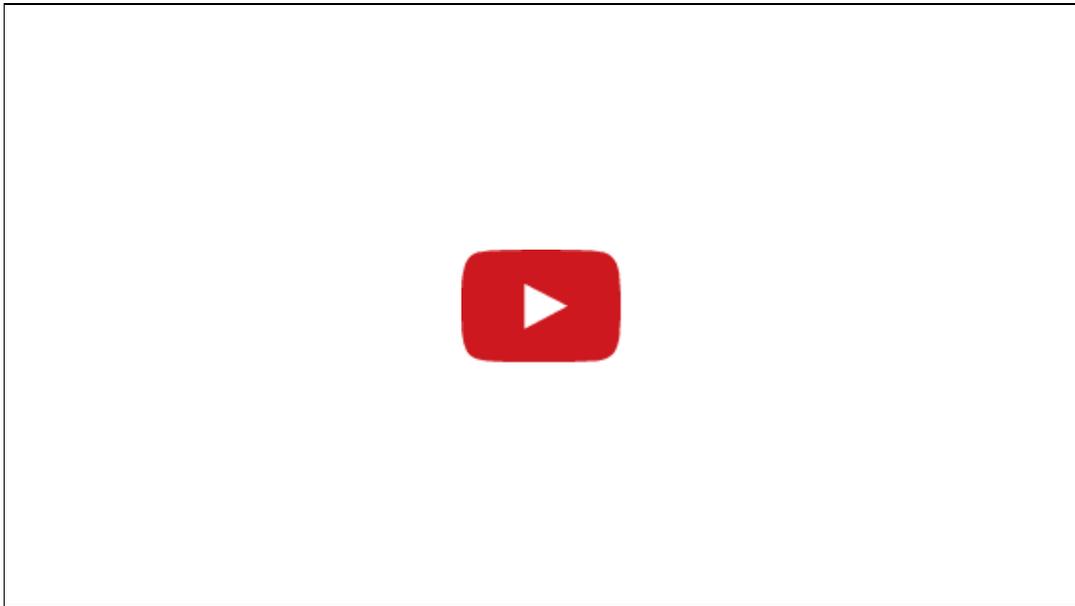
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