Criminal Culpability, Civil Liability, and Police Created Danger: Why and How the Fourth Amendment Provides Very Limited Protection from Police Use of Deadly Force†

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A Fourth Amendment Story

On November 22, 2014, two Cleveland, Ohio police officers received a call to investigate a guy with a gun outside a rec center.[1] The caller told the 911 dispatcher the gunman was "probably a juvenile" and that the gun might not be real; however, dispatch did not communicate those points to the officers.[2] The police were only told by the dispatcher that there was an active shooter in the park.[3] The police officers arrived at the park, immediately exited the vehicle and fired a lethal shot, killing the "guy" with a gun—12-year-old Tamir Rice.[4] Surveillance video of the shooting showed that the police arrived at the scene, and Officer Timothy Loehmann fired his weapon within two seconds.[5] Nevertheless, at the recommendation of county

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1 *See* Press Release, Cuyahoga Cty. Prosecutor, Timothy J. McGinty, Statement from County Prosecutor Timothy J. McGinty on the Decision of the Grand Jury in the Tamir Rice Case (Dec. 28, 2015), (http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/2015-1-28%20Statement%20on%20Grand%20Jury%20decision%20in%20the%20Tamir%20Rice%20case%20(00000002).pdf).

2 *See id.*

3 *Id.*

4 *Id.*

5 Laura Westbrook, *Tamir Rice Shot Within Two Seconds of Police Arrival,* BBC (Nov. 27, 2014), http://www.bbc.com/news/av/world-us-canada-30220700/tamir-rice-shot-within-two-seconds-of-police-arrival.

prosecutor Tim McGinty, the grand jury declined to indict the officers for the death of Rice.[6]

When questioned as to how a 12-year-old boy was shot after the caller said the person with the gun was a juvenile and that the gun was most likely a toy, the answer was miscommunication.[7] According to his statement:

> Minutes before, they had been assigned to respond to a Code One report of a 'guy' pointing a gun at 'people' . . . . [T]he police were prepared to face a possible active shooter in a neighborhood with history of violence. There are in fact memorials to two slain Cleveland Police officers in that very park. And both had been shot to death nearby in the line of duty. Police are trained that it takes only a third of a second to draw and fire a weapon at them—and therefore they must react quickly to any threat. Officer Loehmann had just seen Tamir put an object into his waist as he stood up in the gazebo and started walking away. A moment later, as the car slid toward him, Tamir drew the replica gun from his waist and the officer fired. Believing he was about to be shot was a mistaken—yet reasonable—belief given the high-stress circumstances and his police training. He had reason to fear for his life.[8]

Regarding the police mistake, McGinty said the, "police officers and the police department must live with the awful knowledge that their mistakes—however unintentional—led to the death of a 12-year-old boy. So will the police radio personnel whose errors were a substantial contributing factor to the tragic outcome."[9] In addition to the failure of the 9-1-1 staff to properly relay the full facts to the police, McGinty commented, "[i]f the color and design of Tamir's pellet gun had screamed 'toy' then the call that set this tragedy in motion might never have been made."[10]

McGinty acknowledged Rice's death "as an absolute tragedy" but asserted that the shooting was not a crime.[11] McGinty explained that "to charge police . . . the State must be able to show that the

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6 Press Release, Cuyahoga Cty. Prosecutor, *supra* note 1.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

officers acted outside the constitutional boundaries set forth by the Supreme Court of the United States. Simply put . . . human error, mistakes[,] and miscommunication . . . did not indicate criminal conduct by police."[12] McGinty explained that a critical examination of the surveillance video showed Rice "drawing the gun from his waist" as the officers' vehicle approached the scene. Based on the report from dispatch, and the rapidly unfolding events, McGinty asserted that the video established self-defense and reasonableness of action by the officers.[13]

McGinty's analysis of parameters of the Fourth Amendment law was, of course, correct. Police accountability in use of force cases is not governed or defined by mistake, poor police tactics, or miscommunication.[14] Police use of force is governed, as far as criminal culpability and civil liability are concerned, by the Fourth Amendment of the U.S. Constitution.[15] The law under the Fourth Amendment, in relation to police use of force, is extremely narrow.[16] As is the protection it provides.[17] It only seeks to determine if the police—excluding hindsight bias—acted reasonably.[18] Public officials, including police officers, enjoy qualified immunity from civil liability suit under 42 U.S.C. § 1983. Qualified immunity applies to police officers unless an officer knew the action taken violated a clearly established statutory or constitutional right.[19] In cases of ambiguity, the officer is given the benefit of the doubt.[20]

The principal point of this story is that Fourth Amendment analysis finds irrelevant the fact that police response to a "possible active shooter" that did not utilize distance, cover, and assessment resulted in the death of a 12-year-old boy.[21] The key question is whether what the police did was reasonable at the time of the shooting. Not every

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12 Press Release, Cuyahoga Cty. Prosecutor, *supra* note 1.

13 *Id.*

14 *See Infra* Part IV.

15 Graham v. Connor, 490 U.S. 386, 388 (1989).

16 *See* Rachel A. Harmon, *When is Police Violence Justified*, 102 Nw. U. L. REV. 1119, 1167, 1169 (2008).

17 *See Graham*, 490 U.S. at 397 (finding that a police officer's motive or intent is not relevant to the inquiry but rather whether his actions are objectively reasonable in regards to the facts and circumstances of the situation).

18 *Id.* at 396 (internal citations omitted).

19 *See e.g.,* City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015).

20 Hope v. Pelzer, 536 U.S. 730, 739-40 (2002).

21 Press Release, Cuyahoga Cty. Prosecutor, *supra* note 1.

moral wrong is a legal wrong and not every legal wrong has a criminal sanction as a remedy. What is lawful is not always just and what is just is not always required by the law. As the events surrounding the tragic and avoidable death of Tamir Rice show, miscommunication, possibly due to government incompetence, and overreaction, likely due to the miscommunication, does not automatically equal constitutional and criminal illegality.

The Supreme Court has developed extensive jurisprudence regarding the applicability of the Fourth Amendment when dealing with police liability or culpability when that force results in the death of a person.[22] The Court looks to the level of force used and the justification of the force used but in the context of the totality of the circumstances and the facts known to the officer at the time, viewed from the perspective of the officer.[23] The Court has also made clear that Fourth Amendment analysis is not subject to hindsight and does not consider whether the officer was in fact right or wrong in assessing the situation.[24]

This Article reviews Supreme Court, federal circuit court, and state appellate court jurisprudence regarding police civil liability under the Fourth Amendment and argues that the jurisprudence provides a very limited range of protection from police maleficence in use of force. Part I of this Article focuses on Supreme Court jurisprudence regarding police use of force and how the Court has limited such cases to the reasonableness of the police action under a Fourth Amendment standard which negates police officer intent in acting under standard police policy. Part I begins with a review of the governing cases on police use of force. The Supreme Court held in *Monell v. Department of Social Services*, *Harlow v. Fitzgerald*, *Tennessee v. Garner*, and *Graham v. Connor* collectively that the right against unreasonable search and seizure, seizure being use of force, can be enforced under the Civil Rights Act of 1871 (The Ku Klux Klan Act) codified under 42 U.S.C. § 1983. Local government agencies, including police departments, and police officers are subject to civil liability and criminal culpability for violating individual constitu-

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[22] *See Graham*, 490 U.S. at 388 (finding that cases involving excessive force of a police officer are assessed through the Fourth Amendment's objective reasonableness standard); Tennessee v. Garner, 471 U.S. 1, 7 (1985) (finding use of deadly force is a seizure governed by the reasonableness standard of the Fourth Amendment).

[23] *Graham*, 490 U.S. at 396-97.

[24] City & Cty. of San Francisco v. Sheehan, 135 S. Ct. at 1775.

tional rights.[25] With regard to the police use of force, the Court has held that *Graham v. Connor* is the standard for determining if police use of force violates the Fourth Amendment.[26] In *Graham,* the Court held that the Fourth Amendment is the standard for determining police civil liability for use of force.[27] Part I also reviews how the Supreme Court has limited the applicability of civil liability to the second most important and powerful institution within the criminal justice system, the power of the prosecutor to bring charges and cases against individuals.

Part II focuses on how the United States circuit courts have split on the question of whether reasonableness is exclusively determined at the point in time of the use of force or whether the actions of the officer leading to the use of force are relevant to the reasonableness analysis required by *Graham*. Some circuit courts have held that police use of force is unreasonable if the police create the situation that requires the police to use force. This approach, Police Pre-Seizure Conduct, sometimes called officer created danger or jeopardy (provocation), has found support in six of the eleven courts that have directly addressed the issue.[28] The circuits that have rejected this approach have held that only the facts at the initial use of force are relevant to the question of reasonableness in the use of force.[29] Additionally, Part II reviews the differences between the circuit courts and their approaches to officer created jeopardy, culminating with the Supreme Court rejection of the Ninth Circuit Court version of the police provocation rule in the *Mendez* decision.

Part III shifts focus to the issue of self-defense and police use of force regarding police assertion that the officer feared for his life. Part III reviews basic self-defense law and how police use of force can be found criminally culpable under federal criminal civil rights law.

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[25] *Graham*, 490 U.S. at 399 n.12; Harlow v. Fitzgerald, 457 U.S. 800, 814, 819 (1982); Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690-91 (1978).

[26] Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014).

[27] *Graham*, 490 U.S. at 388.

[28] *See* Pauly v. White, 814 F.3d 1060, 1076 (10th Cir. 2016); Williams v. Indiana State Police Dept., 797 F.3d 468, 483, 485 (7th Cir. 2015); Sheehan v. San Francisco, 743 F.3d 1211, 1216 (9th Cir. 2014); Lamont v. New Jersey, 637 F.3d 177, 186 (3d Cir. 2011); Frances-Colon v. Ramirez, 107 F.3d 62, 63-64 (1st Cir. 1997); Gilmere v. Cty. of Atlanta, 774 F.2d 1495, 1501 (11th Cir. 1985). *See also,* Barrett v. United States, 64 F.2d 148, 149 (D.C. Cir. 1933).

[29] *See* Gandy v. Robey, 520 F. App'x. 134, 142 (4th Cir. 2013), Rockwell v. Brown, 664 F.3d 985, 992-93 (5th Cir. 2011), Livermore v. Lubelan, 476 F.3d 397, 406 (6th Cir. 2007), Salim v. Proulx, 93 F.3d 86, 92 (2d. Cir. 1996), and Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993).

The limitations on police culpability under federal law are reviewed and it is argued that because of strict limitations on intent federal culpability only addresses the most egregious use of police use of force. Part IV summarizes why the Fourth Amendment should not and cannot be looked upon as a limitation and control on police use of force.

Part V reviews Supreme Court jurisprudence regarding municipal and police agency liability and that such civil liability also provides a limited range of protection and culpability for police agency maleficence. This Article concludes with a summary explaining that the Supreme Court and circuit court jurisprudence together have made the Fourth Amendment almost irrelevant in preventing police abuse of power. The Court's jurisprudence has restricted criminal culpability to acts of police intentional violation of established Fourth Amendment law and restricted civil liability to officers not having objective reasonable articulable reasons for the use of force.[30] Neither criminal culpability nor civil liability is established by focusing on abuse of power or causing serious bodily injury and death.[31] The Court has made clear that the result of police force—injuries or death—is not relevant to police use of force under the Fourth Amendment.[32] Only whether that force was objectively reasonable is subject Fourth Amendment prohibition.[33]

I. THE SUPREME COURT AND CIVIL IMMUNITY JURISPRUDENCE: POLICE USE OF FORCE AND PROSECUTOR DECISION-MAKING

The Fourth Amendment protects against unreasonable use of force. The question of whether the force was unreasonable is judged from the perspective of what the officer knew and believed when use of force was applied.[34] The Court has held that the Fourth Amend-

30 *Graham*, 490 U.S. at 397; Brower v. Cty. of Inyo, 489 U.S. 593, 596 (1989).

31 *See Graham*, 490 U.S. at 397 (finding the analysis focuses on whether the officer's actions were objectively reasonable and not focusing on the injury or abuse of power).

32 *See id.* at 396-97 (finding that not every injury is a cause for excessive force but force exceeding the necessary force a police officer would find reasonable in the situation).

33 *Id.* at 397.

34 *See, e.g.,* Hill v. California, 401 U.S. 797, 804 (1971) (finding that a reasonable but mistaken arrest of the wrong person is not a Fourth Amendment violation); Carswell v. Borough of Homestead, 381 F.3d 235, 242 (3d Cir. 2004) ("Qualified immunity operates to protect officers from the sometimes hazy border between excessive and acceptable force. Furthermore, in addition to the deference officers receive on the underlying constitutional claim in excessive force

ment is only invoked upon the specific intention of the police to seize.[35] In *Brower v. County of Inyo*, the Court defined seizure as follows:

> a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.[36]

The Court explained that a, "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking . . . . This is implicit in the word 'seizure,' which can hardly be applied to an unknowing act."[37] Thus, a seizure occurs when the officer intends to impede freedom of movement.

The Supreme Court in its seminal case, *Tennessee v. Garner*, held that the use of deadly force is governed by the Fourth Amendment,[38]

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cases, qualified immunity can apply in the event the mistaken belief was reasonable.") (internal citations omitted); *see also* Wilson v. Russo, 212 F.3d 781, 786–87 (3d Cir. 2000) (stating that to establish false arrest under section 1983, the plaintiff must prove (1) the officer "knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant" and (2) that "such statements or omissions are material, or necessary, to the finding of probable cause.") (internal citation omitted); Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988) ("The proper inquiry in a section 1983 claim based on false arrest or misuse of the criminal process is not whether the person arrested in fact committed the offense but whether the arresting officers had probable cause to believe the person arrested had committed the offense."); McHenry v. Cty. of Delaware, No. 04-1011, 2005 WL 2789182, at *5 (E.D. Pa. Oct. 24, 2005) ("However, a Fourth Amendment violation may be demonstrated if the officers executing the warrant knew they were arresting the wrong person or acted in reckless disregard of facts that would have led to the conclusion that they arrested the wrong person. The linchpin of mistaken identity cases is reasonableness; the key question is whether the arrest of the wrong person was reasonable under the totality of the circumstances.") (internal citation omitted); Doherty v. Haverkamp, No. 93-5256, 1997 U.S. Dist. LEXIS 7547, at *17-18 (E.D. Pa. May 27, 1997) ("Thus, the determination of a Fourth Amendment violation for false arrest depends, first and last, upon whether the arresting officers acted reasonably under all of the circumstances existing at the time and place of the arrest or detention.").

35 Brower v. Cty. of Inyo, 489 U.S. at 596.

36 *Id.* at 596-97.

37 *Id.* at 596.

38 Tennessee v. Garner, 471 U.S. 1, 7 (1985).

and the Fourth Amendment applies to both the justification of use of force and the method in which that force is used.[39] The facts of *Garner* involved a botched burglary and the shooting of the suspected burglar as he attempted to escape arrest.[40] Elton Hymon, a police officer of the Memphis, Tennessee police department, responded to a possible burglary call.[41] Upon entering the house of the suspected burglary, Officer Hymon heard the back door slam and upon investigation saw Edward Garner running to and stopping at the chain-link fence towards the back of the property.[42] Concerned that Garner would escape over the fence, Officer Hymon shot him in the back of the head, killing him.[43]

Garner's father brought a § 1983 action, alleging that the Tennessee law that authorized police officers to shoot escaping felons was unconstitutional.[44] Garner's father claimed that when the police shot his son they acted under a state law that deprived his son of his Fourth Amendment right against unreasonable seizure.[45] The Court, in part, had to determine if a police use of force—a shooting—was governed by the Fourth Amendment.[46]

Justice White, writing for the Majority, stated that when analyzing the constitutionality of police seizures or state policy governing police seizures, under the Fourth Amendment, the question is "whether the totality of the circumstances justified a particular sort of search or seizure."[47] In regard to the use of deadly force by police to secure a suspect, the Court held that, "notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The

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[39] *Id.* at 7-8 ("A police officer may arrest a person if he has probable cause to believe that person committed a crime. E.g., United States v. Watson, 423 U. S. 411 (1976). Petitioners and appellant argue that, if this requirement is satisfied, the Fourth Amendment has nothing to say about how that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure, "[w]e 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.").

[40] *Id.* at 3-4.

[41] *Id.* at 3.

[42] *Id.*

[43] *Id.* at 3-4.

[44] *See Garner*, 471 U.S. at 4-5.

[45] *See id.* at 5-6.

[46] *Id.* at 7.

[47] *Id.* at 8-9.

intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon."[48] Justice White explained that the interest against shooting a suspect also included the requirement that a fact finder determine the suspect's guilt and apply suitable sanctions rather than have the death penalty imposed upon the suspect without trial, right in the street by the police.[49] Both of these interests are to be weighed against the need for effective law enforcement and reduction of violence during arrests when "suspects know that they may be shot if they flee."[50] To the assertion that the known threat to criminals is that they will be shot upon attempted escape is an effective law enforcement tool to prevent escape, the Court asserted that Tennessee had not persuaded it that shooting non-dangerous and fleeing suspects to prevent escape, outweighed that suspect's interest in his own life.[51]

Having dispatched the logic which led to "we had to destroy the village to save it," "Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life."[52] The Court settled the base question of the case: Can the police shoot an unarmed, non-violent suspect felon for fear of his escape?[53] The Court held that when a suspect poses no immediate danger, the possibility of escape does not outbalance the right the defendant has to his life.[54] The Court held the Tennessee statute was unconstitutional in so far as it allowed such force.[55]

Because Fourth Amendment analysis of police use of force involves the determination of whether the actions of the police are objectively reasonable from the perspective of the officer at the time of the action,[56] the Court made clear that the use of deadly force can be justified if the officer has probable cause to believe that the suspect possesses "a threat of serious physical harm" to the officer or others.[57]

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48 *Id.* at 9.

49 *See id.* at 13-14.

50 *Garner*, 471 U.S. at 9.

51 *Id.* at 11-12.

52 *Id.* at 11.

53 *See id.* at 20-21.

54 *Id.* at 11.

55 *See id.* at 19-21.

56 *See, e.g.,* Graham v. Connor, 490 U.S. 386, 397 (1989).

57 Tennessee v. Garner, 471 U.S. at 11.

The Court held possession of a weapon by the suspect can justify the use of deadly force.[58]

Police shootings, like all police actions, are governed by what the officer knew at the time of the action and whether his action at the time was reasonable.[59] To test the reasonableness of the action of the officer, the law requires that the officer be able to articulate reasons to justify the action taken, and then the court determines if those reasons were, under the totality of the circumstances, reasonable for the officer to make.[60] In *Garner*, the Court pointed out that lower courts found that Officer Hymon did not think or believe that Garner was armed.[61] This lack of probable cause made his seizure—the shooting of Garner—unconstitutional.[62]

Four years later in *Graham v. Connor*, the Court affirmed *Garner* and held that all use of force cases were subject to only Fourth Amendment analysis.[63] Police officers detained Dethorne Graham after an officer observed him walking into a grocery store, only to rush out quickly minutes later.[64] Graham, a diabetic, was suffering from an insulin reaction when he was detained, and was uncooperative when approached by the officers who believed he had just robbed the grocery store.[65] He was subsequently beaten by the police but was released when they discovered the store had not been robbed.[66] The Court established the following rules governing use of force, both deadly and non-deadly:

1. Use of force is reasonable is determined by the totality of the circumstances.[67]

2. The courts are to look at the following factors: the severity of crime, the immediate threat to the safety of the officers or others by the suspect, whether the suspect is actively resisting the officers, or attempting to flee.[68]

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58 *See id*.

59 *See id.* at 25-26.

60 Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

61 *See* Tennessee v. Garner, 471 U.S. at 3-6.

62 *See id.* at 11.

63 *See Graham*, 490 U.S. at 395.

64 *Id.* at 389-390.

65 *Id.*

66 *Id.* at 389-90.

67 *Id.* at 396.

68 *Id.*

3. Reasonableness of the use of force must be judged from the perspective of the reasonable police officer on the scene.[69] The use of hindsight of whether in fact the officer was correct in his assessment of the facts is not relevant.[70] The question is what a reasonable officer at the time would have done with what was known at the time.[71]

4. Officers in close cases should be given the benefit of the doubt because the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments."[72]

5. The subjective intent or motivation of the officer is irrelevant.[73]

The police may use deadly, or non-deadly force that could result in great bodily harm, if that force is reasonable under the circumstances, regardless of the officer's intentions or motivations.[74] Fourth Amendment analysis, does not focus on the motive or intent of the officer.[75] The sole focus of Fourth Amendment analysis is whether the officer's action was objectively reasonable because "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[76] The Court held in *Garner*, and affirmed in *Graham*, that the police may use deadly force if they are compelled to do so by the actions of the suspect.[77] Put another way, police have the authority to use force to protect society–and themselves–from the reckless or threatening actions of another.[78]

One remedy for violations of constitutional rights is the filing of a Section 1983 civil liability law suit against the police.[79] Section 1983 allows for the awarding of civil damages for violations of constitu-

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69 *Graham*, 490 U.S. at 396.

70 *Id.*

71 *Id.* at 396.

72 *Id.* at 396-97.

73 *Id.* at 397.

74 *See id.* at 398.

75 *Graham*, 490 U.S. at 398-99.

76 *Id.*

77 *Id.* at 396.

78 *See Id.* at 395-97.

79 *See* Edward J. Hanlon, *Excessive Force by Police Officer*, 21 AM. JUR. PROOF OF FACTS 3D § 6 (Originally published in 1993).

tional rights.[80] The Court held that the mere violation of a constitutional right alone does not establish civil liability.[81] To establish civil liability, a plaintiff must prove two elements.[82] First, a constitutional right must be violated; and second, the government entity does not enjoy immunity from civil liability.[83] As to the latter, government officials enjoy a heightened level of protection from civil liability claims.[84] Prosecutors, for example, enjoy absolute immunity from claims of malicious prosecution; and police officers and other government officials enjoy qualified immunity.[85] In explaining the justification for absolute immunity in civil cases asserting malicious prosecution the Court explained in *Imbler v. Pachtman*, that prosecutor determinations regarding the filing and pursuing cases in court must enjoy absolute immunity.[86] *Imbler* involved the assertion that a prosecutor, Pachtman, brought charges against Imbler knowing that Imbler did not commit a murder.[87] After a decade of litigation, the court reversed Imbler's conviction and because California did not retry him, he was released.[88] Subsequently, Imbler sued Pachtman.[89] The Supreme Court addressed whether the §1983 law suit failed under a claim of absolute immunity by the prosecutor.[90] The Court held that the purpose of the prosecutor within the criminal justice system provides absolute immunity for the decision regarding whether to prosecute a case and how that case is prosecuted.[91] The Court was not insensitive to the result of its decision but it held that in the balancing of interests, the interests of the criminal justice system outweighed those of the person wrongfully and maliciously prosecuted.[92]

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80 *See* 42 U.S.C.A. § 1983 (2018).

81 *See* Richard P. Shafer, *When Does Police Officer's Use of Force During Arrest Become So Excessive as to Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil Rights Act of 1871 (42 U.S.C.A. § 1983)*, 60 A.L.R. FED. 204 § 12 (2016).

82 *See id.*

83 *See id.*

84 *See* Imbler v. Pachtman, 424 U.S. 409, 418-419 (1976).

85 *Id.* at 419, 428-29.

86 *Id.* at 427-28.

87 *Id*. at 415-16.

88 *Id.*

89 *Id.*

90 Imbler v. Pachtman, 424 U.S. 409, 416-17 (1976).

91 *Id.* at 431.

92 The Court wrote:

> To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader pub-

There are limits to the application for *Imbler* in that it is limited to the actions of prosecutors regarding trial and performance in trial.[93] Prosecutors acting outside of these areas enjoy only qualified immunity.[94] The Court heard evidence, in *Buckley v. Fitzsimmons,* of a prosecutor, Fitzsimmons, who allegedly made false statements to the press and fabricated lab reports implicating Buckley in a high profile rape and murder case.[95] Buckley sued Fitzsimmons after the jury returned a hung-jury verdict and the key prosecution witness died before a retrial resulting in all the charges being dropped.[96] Buckley asserted that the prosecutor was liable for his incarceration based on fraudulent press assertions and criminal evidence.[97] The Court determined the question of whether actions by prosecutors outside of advocacy and preparation of a case—criminal investigation, legal advice to police, and statements made to the press—enjoy qualified and not

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lic interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of § 1983. *O'Shea v. Littleton,* 414 U. S. 488, 414 U. S. 503 (1974); *cf. Gravel v. United States,* 408 U. S. 606, 408 U. S. 627 (1972). The prosecutor would fare no better for his willful acts. Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.

. . .

We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force.

Imbler v Pachtman, 424 U.S. 409, 428-30 (1976) (internal citations omitted).

93 Buckley v. Fitzsimmons, 509 U.S. 259, 269-70 (1993).

94 *Id.* at 273-74.

95 *Id.* at 261-64.

96 *Id.* at 264.

97 *Id.* at 262.

absolute immunity.[98] The Court held that there are two types of immunity; and in regard to prosecutors, the level of immunity enjoyed is based on the function of the prosecutor.[99] The Court held that because the decision to prosecute a case and how that case is prosecuted in court serves a judicial purpose, absolute immunity is required.[100] The Court affirmed the logic of *Imbler* and held that if individuals could sue prosecutors for actions taken in the performance of that fundamental function, the judicial process could not achieve its goals.[101] But the Court held that the absolute immunity of a prosecutor is limited to the prosecutor's fundamental function of trial preparation, the decision to charge and prosecute, and advocacy (what is done in court).[102] The Court made distinctions between the administrative functions of prosecutor and the judicial advocacy functions, and only the latter carries absolute immunity.[103]

Police officers enjoy similar protections but not complete protection from civil liability. In *Anderson v. Creighton*, the Court was presented with the question of whether summary judgment can be granted in a case, based on the defense of qualified immunity, regard-

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98 *Id.* at 268-72.

99 Buckley v. Fitzsimmons, 509 U.S. 259, 268-72 (1993).

100 *Id.* at 277-78.

101 *Id.* at 272-73.

102 *Id.* at 277-78 ; *see also* Connick v. Thompson, 563 U.S. 51, 59 (2011) (holding that a Prosecutor's office can be held liable under failure-to-train theory if defendant can establish (1) the policymaker for the district attorney's office, was "deliberately indifferent" to the need to train the prosecutors about their *Brady* disclosure obligation with respect to evidence and (2) that the lack of training actually caused the *Brady* violation); Van de Kamp v. Goldstein, 555 U.S. 335, 339, 343-44, 346-47 (2009) (holding that training, supervision, or establishment of an appropriate information system are all protected by absolute immunity because all three issues are connected to the preparation of trial, which enjoys absolute immunity, but that liability can be established if the prosecutor's office has an actual or functional policy to disregard Brady which can be established through a failure-to-train assertion); Kalina v. Fletcher, 522 U.S. 118, 133 (1997) (holding that when a prosecutor acts as a complaining witness in support of a warrant application, the prosecutor enjoys only qualified immunity); Burns v. Reed, 500 U.S. 478, 487, 492-96 (1991) (holding that a prosecutor giving legal advice to the police on the propriety of hypnotizing a suspect and on whether probable cause existed to arrest that suspect enjoys qualified immunity not absolute immunity and providing evidence to secure a search warrant enjoys absolute immunity and not qualified immunity because securing the warrant was within the judicial duties of the prosecutor in order to prosecute a case).

103 *Id.* ("A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity. We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.") (internal citations omitted).

ing a federal law enforcement officer who entered the home of a suspected bank robber without a warrant.[104] *Anderson* asserted that a reasonable officer could have believed that the entry was lawful, and if as a matter of law he could prove his actions were reasonable, he was entitled to summary judgment and dismissal of the case.[105] The Court made clear that if police, in the performance of their duties, act within the discretion that the law allows—in this case reasonable mistake—they enjoy qualified immunity.[106] In *Anderson*, the Court established that to prevail in a civil lawsuit the plaintiff must prove that the police: (1) violated the Fourth Amendment; and (2) the Fourth Amendment violation, in the situation that the police used force, was clearly established in law when the police action occurred.[107] The Court subsequently held in *San Francisco v.*

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104 Anderson v. Creighton, 483 U.S. 635, 637, 641 (1987).

105 *Id.* at 638.

106 In explaining the justification for qualified immunity for police and other government officials the Court wrote:

> When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Ibid.* Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a *qualified immunity*, shielding them from civil damages liability as long as their *actions could reasonably have been thought consistent with the rights they are alleged to have violated. . . . [Q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law'*[and] officials are immune unless "the law clearly proscribed the actions" they took. . . . Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken.
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> . . .
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> [T]he precise content of most of the Constitution's civil liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable . . . . We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id. at 638-639, 643-644 (internal citations omitted) (emphasis added).

107 *Id.* at 640 ("[T]he right the official is alleged to have violated must have been 'clearly established . . . the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that, in the light of pre-existing law, the unlawfulness must be apparent.") (citation omitted).

Sheehan, discussed in detail below, that an application for dismissal of a lawsuit under a claim of qualified immunity in a use of force case, summary judgment is to be granted under Fourth Amendment jurisprudence, if the actions taken by the officer were such that: (1) they are not open to serious debate regarding the unreasonableness of the actions; and (2) they must be such that only a "plainly incompetent" police officer or one who "knowingly violates clearly established law" would have committed.[108] But the Court made clear that in a motion for summary judgment based on qualified immunity, the reviewing court must view the facts in the light most favorable to the opposing party to the motion.[109]

In *Tolan v. Cotton*, the Court reversed the district court's granting of summary judgment because the court failed to view all the facts in favor of Tolan.[110] The Court explained that the facts are viewed in the light most favorable to the non-moving party in a summary judgment motion.[111] Cotton, a police officer, shot Tolan while he was unarmed sitting on his porch.[112] Cotton claimed that he had qualified immunity.[113] The Court reversed the Fifth Circuit Court of Appeals' granting of summary judgment in favor of Cotton because (1) the court did not view the evidence presented in the best light of Tolan; and (2) the court did not properly review Tolan's evidence to determine assuming his evidence was true, did the actions of the police violate clearly established Fourth Amendment law.[114] The Court made this clear seven years earlier in *Scott v. Harris.*[115].

Harris involved a case in which Victor Harris was rendered a quadriplegic after an attempted police seizure.[116] Harris was injured in a car crash caused by the police forcing his car off the road after a

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[108] City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015) ("An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent . . . placed the statutory or constitutional question beyond debate. This exacting standard gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.") (citation omitted).

[109] *Id.* at 1769.

[110] Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 1864, 1867.

[115] Scott v. Harris, 550 U.S. 372, 375-76 (2007).

[116] *Id.*

high speed car chase in which Harris refused to stop upon the police orders and their determination that Harris's driving caused a danger to the public.[117] The Court in *Harris* held that *Garner* did not establish a *per se* rule regarding the use of deadly force against fleeing suspects.[118] Thus, the issue in the case was whether Officer Scott acted reasonably when he used force against Harris's car which resulted in the accident after Harris refused to stop and was driving erratically and causing danger to the police in pursuit and the general public in the area.[119] The Court concluded that "it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."[120] The point of the case is that the Court reasoned that the police acted reasonably by focusing on the specific facts of the case that resulted in the police use of force.

The Court has repeatedly told the courts that a high level of generality is not to be used.[121] Fourth Amendment analysis requires that the facts, as known to the officer, be embedded into the legal question to determine if a Fourth Amendment violation has occurred.[122] The Court has imposed a two prong question.[123] First, was the Fourth Amendment violated when the officer acted?[124] Second, was Fourth Amendment law clearly settled so that the officer knew the actions taken violated the Fourth Amendment?[125] In *Harris,* the Court found that "[a] police officer's attempt to terminate a dangerous high-speed

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117 *Id.*

118 *Id.* at 375.

119 *Id.* at 381, 383 ("In determining the reasonableness of the manner in which a seizure is effected, 'we 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.' Scott defends his actions by pointing to the paramount governmental interest in ensuring public safety, and respondent nowhere suggests this was not the purpose motivating Scott's behavior. Thus, in judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate.") (internal citations omitted).

120 *Id.* at 384.

121 Ashcroft v. Al-Kidd, 563 U.S. 731, 742 (2011).

122 *Id.* at 736.

123 *See id.* at 735 ("Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. We recently reaffirmed that lower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first.") (citation omitted).

124 *Id.*

125 *Id.*

car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[126]

In *Mullenix v. Luna*, the Court again made clear that in all Fourth Amendment cases, courts must not review claims of violation of the Fourth Amendment from generalities but rather from the specific facts known to the officer to determine if a reasonable officer would have acted as the officer in question.[127] *Mullenix* involved the use of deadly force by a Texas Department of Public Safety Trooper, Chadrin Mullenix, who shot Israel Leija in the head when he attempted to shoot out the tires of Leija's car.[128] The Court admonished the courts for failing to properly apply the Fourth Amendment test regarding qualified immunity.[129] The Court held that the lower court should have determined reasonable force from a review of the specificity of the facts of the case, instead of general abstraction of freedom from unreasonable seizure.[130]

Collectively, the Court held in *Garner*, *Graham*, *Harris*, *Tolan*, *Sheehan*, and *Luna* that:

1. The intent of the officer is not relevant to the reasonableness analysis.

2. The fact that, in hindsight, the officer was wrong does not create civil liability.[131]

3. The force must be reasonable under the circumstances and facts known to the officer at the time (Use of Force - Justification).

4. How the force is utilized/imposed (Method of Use of Force) must be reasonable under the circumstances and facts known to the officer at the time.

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126 Scott v. Harris, 550 U.S. 372, 386 (2007).

127 Mullenix v. Luna, 136 S. Ct. 305, 308 (2015).

128 *Id.* at 307.

129 *Id.* at 308-09.

130 *Id*. at 314.

131 District of Columbia v. Wesby, 138 S. Ct. 577, 581-82 (2018) (citation omitted) (internal quotation marks omitted) ("Even assuming the officers lacked actual probable cause to arrest the partygoers, the officers are entitled to qualified immunity because they reasonably but mistakenly concluded that probable cause was present. Tellingly, neither the panel majority nor the party-goers have identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation 'under similar circumstances.' And it should go without saying that this is not an 'obvious case' where 'a body of relevant case law' is not needed. The officers were thus entitled to qualified immunity.").

5. Reckless and violent behavior that puts the police or the public in danger can justify the use of force and deadly force.[132]

6. Only established law, that is law beyond dispute and clearly established, can form the basis for civil liability.[133]

7. Clearly established law exists when the law is beyond debate regarding what the police are prohibited from doing.[134]

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[132] *Mullenix*, 136 S. Ct. at 308.

[133] As the Court held in *Kisela v. Hughes*, summarily reversing the Ninth Circuit Court in a Per Curium opinion, that in qualified immunity cases

> [T]he focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct . . . Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue . . . . "Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers." But the general rules set forth in Garner and Graham do not by themselves create clearly established law outside an "obvious case." Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it" That is a necessary part of the qualified-immunity standard . . . .

Kisela v. Hughes, 200 L. Ed. 2d 449, 453-54 (2018) (citation omitted).

[134] *See* District of Columbia v Wesby, 138 S. Ct. 577, 589 (2018) (internal citations omitted).

> "Clearly established" means that, at the time of the officer's conduct, the law was "sufficiently clear' that every 'reasonable official would understand that what he is doing" is unlawful. In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law."
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> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority'" . . . It is not enough that the rule is suggested by then-existing precedent . . . .
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> The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted" . . . [in order to reach] the crucial question [of] whether the official acted reasonably in the particular circumstances the officer faced . . . .
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> We have stressed that the "specificity" of the rule is "especially important in the Fourth Amendment context" . . . Thus, we have stressed the need to "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." While there does not have to be "a case directly on point," existing precedent must place the lawfulness of the particular arrest "beyond debate." Of course, there can be the rare "obvious case," where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. But "a body of relevant case law" is usually necessary to "'clearly establish' the answer" with respect to probable cause.

Id. This case involved a situation in which the police were confronted with riotous house party and the issue was whether the police had probable cause to believe that the occupants of the house were trespassing when the occupants claimed that had permission. *Id.* at 583-84. The Court held that the police had probable cause to believe the occupants were trespassing and

8. Clearly established law requires that the facts of previous cases are similar enough to inform or give fair warning to a police officer that the facts he is confronted with prohibit specific action.

9. Although police can be on notice that certain actions violate the law because the actions taken by the police are self-evident that they were unlawful; generally to establish "clearly established law" prior decisions must establish "reasonable" or "fair warning" that the police conduct at issue violates constitutional rights. But in defining fair warning the Court has specifically rejected the assertion that the "clearly established" standard requires prior cases to be "fundamentally similar" or have "materially similar" facts to the case at issue.[135]

10. The fact that the police were factually wrong in their assessment that they can use force does not establish civil liability if the mistake was reasonable under the circumstances.

11. Qualified immunity protects all but the plainly incompetent police officer or an officer who knowingly violates established law when the use of force occurs.

Qualified immunity will protect police action if their actions violate constitutional rights at a high level of generality, such as the right to be free from "unreasonable search and seizure" under the Fourth Amendment or the right "not be punished prior to an adjudication of guilt in accordance with due process of law" under the Fifth Amendment substantive due process clause.[136] Qualified immunity is broken only if the plaintiff can show not only that a general constitutional right was violated but the specific facts of the case and the specific actions of the police are such that prior case law would make the reasonable police officer aware that under the facts the officer is faced with, certain actions violate the law.[137] The police officer enjoys the benefit of the doubt, even if the court finds the specific actions of the officer violated constitutional rights.[138]

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overruled the D.C. Circuit Court of Appeals holding. *Id.* at 588-89. The court of appeals had held that the police did not have probable cause and did not enjoy qualified immunity, because the police knew or should have known that the occupants in fact believed that they had a legal right to be in the house. *Id.* at 584. Thus, the arrest violated the Fourth Amendment and the police knew it when they made the arrest. *Id.*

135 Hope v. Pelzer, 536 U.S. 730 (2002).

136 *See* Ashcroft v. Al-Kidd, 563 U.S. 731, 735, 742 (2011).

137 Scott v. Harris, 550 U.S. 372, 378 (2007). *See* discussion of *Harlow v. Fitgerald*, *State v. White*, *infra* Parts IV and V.

138 Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the

The Court has made clear that these high burdens are established to make sure that only clearly unreasonable police actions are subjected to civil liability and as discussed below, police incompetence or disregard for procedure, alone, does not establish violation of established law, but it can help establish that the actions of an officer were unreasonable.

II. THE CIRCUIT COURTS AND POLICE USE OF FORCE: POLICE LIABILITY ESTABLISHED BY PRE-SEIZURE CONDUCT

A. *Introduction on Police Liability Causation*

In the literature police use of force or *officer created jeopardy* refers to the actions of police prior to the situation that results in the need to use force.[139] State created danger occurs when the action of that state or its agent, the police officer, acted in such way as to create a danger of injury to the plaintiff.[140] In the literature on police use of force this officer created jeopardy is referred to as *pre-seizure conduct* or *provocation*.[141] In other words the police pre-seizure conduct, before the use of force, provoked or created the situation in which police use of force or deadly force became necessary. Provocation by a police officer resulting in injury can sustain a civil liability case.[142]

To sustain this claim the plaintiff must establish a chain of events—from the initial police behavior, the pre-seizure conduct, to

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> time of the challenged conduct. To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right. When properly applied, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.

Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015).

> We do not express any view on whether Officer Stanton's entry into Sims' yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not "beyond debate." Stanton may have been mistaken in believing his actions were justified, but he was not "plainly incompetent."

Stanton v Sims, 571 U.S. 3, 10-11 (2013).

139 Kevin Cyr, *Police Use of Force: Assessing Necessity and Proportionality*, 53 ALTA. L. REV. 663, 668 (2016).

140 *Id.*

141 Aaron Kimber, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL OF RTS. J. 651, 652 (2004).

142 *Id.* at 659.

the police use of force—unbroken by the behavior of the plaintiff.[143] In other words, the plaintiff's actions must not cause the officer's use of force independent of the police officer's initial conduct.[144]

In all civil liability cases the plaintiff must establish both factual causation and proximate cause.[145] Factual causation is the factual link between an act and a resulting harm.[146] In other words, "but for" the police action the plaintiff would not have suffered injury.[147] Once factual causation is established, the plaintiff must also establish proximate cause, which defines legal responsibility for a harm based on one's actions.[148] Proximate cause goes to whether the harm was reasonably foreseeable from the action taken.[149] Proximate cause is a legal question of whether the defendant is lawfully responsible for the harm[150] and factual causation is whether in fact the action of the defendant led to the harm.[151] Factual causation can be broken by an intervening factual event[152] and proximate cause is broken by the absence of a reasonably foreseeable result recognized in law to be directly attached to an act.[153] The significance of establishing causation—proximate cause and cause-in-fact—is that both must be estab-

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143 Williams v. Williams, No. C 07-04464 CW (PR), 2012 U.S. Dist. LEXIS 44081, at *13-14 (N.D. Cal. Mar. 29, 2012).

144 *Id.*

145 Ed Peters Jewelry Co. v. C & J Jewelry Co., 51 F. Supp. 81, 102 (D.R.I. 1999).

146 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM. LAW INST. 2018).

147 *Id.*

148 *Id.* at § 29.

149 Havert v. Caldwell, 452 N.E. 2d 154, 158 (Ind. 1983).

150 Routzahn v. Brown Hotel, 307 Ky. 548, 551 (1948) ("Determination of what constitutes the proximate cause of a given accident ordinarily rests with the jury. But if the facts are such that only one logical determination of the question can be reached by reasonable men, then a directed verdict is proper.").

151 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM. LAW INST. 2018).

152 *See* Douglas v. Smith, 578 F.2d 1169, 1176 (5th Cir. 1978) ("ordinarily an intervening cause breaks the chain of causation"). *See also* RESTATEMENT OF TORTS at § 34 ("When a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.").

153 *Id.; see also* Havert v. Caldwell, 452 N.E.2d 154, 159 (Ind. 1983); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 19 (AM. LAW INST. 2018) ("The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.").

lished at the motion to dismiss or summary judgement stage before the action can be heard as a factual question before the jury.[154]

In police use of force cases, the court will look at the plaintiff's behavior, whether the use of force by the police was justified, and if the level of force was reasonable in order to determine if the resulting injury was the result of the plaintiff's actions and not the initiating police behavior.[155] As the Third Circuit explained, " as long as the officer's use of force was reasonable given the plaintiff's acts, then despite the [police creation of danger or jeopardy], the plaintiff's own conduct would be a superseding cause that limited the officer's liability."[156] Whether the police officer created the danger that justified the use of force and the resulting harm is both factual and legal causation. The plaintiff's behavior can establish an intervening event or a superseding cause. "[I]f the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause that limited the officer liability."[157]

The mere violation of a Fourth Amendment legal standard by the police will not establish proximate cause unless the suffered harm is a foreseeable result of the specific violation of the legal standard.[158] For example, the police's failure to knock and announce can create liability when the result of the entry is the police shooting the plaintiff, since it is foreseeable that a homeowner may feel threatened by an unknown entry and arm himself to confront the intruder – even if the intruder is a police officer since they did not announce their presence.[159]

If the police unlawfully entered by not knocking and announcing themselves at the door, but when inside announced their presence, and then were faced with the plaintiff with a gun, resulting in him being shot, then the plaintiff's actions would break the proximate cause link. If the police, in violation of knock and announce,

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154 *See, e.g.*, Nero v. Mosby, United States District Court for the District of Maryland 17-1166 (May 7, 2018), Tolan v. Cotton, 134 S. Ct. 1861 (2014), *Infra Parts I, II*, *and IV, and* City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015).

155 *See* Sager v. Woodland Park, 543 F. Supp. 282, 298 (D. Colo. 1982).

156 Lamont v. New Jersey, 637 F.3d 177, 186 (3d Cir. 2011) (citation omitted) (internal quotation marks omitted).

157 Hector v. Watt, 235 F.3d 154, 160 (3d Cir. 2000).

158 *Id.*

159 *See* Wilson v. Arkansas, 514 U.S. 927, 931 (1995); Hudson v. Michigan, 547 U.S. 586, 594 (2006) ("One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident.").

announced themselves after the initial entry, the subsequent announcement and the plaintiff approaching them with a gun would be intervening events that would establish a superseding cause that breaks the proximate cause chain and relieves the officers of civil liability.

Not every intervening event is a superseding cause that breaks the proximate cause chain. If the occurrence of an intervening event is clearly foreseeable from the action of the police, then it will not break proximate cause. If the intervening event is due to the intentional, negligent, or reckless behavior of the plaintiff, and the plaintiff's action factually resulted in the harm, then the police officer will not be liable. But if the intervening event or action of the plaintiff is a reasonably foreseeable result of the police officer's actions, then it is considered within the risk of harm created by the police officer, and therefore not a superseding cause, and proximate cause is maintained. Whether liability can be maintained will be fact specific to each case.

B. *Judicial Application of Provocation and Police Pre-Seizure Conduct*

A majority of the federal circuit courts of appeals have adopted the pre-seizure conduct or provocation approach to determining if the use of force was reasonable. The courts have utilized provocation to determine whether the force was reasonable under the totality of the circumstances or if proximate cause is established, or both. As the Court of Appeals for the First Circuit explained in *Lockhart-Bembery v. Sauro*, to establish civil liability, the plaintiff must be able to prove: (1) the officer "affirmatively act[ed] to increase the threat of harm to the claimant or affirmatively prevent[ed] the individual from receiving assistance," (2) "[a] proximate causal link [exists] between a government agent's actions and a personal injury," and (3) the level and intensity of the proximate cause "bring[s] [the] case out of the realm of tort law and into the domain of constitutional due process" meeting the "onerous requirement that the state's actions shock the conscience of the court."[160] In so doing, the plaintiff's case succeeds in "distinguishing between conscience-shocking and seriously negligent behavior."[161] The police behavior must be "manifestly outrageous behavior

[160] Lockhart-Bembery v. Sauro, 498 F.3d 69, 77 (1st Cir. 2007).

[161] *Id.*

[to] qualif[y] as conscience-shocking."[162] In police use of force cases, the police officer's conduct must exceed unnecessary force so as to "constitute 'brutal' and 'inhumane' conduct."[163] "Shocks the conscience" can be established when police conduct is deliberately indifferent to a known risk under circumstances when police officers "have an opportunity to reflect and make reasoned and rational decisions."[164]

One way to establish a case based on pre-seizure conduct or provocation is to focus on the tactics and decisions the police utilized before the actual force was applied. For example, in *Estate of Smith v. Marasco*, the Court of Appeals for the Third Circuit addressed a case in which the state police utilized a Special Emergency Response Team (SERT), otherwise known as a SWAT team, on a Vietnam veteran suffering from Posttraumatic Stress Disorder (PTSD).[165] The use of force can reach constitutional violation if it's found to "shock the conscience" of the court.[166] In *Estate of Smith*, the court set down several factors to consider when examining police use of force. It instructed courts to consider whether the officer was confronted with a "hyper pressurized environment" or was in a situation in which he had "the luxury of proceeding in a deliberate fashion."[167] If the officer was in a "hyper pressurized environment," the "conscience shocking" would be achieved if the actions of the officer establish that he deliberately harmed the victim.[168] But, if the officer had the "luxury of proceeding in a deliberate fashion," then conscience shocking will be established if the officer acted with deliberate indifference to the asserted right violated by the officers' actions.[169] Thus, even if the action of the officer is shown to be on the level of "shocks the conscience," the plaintiff must still show that a reasonable officer would not have acted similarly given the totality of the circumstances.[170] In other words, would a reasonable officer have known his actions at the time crossed

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162 *Id.*

163 *Id.* (citing Cummings v. McIntire, 271 F.3d 341, 345-46 (1st Cir. 2001)).

164 Melendez-Garcia v. Sanchez, 629 F.3d 25, 36 (2010) (citing Cty. of Sacramento v. Lewis, 523 U.S. 833, 851-52 (1998)).

165 Estate of Smith v. Marasco, 430 F.3d 140, 145-46 (3d Cir. 2005).

166 *Id*. at 153-54.

167 *Id.* at 153.

168 *Id*.

169 *Id.*

170 *Id.* at 154.

a constitutional boundary and violated established rights under the law?[171]

When the court is determining if the standard is met, it will look at the circumstances of the case, including whether the officer had time to think about the force used. In situations when the officer was confronted with events creating a "hyper-pressurized environment," shocks the conscience may require a deliberate intention to harm the plaintiff, which is a higher level of wrongfulness than if the situation allowed for reflection. If the officer had such time for reflection on the force used, then a lower level of wrongfulness—deliberate indifference—would establish shocks the conscience.

Even if the shocks the conscience standard is met, the plaintiff must still establish that the law was so clear that the officer knew the wrong action taken rose to the level to violate the shock the conscience standard when the officer acted. This was the point the Supreme Court stressed in *San Francisco v. Sheehan*.

In *Sheehan*, the Supreme Court heard a case in which a social worker called the San Francisco police to aid in executing a mental health temporary detention treatment and evaluation order for Sheehan after she stopped taking her medication, stopped seeing her psychiatrist, and threatened the social worker by saying she had a knife.[172] After the police entered Sheehan's room, she chased them out while threatening to kill them.[173] The officers discussed the possibility of Sheehan escaping, and that she was a threat to herself and others and could possibly secure other knives from the room.[174] Subsequently, they decided to force their way into the room to secure her. They tried to use pepper spray to subdue her but it was unsuccessful, which is when one officer shot Sheehan twice and another shot her multiple times.[175] Sheehan survived and filed a §1983 civil rights claim.[176] The Court ruled in *Sheehan* that when a plaintiff claims improper police tactics and violation of federal law regarding the treatment of the mentally ill, qualified immunity attaches even when the police fail to follow proper police procedures.[177]

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171 Estate of Smith v. Marasco, 430 F.3d 140, 154 (3d Cir. 2005).

172 City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1769-70 (2015).

173 *Id.* at 1770.

174 *Id.*

175 *Id.* at 1771.

176 *Id.*

177 *Id.* at 1772.

Fourth Amendment jurisprudence protects against civil liability actions that, at the time they were taken, it could be found that a reasonable officer would have acted the same way.[178] That is not changed by hindsight assertions from a police expert that the officer was imprudent, inappropriate, or even reckless.[179] The Court held that in close cases of police judgment, "a jury does not automatically get to second-guess these life and death decisions."[180] As discussed, civil liability only attaches if the officer violated established law and it was clearly established that the specific actions were unlawful at the time they were taken.[181] In close cases, the police enjoy the benefit of the doubt.

Sheehan presented a claim that the police provoked the incident that led to the police using force.[182] The provocation, Sheehan asserted, and the Court of Appeals for the Ninth Circuit agreed, established a Fourth Amendment violation.[183] The Supreme Court did not decide on that issue, but instead focused on the issue of qualified immunity.[184] The Court held that the officers were entitled to qualified immunity even through their tactics were in error because the officers could have believed a second entry was necessary.[185] The Court also held that even if the officers' entry violated the Fourth Amendment, there was no way for the officers to know that *Graham* prevented the forced entry of the police to secure a mentally ill person and prevent her from escaping with weapons.[186] The lack of "fair notice" that the police under the specific situation were barred from the use of force to secure Sheehan, by itself, entitled the officers to qualified immunity even if they acted unreasonably.[187] The Court would return to the applicability of the Court of Appeals for the Ninth Circuit's version of the provocation rule, discussed below, two years later in *Los Angeles v. Mendez*.[188]

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178 City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015).

179 *Id.* at 1777.

180 *Id.*

181 *See supra*, Part I.

182 City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1770-72 (2015).

183 *Id.* at 1771.

184 *See id.* at 1769.

185 *Id.* at 1775-78.

186 *Id.* at 1776-77.

187 *Id.*

188 Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017).

Although the Court stated in *Sheehan* that it was not making a judgment on the Court of Appeals for the Ninth Circuit's provocation rule, it held that its applicability was not so settled and established in law that the police were given fair and clear notice that their actions created civil liability when they (1) failed to use police procedures or (2) failed to comply with the Americans with Disabilities Act (ADA), or that the ADA even applied to police officers applying force during a seizure of a person they knew was mentally disabled when such a person poses a threat to himself or others.[189] The Court held that the lack of clarity of law, by itself, established the officer's right to qualified immunity.[190]

Even though the failure to use proper police tactics is not per se unreasonable, some courts have held that such failure is relevant to the reasonableness inquiry.[191] For example, in *Moody v. Philadelphia Housing Authority*, the Pennsylvania Commonwealth Court affirmed the trial court and held that failure to comply with clear police policy and procedures, along with established case law, can negate qualified immunity.[192] The court held that police actions are unreasonable when the officer makes a conscious decision to disregard standard established police tactics, policies, and procedures which places the officer at greater risk of harm to himself or others.[193] This theory of police liability is limited because the officer's disregard of policy must be more than a mistake or poor police work.

As the Court of Appeals for the Tenth Circuit held, "[a]n officer's pre-seizure conduct can be part of the reasonableness inquiry, but

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189 *See id*. at 1772-74 (The Court discusses how it originally accepted the case to review the Ninth Circuit's holding that the ADA applied to police officers and how San Francisco initially asserted in its petition for certiorari that the ADA did not apply. The City later abandoned that assertion and instead argued that Sheehan was not a "qualified person" entitled to protection under the ADA, because Sheehan posed a direct threat to the officers. The Court did not answer San Francisco's new assertion because it was not what the Court agreed to address when it decided to grant certiorari.).

190 *See id*. at 1778.

191 *See* Moody v. Philadelphia Hous. Auth., 673 A.2d 14, 19 (1996) (determining that an officer would not have been entitled to qualified immunity, in part, because his use of force did not conform with "the Philadelphia Police Department's pamphlets and policies concerning the use of force"). *But see* Drewitt v. Pratt, 999 F.2d 774, 780 (4th Cir. 1993); Fraire v. City of Arlington, 957 F.2d 1268, 1276 (5th Cir. 1992) (stating that "even a negligent departure from established police procedure does not necessarily signal violation of constitutional protections").

192 *See id.*

193 *See id.*; Jeffrey J. Noble & Geoffrey P. Alpert, *State-Created Danger Should Police Officers Be Accountable for Reckless Tactical Decision Making?*, in CRITICAL ISSUES IN POLICING 571-578 (Roger G. Dunham & Geoffrey P. Alpert eds., 2015).

only if the officer's *own* reckless or deliberate conduct during the seizure unreasonably created the need to use . . . force."[194] The disregard of constitutional rights, in the action of the police, must rise to the level of shocks the conscience, which can be defined by a reckless disregard of risk or behavior that only a "plainly incompetent" police officer would engage in, or actions that "knowingly violated the law."[195]

The Supreme Court held that the standard for civil liability under the Fourth Amendment focuses on the objective reasonableness of the police action. Some circuit courts of appeals have narrowed their focus to the moment the force is used.[196] Other circuit courts include the officer's pre-seizure conduct.[197] The Court of Appeals for the Third Circuit disagreed that events leading up to the actual seizure must be excluded, reasoning that excluding pre-seizure events from evidence would violate the Supreme Court's requirement to review the "totality of the circumstances."[198]

The Court of Appeals for the Seventh Circuit, in *Williams v. Indiana*, came to a similar conclusion, holding that the dispute of whether an officer kicking in a door created the situation that led to him shooting the suspect justified the denial of summary judgment because the question was for the jury to settle.[199] The court held that the actions of the officer before the use of force are relevant to the reasonableness of that force.[200] The court further held that Fourth Amendment law makes clear that "officers cannot resort as an initial matter to

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194 Pauly v. White, 814 F.3d 1060, 1076 (10th Cir. 2016) (internal citation omitted).

195 Malley v. Briggs, 475 U.S. 335, 341 (1986).

196 *See* Salim v. Proulx, 93 F.3d 86, 91-92 (2d Cir. 1996) (stating that a police officer's actions leading up to a shooting were "irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force," and that the "reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force."); *see also* Rollins v. Smith, 106 Fed. Appx. 513, 514 (8th Cir. 2004); Bella v. Chamberlain, 24 F.3d 1251, 1256 (10th Cir. 1994); Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993); Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992).

197 *See* Abraham v. Raso, 183 F.3d 279, 291-92 (3d Cir. 1999); St. Hilaire v. City of Laconia, 71 F.3d 20, 26 (1st Cir. 1995); Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994).

198 *See* Abraham v. Raso, 183 F.3d 279, 291-92 (3d Cir. 1999).

199 *See* Williams v. Indiana State Police Dept., 797 F.3d 468, 482-85 (7th Cir. 2015).

200 *See id*. at 483 ("[The] sequence of events leading up to the seizure is relevant because the reasonableness of the seizure is evaluated in light of the totality of the circumstances; that the 'short period of time that elapsed from Blanchard's arrival to the confrontation, and his abrupt action in kicking in the door, give context to John's possession of the knife that might be different if John had himself opened the door holding the knife'" . . . [The] circumstances known

lethal force on a person who is merely passively resisting and has not presented any threat of harm to others."[201] The Court of Appeals for the Tenth Circuit, in *Holland v. Harrington*, similarly held that when the issue involves the decision to use force, in this case a SWAT team to execute a misdemeanor warrant, the court should look at the reasons that underlined the application for the use of force.[202]

The Supreme Court has made clear that courts are to keep in mind that "the '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,"[203] and that "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."[204] Still, the Courts of Appeals for the Ninth and Third Circuits have admonished trial courts to consider that a victim of deadly force does not have the ability to challenge the assertions of the police when they claim qualified immunity.[205] The Third Circuit explained that "the court may not simply accept what may be a self-serving account by the officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story."[206]

While the Supreme Court has noted that "[w]ith respect to a claim of excessive force . . . '[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment,"[207] the Court has also recognized that "[a] passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect."[208] The questions of whether the facts are such that a reasonable officer in the situation would have perceived a threat worthy of deadly force and whether the forced used

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by Blanchard, or even created by him, inform the determination as to whether the lethal response was an objectively reasonable one.").

[201] *Id.* at 485.

[202] Holland v. Harrington, 268 F.3d 1179, 1189-91 (10th Cir. 2001).

[203] *Graham*, 490 U.S. at 396.

[204] *Id*. at 396-97.

[205] *See* Abraham v. Raso 183 F.3d 279, 294 (3d Cir. 1999); Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994).

[206] *Abraham*, 183 F.3d at 294 (quoting *Scott*, 39 F.3d at 915).

[207] *Graham*, 490 U.S. at 396-97 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

[208] *Abraham*, 183 F.3d at 294.

was reasonable are factual questions for the trier of fact.[209] The court must determine if the facts are in dispute and if the facts, viewed in favor of the plaintiff, establish a violation of law.[210]

The Supreme Court has also affirmed the application of the objective reasonableness standard to use of force questions related to Fourteenth Amendment Due Process Claims in *Kingsley v. Hendrickson*.[211] The Court held that the Due Process Clause requires the same test as the Fourth Amendment, the objective reasonableness test—whether "use of force was unreasonable in light of the facts and circumstances at the time."[212] As with police officers, when dealing with prison officers and the application of the objective standard, the fact finder's determination turns on whether the use of force was objectively reasonable based on the totality of the facts and circumstances of each case.[213] The Court concluded that the objective reasonableness test "protects an officer who acts in good faith" who is "forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[214]

The Court rejected the subjective test because it would require the jury to "weigh respondents' subjective reasons for using force and subjective views about the excessiveness of the force."[215] The Court concluded that the proper test was whether, under the circumstances, the officer acted reasonably, and not whether the officer thought he acted reasonably under the circumstances.[216]

Although the Court in Sheehan made clear that a plaintiff "cannot 'established a Fourth Amendment violation based merely on bad

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209 Scott v. Henrich, 39 F.3d at 915.

210 Pauly v. White, 814 F.3d 1060, 1076 (10th Cir. 2016) (citation omitted).

211 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2471, 2474 (2015).

212 *Id.* at 2471; *see also Graham,* 490 U.S. at 388.

213 *Kingsley,* 135 S. Ct. at 2473.

214 *Id.* at 2474 (citation omitted) ("For these reasons, we have stressed that a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer. We have also explained that a court must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate. And we have limited liability for excessive force to situations in which the use of force was the result of an intentional and knowing act (though we leave open the possibility of including a 'reckless' act as well). Additionally, an officer enjoys qualified immunity and is not liable for excessive force unless he has violated a 'clearly established' right, such that 'it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'").

215 *Id.* at 2477.

216 *Id.* at 2476-77.

tactics that result in a deadly confrontation that could have been avoided,'" six circuit courts of appeals have adopted the provocation rule.[217] The Courts of Appeals for the First,[218] Third,[219] Seventh,[220] Ninth,[221] Tenth,[222] and Eleventh[223] Circuits have adopted the provocation approach. The D.C. Circuit has not directly ruled on the adop-

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217 City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1777 (2015) (quoting Billington v. Smith, 292 F.3d 1177, 1190 (9th Cir. 2001)).

218 *See, e.g.*, St. Hilaire v. Cty. of Laconia, 71 F.3d 20, 26 (1st Cir. 1995) ("[T]he question [in Hodari] was not whether the seizure was *reasonable*, which requires an examination of the totality of the circumstances, but whether there had been a seizure at all. We do not read this case as forbidding courts from examining circumstances leading up to a seizure, *once it is established that there has been a seizure*."); Frances-Colon v. Ramirez, 107 F.3d 62, 63-64 (1st Cir. 1997) ("A substantive due process interest in 'bodily integrity' or 'adequate medical care' cannot support a personal injury claim under section 1983 against the provider of a governmental service unless . . . the government employee, in the rare and exceptional case, affirmatively acts to increase the threat of harm to the claimant.").

219 *See, e.g.*, Abraham v. Raso, 183 F.3d 279, 291 (1999) ("[W]e want to express our disagreement with those courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure.'"); Lamont v. New Jersey 637 F.3d 177, 186 (3d Cir. 2011) (quoting Hector v. Watt, 235 F.3d 154, 160 (3d. Cir. 2000)).

220 *See e.g.,* Estate of Williams v. Ind. State Police Dep't, 797 F.3d 468, 483 (2015) ("That does not mean that Blanchard's pre-seizure conduct is irrelevant to the Fourth Amendment claim. The sequence of events leading up to the seizure is relevant because the reasonableness of the seizure is evaluated in light of the totality of the circumstances . . . . Under this theory of liability, the issue is whether it is clearly established, however, that officers cannot resort as an initial matter to lethal force on a person who is merely passively resisting and has not presented any threat of harm to others.").

221 *See, e.g.*, Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002) ("[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."). The Supreme Court reversed the Ninth Circuit's provocation rule in Cty. of L.A. v. Mendez, 137 S. Ct. 1539, 1547, n.* (2017), but limited the impact of its holding, stating that its prior holding in Graham v. Connor, 490 U.S. 386 (1989), determines what is reasonable use of force, but that does not preclude other Fourth Amendment claims.

222 *See* Pauly v. White, 814 F.3d 1060, 1076 (10th Cir. 2016) (citations omitted) ("An officer's pre-seizure conduct can be part of the reasonableness inquiry, but only if the officer's own reckless or deliberate conduct during the seizure unreasonably created the need to use such force."), vacated on other grounds, 137 S. Ct. 548 (2017). The Tenth Circuit reheard the case in Pauly v. White, 874 F.3d 1197 and a petition of certiorari, which in part requests the Court review the provocation rule, has been filed based on that ruling. Petition for Writ of Certiorari at 30, Pauly v. White, 137 S. Ct. 548 (2018) (No. 17-1078).

223 *See* Gilmere v. City of Atlanta, 774 F.2d 1495, 1501 (11th Cir. 1985) (en banc) ("We conclude that a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power."), *abrogated on other grounds* by Graham v. Connor, 490 U.S. 386 (1989).

tion of the provocation approach, but has seemed to supported it.[224] The Courts of Appeals for the Second,[225] Fourth,[226] Fifth,[227] Sixth,[228] and Eighth[229] Circuits have rejected the provocation approach.

The courts that have accepted the provocation rule require the plaintiff to clearly establish proximate cause and the lack of a super-

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224 *See* Barrett v. United States, 64 F.2d 148, 149 (D.C. Cir. 1933) (citation omitted) ("[I]n order to determine [if the force used in the arrest was justified] it is necessary to look at all the surrounding circumstances. In making an arrest the measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary.").

225 *See* Salim v. Proulx, 93 F.3d 86, 92 (2d. Cir. 1996) (". . .Officer Proulx's actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force. The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force.").

226 *See* Gandy v. Robey, 520 F. App'x. 134, 142 (4th Cir. 2013) ("A police officer's pre-seizure conduct, regardless of whether it was ill-advised or violative of law enforcement protocol, is generally not relevant for purposes of an excessive force claim under the Fourth Amendment which looks only to the moment force is used . . . . we must focus on the moment when such force was employed."). *See* Elliott v. Leavitt (4th Cir. 1996) ("Graham requires us to focus on the moment force was used; conduct prior to that moment is not relevant in determining whether an officer used reasonable force.").

227 *See* Rockwell v. Brown, 664 F.3d 985, 992-93 (5th Cir. 2011) (citation omitted) ("It is well-established that the excessive force inquiry is confined to whether the officer or another person was in danger at the moment of the threat that resulted in the officer's use of deadly force.").

228 *See* Livermore v. Lubelan, 476 F.3d 397, 406 (6th Cir. 2007) (". . .Livermore points to Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002), in which the Ninth Circuit held that a plaintiff's Fourth Amendment claim against police officers who used deadly force may survive summary judgment, even where the particular seizure is reasonable, if the defendant police officers acted recklessly in creating the circumstances which required the use of deadly force. . . . [W]e have rejected such an analysis. . . . The proper approach under Sixth Circuit precedent is to view excessive force claims in segments. That is, the court should first identify the 'seizure' at issue here and then examine whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances. . . . Livermore argues that Lt. Ellsworth acted negligently by increasing the likelihood that Rohm would be shot . . . All of the actions concerning Lt. Ellsworth, however, occurred in the hours and minutes leading up to Rohm's killing; Dickerson instructs us to disregard these events and to focus on the 'split-second judgments' made immediately before the officer used allegedly excessive force.").

229 *See* Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993) ("[W]e scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment. . . . The district court seemingly believed that Rice's conduct was legally unreasonable because it was not authorized under the policies of the Missouri Highway Patrol. We need not determine whether Trooper Rice violated Missouri Highway Patrol policy, however, for under section 1983 the issue is whether the government official violated the Constitution or federal law, not whether he violated the policies of a state agency. Conduct by a government official that violates some state statutory or administrative provision is not necessarily constitutionally unreasonable.").

seding cause. The Third Circuit Court of Appeals noted in *Raso* disagreement with those courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure.'"[230] But in *Lamont v. New Jersey*, the court held that if officer use of force was reasonable in light of the plaintiff's actions, then regardless of the provocation, there would be no civil liability on the officer.[231] The Third Circuit explained the distinction in the following hypothetical.

> Suppose that three police officers go to a suspect's house to execute an arrest warrant and that they improperly enter without knocking and announcing their presence. Once inside, they encounter the suspect, identify themselves, show him the warrant, and tell him that they are placing him under arrest. The suspect, however, breaks away, shoots and kills two of the officers, and is preparing to shoot the third officer when that officer disarms the suspect and in the process injures him. Is the third officer necessarily liable for the harm caused to the suspect on the theory that the illegal entry without knocking and announcing rendered any subsequent use of force unlawful? The obvious answer is "no."[232]

Some circuit courts of appeals have used the provocation approach as a factor in determining reasonableness. For example, in *Gilmere v. City of Atlanta*, the Court of Appeals for the Eleventh Circuit was confronted with a case in which the police beat to death Thomas Patillo.[233] The court upheld the lower court's finding "that the beating occurred 'with little or no provocation' and that 'the blows were not delivered in a good faith effort to control Patillo, but rather out of irritation at his initial resistance.'"[234] The court found that the decedent was "an older, smaller, and unarmed man who was clearly intoxicated," and that there was no evidence showing that the decedent had provoked the beating.[235] Thus, the court found that the

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230 Abraham v. Raso, 183 F.3d 279, 291 (3d Cir. 1999).

231 Lamont v. New Jersey, 637 F.3d 177, 183-84 (3d Cir. 2011).

232 *Id.* (quoting Bodine v. Warwick, 72 F.3d 393, 400 (3d Cir. 1995)); *see also* George v. City of Long Beach, 973 F.2d 706 (9th Cir. 1992), *cert. denied*, 507 U.S. 915, 122 L. Ed. 2d 664, 113 S. Ct. 1269 (1993). The suspect's conduct would constitute a "superseding" cause, see Restatement (Second) of Torts § 442 (1965), that would limit the officer's liability. *See id.* § 440.

233 Gilmere v. City of Atlanta, 774 F.2d 1495, 1501 (11th Cir. 1985).

234 *Id.*

235 *Id.*

police unreasonably created a situation in which Patillo sought to defend himself from a beating by the police and was shot and killed.[236] The court acknowledged that the police were subjectively in fear that Patillo was going to attack them. but that the fear was not objectively reasonable because the police had unreasonably used force and created the situation that resulted in the need to use deadly force.[237]

Although the Supreme Court did not take a position on the Ninth Circuit "provocation" rule in *Sheehan*, in *Los Angeles v. Mendez*, the Court directly addressed the issue.[238] In *Mendez*, a Los Angeles County Sheriff's office task force was searching for a wanted parolee.[239] With an arrest warrant, the deputies approached a home at which the parolee had been seen.[240] While one deputy knocked at the door, two other deputies went around to the back of the house.[241] A woman answered the door and the deputies informed her that they were looking for the parolee.[242] She said he was not it the house.[243] When one of the officers thought they had heard someone running, the police entered the house and, after placing the woman under arrest, searched the house.[244] The parolee was not in the house.[245]

With guns drawn, the deputies searched the back of the house, which included the shed of Angel and Jennifer Mendez, who were sleeping in the shack.[246] Without a search warrant and without announcing themselves, the deputies entered.[247] Angel Mendez thought it was the woman of the house and got up to move his BB gun out of the way.[248] As he moved with the gun in his hand, it was pointing in the deputies' direction. One deputy saw it and shouted "Gun!" and both shot in the direction of Angel and Jennifer Mendez fifteen times, resulting in injuries to both Mendezes, including the loss of Angel Mendez's leg below the knee.[249] The Court of Appeals for the

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236 *Id.*
237 *See id.*
238 *See* Cty. of Los Angeles. v. Mendez, 137 S. Ct. 1539, 1543-44 (2017).
239 *See id.* at 1544.
240 *Id.*
241 *Id.*
242 *Id.*
243 *Id.*
244 Cty. of Los Angeles. v. Mendez, 137 S. Ct. 1539, 1544 (2017).
245 *Id.*
246 *Id.*
247 *Id.*
248 *Id.* at 1544-45.
249 *Id.* at 1545.

Ninth Circuit affirmed the district court's holding that under the provocation rule, even though the offers acted reasonably in regard to the use of force upon seeing Mendez with a gun, they were not entitled to qualified immunity because the unconstitutional entry without a search warrant recklessly and intentionally brought about the shooting.[250] The State of California appealed and the Trump Administration filed an amicus brief supporting the reversal of the decision and a formal rejection of the provocation rule by the Supreme Court.[251]

The Trump Administration argued that the Ninth Circuit provocation rule, in violation of *Graham*, does not exclusively focus on the specific moment in time of the use of force, but focuses on the moments in time that led to the use of force incident.[252] Further, the Ninth Circuit provocation rule violates *Graham* because it allows the court to consider the subjective thinking of the officer, whether the officer acted in an intentional or reckless manner in the use of force, which the Court has rejected in its Fourth Amendment analysis.[253] The Trump Administration argued that the rule would force police officers to second guess themselves in split-second decisions for fear of civil liability.[254] Furthermore, the Administration argued that it could make officers liable even if their use of force was reasonable, but the police had created the situation that made the use of force necessary.[255] The Supreme Court rejected both approaches of the civil liability jurisprudence.[256] The Trump Administration concluded its argument by stating that the court erred by focusing on factual causation and not proximate cause.[257] The Administration asserted that proximate cause is established only if the harm that occurred is directly associated with the law that a police officer is accused of violating, and the harm must be such that it is clearly foreseeable from the recognized law that was violated.[258]

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250 *See Mendez*, 137 S. Ct. 1539, 1556 (2017).

251 *See* Brief for the United States as Amicus Curiae Supporting Petitioners, Cty. of Los Angeles v. Mendez, No. 16-369 (January 24, 2017), 2017 WL 371930 at 6-7.

252 *See id.* at 18-19.

253 *See id.* at 19.

254 *See id.* at 18-19, 22-25.

255 *See id.*

256 *See id.*

257 *See* Brief for the United States as Amicus Curiae Supporting Petitioners, Cty. of Los Angeles v. Mendez, No. 16-369 (January 24, 2017), 2017 WL 371930 at 32.

258 *Id.* at 28-29.

In *Mendez*, the Court rejected the Court of Appeals for the Ninth Circuit's version of provocation,[259] but took no position on police provocation when applied through a totality of the circumstances test in *Graham*.[260] The Court's skepticism regarding the Ninth Circuit provocation rule voiced in *Sheehan* was made plain in *Mendez*. The Court explained that the problem with the Ninth Circuit's version of provocation was that the rule "uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist."[261] The Court found that an unreasonable seizure does not validate an excessive force claim.[262] The Court took issue with the Ninth Circuit's version of provocation, by which a constitutional violation that occurs before a use of force occurs creates liability even when the use of force is found reasonable under *Graham*.[263] It explained:

> This approach mistakenly conflates distinct Fourth Amendment claims. Contrary to this approach, the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional. An excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry. By conflating excessive force claims with other Fourth Amendment claims, the provocation rule permits excessive force claims that cannot succeed on their own terms.[264]

The Court explained that the different types of Fourth Amendment violations are independent of each other. It noted that all excessive force claims must be analyzed under *Graham*, independent of all other Fourth Amendment Claims.[265]

But the Court did not rule on the concept that an unreasonable officer-created danger can support the determination that the officer acted unreasonably when applying the totality of the circumstances

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259 Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1543-44 (2017).

260 Graham v. Connor, 490 U.S. 386, 386 (1989).

261 *Id.* at 1546.

262 *Id.* at 1547.

263 *Id.*

264 *Id.*

265 *Id.*

test under *Graham*.[266] The Court limited the impact of its decision by only deciding on the Ninth Circuit's version of provocation.[267] By doing so, the Court specifically bypassed the theory of officer created jeopardy as a means to prove unreasonableness. The impact of the Court holding that, "once a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation," is that, with the exception of the Ninth Circuit, the circuit courts of appeals that have adopted the police created danger approach to determine whether the police use of force was reasonable were not reversed.[268]

In *Mendez*, the Court made three clear statements regarding Fourth Amendment civil liability claims. First, *Graham* is the governing case on the issue of police use of force and what is required to establish police liability.[269] Second, whatever facts and events establish the officer-created danger, a prior Fourth Amendment violation does not per se change a reasonable use of force into a constitutional violation.[270] For example, as the Third Circuit held, a violation of knock and announce before entering a home does not turn a reasonable use of force once in the home into a Fourth Amendment use of force violation.[271] Lastly, once a use of force is found to be reasonable, the use of force analysis ends.[272]

The Court ruled that any violation of the Fourth Amendment can establish liability and the plaintiff does not need to "dress up" all violations as use of force violations.[273] The Court rejected the conflating of different Fourth Amendment violations into one analysis in which a single violation established liability, even when the use of force was itself reasonable and thus constitutional.[274] While the Court of Appeals for the Ninth Circuit's version of analysis of police-created danger, or provocation, was rejected, the Supreme Court did not reject the proposition that under *Graham*, and the totality of the circumstances test, prior police activity can create a Fourth Amendment

266 Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1549 n* (2017).
267 *Id.*
268 *Id.*
269 *Id.* at 1546.
270 *Id.* at 1546-47.
271 Bodine v. Warwick, 72 F.3d 393, 400 (3d Cir. 1995).
272 Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546 (2017).
273 *Id.* at 1548 (emphasis in original).
274 *Id.* at 1547.

violation.[275] The Court simply stated that all relevant circumstances of the use of force determines whether a seizure is reasonable.[276]

In *Kentucky v. King*, the Supreme Court found that a search and seizure without a warrant was reasonable, not because of the actions of the officers at the moment they used force to gain entry, but by looking at the totality of the circumstances that led to the forced entry.[277] This case involved police pursuit of a drug dealer who ran upstairs and into an apartment.[278] Upon pursuit, police did not know which apartment the suspect ran into.[279] When the police officers knocked on the plaintiff's door and announced themselves, they heard rustling, which they thought was destruction of evidence, and broke down the door.[280] Upon entering, the police officers secured drugs, but the door turned out not to be that of the suspect they were chasing.[281] The case turned on whether the entry was constitutional when the police created the exigent circumstance of destruction of evidence by knocking on the wrong door in the first place.[282] The case presented the question of whether a warrantless entry resulting in a search and seizure based on exigent circumstances is unconstitutional, if the police created the exigent circumstances.[283] In *King*, the Court accepted police-created exigency as method of determining if the actions were reasonable.[284] Thus, the reasonableness analysis of police use of force under *Graham* includes consideration of police actions and decision-making leading up to the use of force.[285] Under *King*, the analysis of police use of force would inquire as to whether the police impermissibly created the need to use force.[286] The Court would look at the actions that led up to the use of force and ask whether police actions leading to the use of force themselves violated the Fourth Amendment.[287] But even if under *King* police pre-seizure

275 *Id.* at 1549.
276 *Id.* at 1547.
277 Kentucky v. King, 563 U.S. 452, 455 (2011).
278 *Id.* at 456.
279 *Id.*
280 *Id.*
281 *Id.* at 456-57.
282 Kentucky v. King, 563 U.S. 452, 455 (2011).
283 *Id.*
284 *Id.*
285 Graham v. Connor, 490 U.S. 386, 396 (1989).
286 Kentucky v. King, 563 U.S. at 462.
287 *Id.* at 461-64.

conduct violates the Fourth Amendment, the Court held in *Mendez* that once the use of force is found to be reasonable at the point in time it was used, an unrelated but prior action that violates the Fourth Amendment does not make the subsequent use of force unconstitutional.[288]

In *King*, the Court further limited the police pre-seizure conduct analysis by holding that the reasonableness of police actions under the Fourth Amendment does not include consideration of bad faith, reasonable foreseeability, or officer violation of good investigatory or law enforcement practice.[289] Additionally, the Court has repeatedly stated that a Fourth Amendment violation is not established by an application of constitutional law to the behavior of the officer on a high level of generality.[290] But, rather, the facts of the specific case must put an officer on notice that such facts establish a Fourth Amendment violation.[291] In other words, the Court requires the legal question to consider the specific facts and circumstances confronting the officer and ask whether under those circumstances the law is so "clearly established" that the officer's actions are in fact a violation of Fourth Amendment law.[292]

The last point the Court made in *Mendez* was on causation. Even if a Fourth Amendment violation is established, the plaintiff must establish that the violation was the cause-in-fact and the proximate cause of the injury, absent any superseding causes.[293] The Court, affirming the approach used by the Courts of Appeals for the First and Third Circuits, held in *Mendez* that the proper "analysis of this proximate cause question require[s] consideration of the 'foreseeability or the scope of the risk created by the predicate conduct,' and require[s] the court to conclude that there was 'some direct relation between the injury asserted and the injurious conduct alleged.'"[294] The Court held that the Ninth Circuit confused the causation question of warrantless search with the failure of the officers to knock and

288 Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546-47 (2017).

289 Kentucky v. King, 563 U.S. at 453, 464-65, 467-68.

290 *See, e.g.*, *Mendez*, 137 S. Ct. at 1547.

291 *Id.* at 1547-48.

292 *Id.*; Kingsley v. Hendrickson, 135 S. Ct. 2466, 2474 (2015) (citing Saucier v. Katz, 533 U.S. 194, 202 (2001)).

293 *Mendez*, 137 S. Ct. at 1549.

294 *Id.* at 1548-49 (citation omitted).

announce in relation to the injuries suffered as a result of the police shooting.[295] In overruling the Ninth Circuit, the Court stated:

> Unfortunately, the Court of Appeals' proximate cause analysis appears to have been tainted by the same errors that cause us to reject the provocation rule. The court reasoned that when officers make a "startling entry" by "barging into" a home "unannounced," it is reasonably foreseeable that violence may result. But this appears to focus solely on the risks foreseeably associated with the failure to knock and announce, which could not serve as the basis for liability since the Court of Appeals concluded that the officers had qualified immunity on that claim. By contrast, the Court of Appeals did not identify the foreseeable risks associated with the *relevant* constitutional violation (the warrantless entry); nor did it explain how, on these facts, respondents' injuries were proximately caused by the warrantless entry. In other words, the Court of Appeals' proximate cause analysis, like the provocation rule, conflated distinct Fourth Amendment claims and required only a murky causal link between the warrantless entry and the injuries attributed to it. On remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset.[296]

The Supreme Court stated that civil liability under the Fourth Amendment could be established in that case by applying one of three different theories:[297] first, the "warrantless entry claim," which occurs when the police conduct a search without a warrant;[298] second, "the knock-and-announce claim," which is police officers entering a home unreasonably by failing to announce their presence;[299] or third, the "excessive force claim," which is when a police officer is conducting an unreasonable seizure by using excessive force in opening fire.[300] But under any of these three theories, the plaintiff must establish that the

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295 *Id.* at 1549.

296 *Id.* (citation omitted). The Court concluded that "On remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset."

297 *Id*. at 1545-46.

298 *Id.*

299 *Mendez*, 137 S. Ct. at 1545-46.

300 *Id.*

resulting injury was foreseeable from the constitutional violation absent any actions by the plaintiff that break the causal chain.[301]

Because the Ninth Circuit had granted the officers summary judgment on the "knock and announce" claim, and not the "warrantless entry" claim, the Court referred to the question of whether proximate cause permits the plaintiffs to recover damages based on the deputies' failure to secure a warrant before entering their home.[302] The Court cited the briefs submitted by both parties as a starting point for determining that question.[303]

II. POLICE USE OF FORCE, SELF-DEFENSE, AND FEDERAL CRIMINAL CULPABILITY

A. *General Concepts*

More recent issues regarding police use of force have shifted from Fourth Amendment analysis to questions of officer safety and officer-perceived threats as justification for the use of deadly and non-deadly force.[304] If the officer reasonably believes that his life or the life of another officer is in danger, the officer may use deadly force.[305] Because police use of force is regulated by the Fourth Amendment, an officer that fears for his life must be able to articulate reasons for that belief.[306] Failure to do so can result in the officer being subject to civil liability or criminal culpability.[307] But police use of deadly force in the line of duty carries certain protections that separate the use of force from the analysis of a civilian using deadly force.

Self-defense laws, although varied among the fifty states, all consider the same basic factors. These include: (1) the nature of the threat, (2) the totality of the circumstances regarding the threat, and (3) the reasonableness of the forced used.[308] In regard to the use of

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301 *Id.*

302 *Id.* at 1548-49.

303 *Id.*

304 Richard P Shafer, *When Does Police Officer's Use of Force During Arrest Become So Excessive as to Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil Rights Act of 1871 (42 U.S.C.A. § 1983)*, 60 A.L.R. FED. 204 § 12 (2016).

305 *Id.* at § 9.

306 *Id.* at § 12.

307 *Id*.

308 *E.g.*, Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J. LAW & PUB. POL'Y 397, 404

deadly force, the person using the force: (1) must have believed that deadly force or force that could cause serious bodily harm was imminently threatened, (2) must not have initiated the confrontation, and (3) must have believed that the deadly force used was needed to prevent deadly force from being inflicted upon him.[309] Deadly force generally is limited to repelling a threat or imposition of deadly force, kidnapping, or rape.[310] States vary on the ability to use force or deadly force to prevent theft in a home or destruction of property in a home.[311] The right to self-defense includes the right to defend oneself in one's home and at work, without the requirement of retreat, with some states extending the same right to any place a person has a legal right to be, known as "stand your ground" laws.[312] Depending on the jurisdiction, there may be a requirement for retreat, if under the circumstances it can be done with safety, before force or deadly force can be used.[313] State law may also require a lack of viable options to the person threatened with force.[314] In other words, they may require that there is no other level of force available other than deadly force to respond to the immediate force being used against the person who is claiming self-defense.

While it is a general rule that self-defense cannot be used to repel force used by the police, self-defense can be utilized if the police use unreasonable force that rises to force that threatens life or great bodily harm.[315] For example, the Supreme Court of Pennsylvania, in a case of first impression, held that the threat of civil liability was not enough protection from the use of unreasonable deadly force by police.[316] In *Commonwealth v. French*, Kathleen French was convicted of aggravated assault of a police officer for actions taken during a dispute regarding police use of force against her boyfriend, in which police were beating him with nightsticks and choking him while he

(2001) ("Nonetheless, three themes link Garner and Graham: (1) a focus on the nature of the suspect's actions; (2) an understanding that reasonableness is ultimately determined by examining the totality of the circumstances; and (3) a recognition of reasonableness as an objective inquiry.")

309 *See* Wayne R. LaFave, *Self Defense*, 2 SUBST. CRIM. LAW § 10.4 (3d ed.).

310 *See id.*

311 *Id.*

312 *Id.*

313 *Id.*

314 *See id.*

315 Commonwealth v. French, 611 A.2d 175, 179 (Pa. 1992).

316 *Id.*

was on the ground.[317] The police claimed that French's boyfriend started the fight with the officers.[318] French appealed the conviction by asserting that the trial court applied the wrong standard to self-defense of police use of force.[319] Although French requested a jury instruction that she only had had to believe she intervened to prevent bodily injury, the trial court instructed the jury that French had to believe she was intervening to prevent *serious* bodily injury.[320]

Three years later, the Pennsylvania Supreme Court affirmed its decision and explained the parameters of self-defense against excessive force by police. In *Commonwealth v. Biagini*, Bruce Biagini was arrested for public drunkenness, disorderly conduct, aggravated assault, resisting arrest, prohibited offensive weapons, and possession of a small amount of marijuana resulting from Biagini being drunk and disruptive leaving a party.[321] The case reached the Pennsylvania Supreme Court on appeal, after the superior court reversed the court of common pleas' conviction of Biagini.[322] The superior court held that Biagini had not initially committed an offense worthy of arrest.[323] But the superior court affirmed his conviction for resisting arrest and aggravated assault,[324] asserting that Biagini had no right to use force to prevent an unlawful arrest.[325] The aggravated assault charge resulted from Biagini's punching the arresting officer.[326] Biagini appealed, claiming that under *Commonwealth v. French* he could use force to protect himself from an unlawful arrest.[327] The Pennsylvania Supreme Court rejected this argument, concluding that being confronted with police use of force rising to the level of great bodily

317 *Id.* at 176-77.

318 *Id.*

319 *Id.* at 177-78.

320 *Id.* at 177-79.

321 Commonwealth v. Biagini, 655 A.2d 492, 494 (Pa. 1995).

322 *Id.*

323 *Id.* at 494-95.

324 *Id.* at 495; 18 PA. CONS. STAT. § 2702 (2016). Under Pennsylvania law, an individual is guilty of aggravated assault if he causes bodily injury to a police officer when the officer is effectuating an arrest, regardless of whether the arrest is supported by probable cause. The use of force capable of causing death or serious bodily injury on a person is aggravated assault; "serious bodily injury" is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ." *Id.* at §§ 2301, 2702.

325 *Biagini*, 655 A.2d at 495.

326 *Id.*

327 *Id.* at 496.

injury is different than being confronted with unlawful arrest.[328] The court made clear that the former can be resisted, but not the latter.[329]

In a self-defense case, the analysis focuses on whether the use of force was reasonable.[330] States vary as to the definition of reasonableness. The test can be objective or subjective. The objective test is whether a reasonable person in the situation would believe deadly force was required.[331] The subjective test asks whether (1) the person who used the force believed deadly force was required *and* (2) if that belief was reasonable for the person to have.[332] The objective test does not focus on what the actual person believed, but rather on what a reasonable person in that situation would have believed.[333] An individual who uses deadly force is more likely to escape criminal or civil responsibility if the test is subjective rather than objective.[334] Regardless of whether the test is objective or subjective, the assessment of the facts and circumstances regarding the use of force is not retroactive with the use of hindsight.[335] The assessment of the facts is as the person believed them to be at the time or what a reasonable person would have believed them to be at the time the deadly forces was used.[336]

B. *Police Federal Culpability for Use of Force*

There are distinctions between civilian use of self-defense and police officer use of self-defense. Police shootings are assessed only under the objective test.[337] Another distinction between police and civilian use of force analysis is that the requirement that the person using deadly force did not start the altercation, which does not apply

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328 *Id.* at 493, 499.

329 *Id.* at 459-500.

330 Urbonya, *supra* note 308, at 404.

331 *See, e.g.*, GEORGE COPPOLO, OLR RESEARCH REPORT (Feb. 1, 2008), https://www.cga.ct.gov/2008/rpt/2008-R-0074.htm (describing the "subjective-objective test" used for evaluating self-defense claims under Connecticut General Statute § 53a-22).

332 *Id.*

333 *Id.*

334 *See e.g.*, Douglas Husak, *A Liberal Theory of Excuses*, 3 OHIO ST. J. CRIM. L. 287, 304 (2005).

335 Graham v. Connor, 490 U.S. 386, 396-97 (1989)

336 *Id.* at 396-99.

337 *Id.* at 388.

in police use of force.[338] Regardless of whether the use of force is committed by a police officer or a private person, the use of force event and must be determined to be reasonable under the totality of circumstances test.[339] In terms of police behavior, the totality of the circumstances test is utilized to determine if the use of force was reasonable under the Fourth Amendment.[340] Civil liability for the officer can only be established if the facts are such that the officer did not act reasonably. Criminal culpability requires not only that the officer acted unreasonably but also that the use of deadly force by the officer had no legal justification.[341] When it comes to police use of force, state law is not the only avenue for criminal culpability. Police use of force that is without legal justification and involves a certain level of malice can expose an officer to federal criminal culpability.[342]

While criminal culpability requires a lack of legal justification at the state level, under federal criminal law, culpability requires that the officer acted with willful intent to violate established law.[343] The federal law that provides criminal enforcement of constitutional rights that are protected from unlawful state action or police use of force makes it unlawful for anyone

> *under color of any law, statute, ordinance, regulation, or custom, [to] willfully subject[ ] any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States,* or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this sec-

338 *See e.g.*, 18 PA. STAT. AND CONS. STAT. ANN. § 508(a)(1) (West 2007) ("A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest.").

339 Shafer, *supra* note 304 ("Under the Fourth Amendment, before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others; officers need not be absolutely sure . . . since the Constitution does not require that certitude precedes the act of self-protection."); *see also Graham*, 490 U.S. at 394-96; Tennessee v. Garner, 471 U.S. 1, 7-8 (1985).

340 *Graham*, 490 U.S. at 396.

341 *See supra* Parts I and II.

342 *See* 18 U.S.C. § 242 (2018) and *infra* note 356.

343 *See* 18 U.S.C. § 242 (2018).

> tion or if such acts include the use . . . of a dangerous weapon . . . shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section . . . shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.[344]

Thus, under federal law, a police officer who uses deadly force can be subject to life imprisonment, and a police officer who causes serious bodily injury can be subject to imprisonment for up to ten years.[345] Section 242 is a civil rights statute that punishes police use of force but does not require that the police action be caused by animus toward the race, color, religion, sex, handicap, familial status, or national origin of the victim but requires, rather, that the police officer knew his action violated federal constitutional rights.[346] To prove a violation of Section 242, the United States Department of Justice (DOJ) must prove "beyond a reasonable doubt: (1) that the defendant was acting under color of law, (2) that he deprived a victim of a right protected by the Constitution or laws of the United States, (3) that he acted willfully, and (4) that the deprivation resulted in bodily injury and/or death."[347] "Under color of law" involves governmental authority, and the "willfully" standard requires proof that the officer using force or deadly force must have done so with

> the purpose to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them. While the officer need not be 'thinking in Constitutional terms' when deciding to use force, he must know what he is doing is wrong and decide to do it anyway. Mistake, panic, misperception, or even poor judgment by a

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344 *Id.* (emphasis added); *see also* United States v. Classic et al, 313 U.S. 299, 326 (1941) (discussing the protection from unlawful state action under the color of law because the action infringed on a constitutional right)..

345 *Id.*

346 United States Department of Justice, *Deprivation of Rights Under Color of Law* (last updated Aug. 6, 2015), https://www.justice.gov/crt/deprivation-rights-under-color-law; *see also* ALISON M. SMITH, CONG. RESEARCH SERV., R43830, OVERVIEW OF SELECTED FEDERAL CRIMINAL CIVIL RIGHTS STATUTES 1-2 (2014).

347 UNITED STATES DEPARTMENT OF JUSTICE, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 9 (March 4, 2015) (hereinafter UNITED STATES DEPARTMENT OF JUSTICE REPORT), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

> police officer does not provide a basis for prosecution under Section 242.[348]

In federal prosecution for police use of deadly force, a DOJ investigation involves an assessment of the reasonableness of the act and the officer's intent.[349] As the DOJ explained in a recent report, Section 242 applies in a police use of deadly force incident because there

> is no dispute that [a police officer] who was on duty and working as [an] officer for [a police department], act[s] under color of law [or that bodily injury due to the police] resulted in [a] death. The determination of whether criminal prosecution is appropriate rests on whether there is sufficient evidence to establish that any of the shots fired by [the officer] were unreasonable given the facts known to [the officer] at the time, and if so, whether [the officer] fired the shots with the requisite 'willful' criminal intent, which . . . would require proof that [the officer used deadly force] under conditions that no reasonable officer could have perceived as a threat.[350]

As discussed above, it does not matter if the officer is wrong about a perceived threat, because the reasonableness standard is governed both by the Fourth Amendment and, in part, by the officer's perception and knowledge at the time.[351]

Under Section 242, an officer can claim self-defense in his use of deadly force if the officer believed, at the exact time he used deadly force, that the threat rose to the level justified by deadly force.[352] While proper police tactics suggest that a police officer should use time, distance, and cover to control and assess the situation before using deadly force, self-defense is not negated by these police tac-

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348 *Id.* at 79 (citation omitted) (internal quotation marks omitted) (citing United States v. Lanier, 520 U.S. 259, 267 (1997); United States v. McClean, 528 F.2d 1250, 1255 (2d Cir. 1976)).

349 *Id.* at 10.

350 *Id.* at 79.

351 *Id.* at 84 (citing Loch v. City of Litchfield, 689 F.3d 961, 966 (8th Cir. 2012) (holding that "[e]ven if a suspect is ultimately 'found to be unarmed, a police officer can still employ deadly force if objectively reasonable.'") (quoting Billingsley v. City of Omaha, 277 F.3d 990, 995 (8th Cir. 2002)); Reese v. Anderson, 926 F.2d 494, 501 (5th Cir. 1991) ("Also irrelevant is the fact that [the suspect] was actually unarmed. [The officer] did not and could not have known this."); Smith v. Freland, 954 F.2d 343, 347 (noting that "unarmed" does not mean "harmless) (6th Cir. 1992); *see also supra* notes 104-138 and accompanying text.

352 UNITED STATES DEPARTMENT OF JUSTICE REPORT, *supra* note 347, at 84.

tics.[353] Furthermore, because of the nature of a confrontation between a police officer and a possible assailant, the officer is given great deference—and the benefit of the doubt—under Section 242.[354]

Even if the prosecution can prove that it was objectively unreasonable for the officer to use deadly force, the government is required to prove beyond a reasonable doubt that the officer "acted willfully, that is, with the purpose to violate the law."[355] Proof of willful intent can be proved two ways: (1) the officer directly, with purposeful intent, decided to violate the law or (2) the officer acted with the highest level of negligence, which is effectively treated as a willful decision.[356] The Supreme Court has held that

> an act is done willfully if it was 'committed' either 'in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.' The government need not show that the defendant knew a federal statute or law protected the right with which he intended to interfere . . . However, we must prove that the defendant intended to engage in the conduct that violated the Constitution and that he did so knowing that it was a wrongful act.[357]

Willfulness to deprive a person of constitutional rights can be inferred from conduct, and reckless disregard for the law establishes willful intent to deprive a person of those rights.[358] As the Seventh Circuit held regarding the *mens rea* required under Section 242,

> Bradley next contends that the evidence did not support the jury's finding that he acted "willfully" because he acted out of fear for his own safety rather than a specific intent to deprive Marshall of his constitutional rights. To show a willful deprivation of a civil right under § 242, the government must establish that the defendant acted "in open defiance or in reckless disregard of a constitutional require-

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353 *See* POLICE EXECUTIVE RESEARCH FORUM, CRITICAL ISSUES IN POLICING SERIES: GUIDING PRINCIPLES ON USE OF FORCE 98 (2016), http://www.policeforum.org/assets/guidingprinciples1.pdf; *see also* UNITED STATES DEPARTMENT OF JUSTICE REPORT, *supra* note 347, at 84.

354 UNITED STATES DEPARTMENT OF JUSTICE REPORT, *supra* note 347, at 85.

355 *Id.*

356 *Id.* at 79.

357 *Id.* at 85-86 (citation omitted) (internal quotation marks omitted)

358 UNITED STATES DEPARTMENT OF JUSTICE REPORT, s*upra* note 347, at 11("Willfulness may be inferred from blatantly wrongful conduct.").

> ment." A defendant need not "have been thinking in constitutional terms" to willfully violate a constitutional right. Willfulness may be shown by circumstantial evidence so long as the purpose may "be reasonably inferred from all the circumstances attendant on the act." . . . Bradley's actions in these circumstances were clearly unreasonable and excessive. The jury had ample evidence to reasonably conclude that Bradley willfully violated Marshall's Fourth Amendment right to be free from the use of excessive force during an arrest . . . .
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> Willfulness under § 242 essentially requires that the defendant intend to commit the unconstitutional act without necessarily intending to do that act for the specific purpose of depriving another of a constitutional right. In other words, to act "willfully" in the § 242 sense, the defendant must intend to commit an act that results in the deprivation of an established constitutional right as a reasonable person would have understood that right.[359]

Under federal law, police error does not necessarily establish criminal culpability. As the DOJ concluded, a Section 242 case is not established even when the officer mistakenly perceives the actions of the person shot as being aggressive or violent—if a reasonable police officer in that situation could have believed that the person shot could have been perceived as aggressive— because that reasonableness precludes a finding that the officer acted with a purpose to violate the law. Section 242 does not criminalize bad judgment in either the initial contact or pursuit of a person culminating in an incident of deadly force.[360] Police error, without more, precludes a federal criminal civil rights charge.

IV. LIMITATIONS TO FOURTH AMENDMENT PROTECTIONS

The law under the Fourth Amendment regarding police use of force is very narrow and so is its protection. Fourth Amendment analysis does not focus on the motive of the officer.[361] A Fourth Amend-

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[359] United States v. Bradley, 196 F.3d 762, 769-70 (7th Cir. 1999) (internal citations omitted).

[360] UNITED STATES DEPARTMENT OF JUSTICE REPORT, *supra* note 347, at 86.

[361] *See* Graham v. Connor, 490 U.S. 386, 397 (1989) ("As in other Fourth Amendment contexts, however, 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, without regard to their underlying intent or motivation.").

ment inquiry only seeks to determine if the police, without the help of hindsight, acted reasonably.[362] Federal criminal civil rights law in police shootings is even more restrictive because it requires proof that the police intentionally (knowingly) or recklessly acted to violate the civil rights of a person subjected to police use of force.[363] The Fourth Amendment only establishes a constitutional floor, which police cannot act below. The Fourth Amendment does not require professionalism, the intelligent use of force, or even compliance with department policy that establishes the restrained and gradual elevation of force in a given situation.[364] The Fourth Amendment does not focus on subjective mental decision making nor does it consider how race impacts

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[362] *Id.*

[363] *See* 18 U.S.C. § 242.

[364] *Supra* note 304. In police use of force cases the courts focus on the reasonableness of the police action. The injury resulting from the use of force is not part of the analysis. The courts are only interested in the facts leading to the use of force and legal question of whether under those facts the force as reasonable. For example, see what facts the Court thought relevant in *Mullenix* case. As the Court in *Mullenix* explained, the correct inquiry regarding the reasonableness of the officer's conduct "was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the "'situation [she] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."

. . . .

In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road. The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances "beyond debate." The general principle that deadly force requires a sufficient threat hardly settles this matter. ("[I]t would be unreasonable to expect a police officer to make the numerous legal conclusions necessary to apply *Garner* to a high-speed car chase . . .").

. . . By the time Mullenix fired, Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location. . . .

. . . . The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity. . . . Given Leija's conduct, we cannot say that only someone "plainly incompetent" or who "knowingly violate[s] the law" would have perceived a sufficient threat and acted as Mullenix did.

. . . .

. . . The fact is that when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards Officer Ducheneaux's position. Even accepting that these circumstances fall somewhere between the two sets of cases respondents discuss, qualified immunity protects actions in the "'hazy border between excessive and acceptable force.'"

Mullenix v. Luna, 136 S. Ct. 305, 309 (2015).

the decision making or processing of a police officer.[365] The Fourth Amendment only protects against unreasonable use of force, and the question of whether the force was unreasonable is judged from the perspective of what the officer knew and believed when the force was applied. The Court has held that the Fourth Amendment is only invoked upon the specific intention of the police to seize. As the Court defined a seizure in *Brower v. County of Inyo*,

> a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied.[366]

Thus, the "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking . . . . This is implicit in the word 'seizure,' which can hardly be applied to an unknowing act."[367]

Regarding what a plaintiff must prove about police state of mind, the Supreme Court held—in *Kingsley v. Hendrickson*—that police use of force entails two types of state of mind.[368] The first state of mind is the mental decision to apply force.[369] It is not the reasoning regarding why the force was used or the motive for the force, but the decision regarding the actual action.[370] The Court held that the first question, state of mind, was not disputed in *Hendrickson* because the officers intended to use force.[371] The second state of mind question is whether the deliberate use of force was excessive.[372] This determination is governed by whether the force used was objectively reasonable, not by the officer's motive.[373]

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365 *Graham*, 490 U.S. at 397-99.
366 Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989).
367 *Id*. at 596.
368 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472 (2015).
369 *Id.*
370 *Id.*
371 *Id.*
372 *Id.*
373 *Id.*

In *Kingsley*, the Supreme Court held that the reasonableness of the use of force on a pre-trial detainee by jail officers is determined by the objectively-determined need of the force, the amount of the force, the type of the force, the intensity of the force, and the duration of the force.[374] The Court in *Kingsley* held that the legal standard was an objective test when it rejected the respondent's argument for a subjective legal standard, stating that "the plaintiff must prove that the use of force was not applied in a good-faith effort to maintain or restore discipline but rather, was applied maliciously and sadistically to cause harm."[375] The Court held that in a case with a pre-trial detainee asserting excessive force, the question of whether the use of force was excessive is determined by an objective test—not by whether the force was "unreasonable in light of the facts and circumstances at the time."[376] The use of the word "reckless" in the jury instructions inserted a subjective test.[377]

Under Fourth Amendment analysis, it does not matter whether the behavior of a person subjected to police use of force is, in fact, innocent or non-threatening.[378] The legal question focuses on the perception and actions of the police officer and whether the officer thought the behavior of the person was threatening.[379] The Court of Appeals of Ohio, rejecting the provocation theory, summarized the law on threat perception of police in justifying the use of force as follows:

> A serious and imminent threat to the officer's safety will permit him to respond with gunfire . . . . Whether the officer reasonably perceived a threat must be assessed objectively. The focus is specifically on the moment he used his weapon and in the moments directly preceding it.

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374 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015).

375 *Id.* at 2475.

376 *Id.* at 2476 (holding that the jury instruction which asked whether the force was "unreasonable in light of the facts and circumstances at the time" was an error due to its subjectivity).

377 *Id.* at 2476-77 ("[T]he instructions were erroneous. [R]eckles[s] disregar[d] [of Kingsley's] safety was listed as an additional requirement, beyond the need to find that [respondents'] use of force was unreasonable in light of the facts and circumstances at the time. And in determining whether respondents acted with reckless disregard of [Kingsley's] rights, the jury was instructed to consider [w]hether [respondents] reasonably believed there was a threat to the safety of staff or prisoners. Together, these features suggested the jury should weigh respondents' subjective reasons for using force and subjective views about the excessiveness of the force. As we have just held, that was error.") (internal citations and quotation marks omitted).

378 State v. White, 988 N.E.2d 595, 614 (Ohio Ct. App. 2013).

379 *Id.*

> Earlier errors in the officer's judgment do not make a shooting unreasonable if he was acting reasonably then . . . .
>
> In deadly-force cases involving both armed and unarmed suspects, courts have accepted the action-reaction principle on facts justifying the officer's anticipatory use of his weapon to protect himself. In other words, a nascent threat can be sufficient; it need not materialize to the point of harm. *[The use] of deadly force is presumptively reasonable when the officer could reasonably have interpreted the suspect's movement as reaching for a weapon . . . [and an] officer does not have to wait until a gun is pointed before acting. [An] officer need not actually detect the presence of an object in a suspect's hands before firing on him* . . . .
>
> Officers need not be absolutely sure of the suspect's intent to cause them harm - the Constitution does not require that certitude precede the act of self-protection . . . .
>
> *Rather, it is the perceived threat of attack by a suspect, apart from the actual attack, to which the officer may respond preemptively. If his perceptions were objectively reasonable, he incurs no liability* even if no weapon was seen, or the suspect was later found to be unarmed, or if what the officer mistook for a weapon was something innocuous. [Although] no weapon [was] seen [by the officer, the court is] declining to second-guess the split-second judgment of a trained police officer merely because that judgment turns out to be mistaken, particularly where inaction could have resulted in his death or serious injury. . . .
>
> In evaluating reasonableness in the threat-perception cases, courts have also accepted that officers are trained to recognize certain behaviors and "body language" as danger cues. These include obvious attempts to evade the officer, furtive gestures and glances, sudden turns, and the ignoring of commands, such as an order to show one's hands. Because such encounters often occur at night, this limits vision significantly and enhances risk to both the officer and the suspect.[380]

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[380] *Id.* at 614-15 (emphasis added) (citation omitted, parentheses added).

The court made clear that even innocent actions or movements—if reasonably perceived as threatening by the officer—can justify the officer's use of force.[381]

> In assessing the officer's decision to use force, including deadly force, juries (and judges when they are fact-finders) are strictly forbidden from using "the 20/20 vision of hindsight." Instead, *Graham* mandates a tightly constrained frame of reference within which to calculate reasonableness. The required perspective is that of the "reasonable officer on the scene," standing in the *defendant-officer's* shoes, perceiving what *he* then perceived and acting within the limits of *his* knowledge or information as it then existed. When the jury reviews the officer's action against the standard applicable to the force used, it must do so from *that* viewpoint. This constraint is unique to police-defendant cases, in contrast to the jury's normal freedom to envision the dynamics of a confrontation through the eyes of other parties or witnesses.[382]
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> . . . .
>
> *[The] relevant legal consideration is not what this defendant-officer "should have" known or done, but rather what the reasonable officer, placed in his shoes, "could have believed" about the situational need for deadly force in reacting to an imminent threat*.
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> . . . .
>
> The objectively reasonable officer can be mistaken. What is a "reasonable" belief in light of the officer's perceptions could also be a mistaken belief, and the fact that it turned out to be mistaken does not detract from its reasonableness when considered within the factual context and compressed time-frame of his decision to act.[383]

The Supreme Court came to the same conclusion regarding reasonable mistake in *Heien v. North Carolina*, which involved a police officer incorrectly believing a state law required both brake lights to be operational when, in fact, only one operational brake light was

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381 State v. White, 988 N.E.2d at 618-19; s*ee also* Saucier v. Katz, 533 U.S. 194, 205 (2001); Pearson v. Callahan, 555 U.S. 223, 231 (2009).

382 *Id.* at 617-618 (internal citation and quotation marks omitted) (emphasis in original).

383 State v. White, 988 N.E.2d at 617-18 (emphasis added).

required.[384] The Court held reasonableness includes both factual reasonable error and legal reasonable error.[385] Thus, if the officer makes an error in law—but the error is one a reasonable police officer could make—there is no Fourth Amendment violation.[386] In an effort to place some limitation on the assertion that the Court's decision will encourage the police to allow themselves to be ignorant of the law to get around being correct in knowing and enforcing the law, the Court held that the police are required to know the law, and if the mistake is one a reasonable police officer would not make, the Fourth Amendment provides the police no protection.[387]

In *Utah v. Strieff*, the Court addressed the detention of Strieff after he left a house suspected of drug activity.[388] After running a warrant check, the officer found that a warrant was pending and subsequently arrested Strieff.[389] Upon a search incident to arrest, the officer discovered drugs on Strieff's person.[390] The trial court found the initial stop was conducted without reasonable suspicion.[391] However, the legal question was whether "the valid arrest warrant attenuated the connection between the between the unlawful stop and the discovery of the contraband."[392] The Court held that it was.[393]

In summary, only police action without objectively reasonable explanation—or action done with purposeful and flagrant intent to violate the Fourth Amendment—will invoke a violation of the Fourth

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384 Heien v. North Carolina, 135 S. Ct. 530, 534-36, 540 (2014).

385 *Id.* at 534, 539.

386 *Id.* at 536, 539-40.

387 *Id.* at 539-40. As to the argument that "ignorance of the law is no excuse" should apply equally to police officers as it does to citizens, the Court wrote, "Though this argument has a certain rhetorical appeal, it misconceives the implication of the maxim. The true symmetry is this: Just as an individual generally cannot escape criminal liability based on a mistaken understanding of the law, so too the government cannot impose criminal liability based on a mistaken understanding of the law. If the law required two working brake lights, Heien could not escape a ticket by claiming he reasonably thought he needed only one; if the law required only one, Sergeant Darisse could not issue a valid ticket by claiming he reasonably thought drivers needed two. But just because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop. And Heien is not appealing a brake-light ticket; he is appealing a cocaine-trafficking conviction as to which there is no asserted mistake of fact or law" Id. at 540) (emphasis added).

388 Utah v. Strieff, 136 S. Ct. 2056, 2059-60 (2016).

389 *Id.* at 2060.

390 *Id.*

391 *Id.* at 2063.

392 *Id.*

393 *Id.* at 2059.

Amendment's prohibition against unreasonable seizure.[394] Simple mistake (reasonable error) of law or fact will not invoke a Fourth Amendment violation.[395] The Court has also made clear that police actions based on mistake of fact—if the mistaken facts had been true—are lawful even though the actions are based upon the initial factual error.[396] Further, the Court in *Hill* v. *California* famously concluded that the wrongful arrest of a person does not create a Fourth Amendment violation if the intended arrest would have been lawful had the police arrested the correct person.[397] Fourth Amendment

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[394] The Court wrote, "For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure" *Id.* at 9-10. As a side note, the Court wrote

> Second, Strieff argues that, because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied. We think that this outcome is unlikely. Such wanton conduct would expose police to civil liability. See 42 U. S. C. §1983; Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 690 (1978); see also Segura [v. United States], 468 U. S., at 812 [(1984)]. And in any event, the Brown factors take account of the purpose and flagrancy of police misconduct. Were evidence of a dragnet search presented here, the application of the Brown factors could be different.

Brown v. Illinois, 422 U.S. 590 (1975) established a three part test as to whether an event breaks the causal link between unlawful conduct and the evidence found as a result of unlawful conduct. The factors are (1) the temporal link (time) between the unconstitutional conduct and the finding of the evidence ("The first factor, temporal proximity between the initially unlawful stop and the search, favors suppressing the evidence . . . unless substantial time elapses between an unlawful act and when the evidence is obtained. As the Court explained in Brown . . . a short time interval counsels in favor of Suppression"), (2) the intervening circumstances between the unconstitutional conduct and the finding of the evidence ("In this case, the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop"), and (3) whether the finding of the evidence was the result of unconstitutional conduct by police that was purposeful and flagrant in disregard of the constitutional right violated by the conduct that resulted in the evidence ("The exclusionary rule exists to deter police misconduct. Davis v. United States, 564 U. S. 229, 236–237 (2011). The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.") Utah vs Strieff, (Slip Opinion at 5-8).

[395] Heien v. North Carolina, 135 S. Ct. 530, 534-36, 539-40 (2014).

[396] *Id.*

[397] The Court held

> The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong, as it turned out, and subjective good faith belief would not, in itself, justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment, and, on the record before us, the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time.
>
> Nor can we agree with petitioner that, however valid the arrest of Miller, the subsequent search violated the Fourth Amendment. It is true that Miller was not Hill; nor did Miller have authority or control over the premises, although, at the very least, he was Hill's guest. But the question is not what evidence would have been admissible against Hill (or

jurisprudence has made it clear that the reasonableness of the justification, method, and manner of the force used at the moment matters, not whether it was correctly determined to be necessary.[398]

The Fourth Amendment right against unreasonable search and seizure covers the entire continuum of police use of force, from a verbal command to stop to the use of deadly force.[399] The Court has also made clear that the police are allowed certain latitude in the use of force before such force is found to violate the Fourth Amendment. As the Second Circuit famously held more than four decades ago regarding the use of force by law enforcement:

> The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. *Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.* 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.[400]

The Supreme Court held that the decision to use force, and the level of force used, are two different legal questions, and the latter does not change the analysis of whether the decision to use force during a seizure was unreasonable.[401] The analysis of the decision to use force

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against Miller, for that matter) if the police, with probable cause to arrest Miller, had arrested him in Hill's apartment and then carried out the search at issue. Here, there was probable cause to arrest Hill, and the police arrested Miller in Hill's apartment, reasonably believing him to be Hill. In these circumstances, the police were entitled to do what the law would have allowed them to do if Miller had in fact, been Hill, that is, to search incident to arrest and to seize evidence of the crime the police had probable cause to believe Hill had committed. When judged in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," Brinegar v. United States, 338 U. S. 160, 338 U. S. 175 (1949), the arrest and subsequent search were reasonable and valid under the Fourth Amendment.

Hill v. California, 401 U.S. 797, 803-05 (1971) (emphasis added).

398 *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396-97 (1989).

399 Tennessee v. Gardner, 471 U.S. 1, 7 (1985).

400 Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

401 Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

is the same whether the officer stops or shoots an individual.[402] As the Court ruled in *Terry v. Ohio*, "[I]n determining whether the seizure and search were 'unreasonable,' our inquiry is a dual one—[1] whether the officer's action was justified at its inception, and [2] whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[403] In other words, the Court looks at whether the search and seizure was reasonable at both its inception and when it was conducted.[404]

V. CUSTOM, POLICY, OR PRACTICE: MUNICIPAL AND POLICE AGENCY LIABILITY

Civil liability can also be established against a police department or municipality due to the behavior of individual police officers under a § 1983 civil rights claim.[405] The Supreme Court, in the seminal case *Monell v. Department of Social Services of the City of New York*, held that local governing agencies are persons and, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief when that agency implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers that result in a deprivation of rights protected by the Constitution.[406] The Court explained that the purpose of § 1983 was to allow local governments to be held accountable for direct violations of constitutional rights; thus, local agencies cannot be held liable solely because they employ a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.[407] Thus, § 1983 "imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights."[408] Local government agencies, like police

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402 Tennessee v. Gardner, 471 U.S. 1, 7 (1985).

403 *Terry*, 392 U.S. at 19-20.

404 *Id.* at 27-28.

405 Monell v. Deprt' of Soc. Servs. of the City of N.Y., 436 U.S. 635, 690 (1978).

406 *Id.* at 690.

407 *Id.* at 690-91. "We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government, as an entity, is responsible under § 1983." *Id.* at 694.

408 *Id.*

departments, are entitled to qualified immunity.[409] Two years later, the Court clarified the contours of their qualified immunity.[410]

In *Owens v. City of Independence, Missouri*, the parties presented the Court with a dispute between the former police chief of Independence and the city manager and board of managers because the city manager fired the police chief.[411] The police chief sued, asserting lack of due process.[412] The Court ruled that

> there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.[413]

The Court concluded that, "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed."[414] The Court explained, "The central aim of the Civil Rights Act was to provide protection to those persons wronged by the misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[415]

The Court ruled two years later that, while local agencies are subject to liability without qualification, government officials are immune from the burdens of litigating a § 1983 case; thus, the case ends at summary judgment if they successfully assert their qualified immunity.[416] In *Harlow v. Fitzgerald*, the Court was confronted with another employment dispute in which Harrow was alleged to have entered into a conspiracy with others to get Fitzgerald fired from his position in the Department of the Air Force.[417] The Court held that

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409 *Id.* at 701.
410 Owen v. City of Independence, Mo., 445 U.S. 622 (1980).
411 *Id.* at 628.
412 *Id.* at 630.
413 *Id.* at 638.
414 *Id.* at 647-48.
415 *Id.* at 650 (citing Monroe v. Pape, 365 U.S. 167, 184 (1961)).
416 Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).
417 *Id.* at 802.

the level of immunity a person enjoys is attached to the position that person holds.[418] The Court explained that government officials, due to the nature of their work, are entitled to a "good faith" or qualified immunity from the burdens of defending a lawsuit for the decisions they make in the performance of their duties.[419] The Court held

> qualified immunity would be defeated if an official '*knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . .*'[420]

The Court has held that discretionary decisions made by government officials enjoy qualified protection from litigation, while ministerial actions that are required by law are not covered by qualified immunity.[421] Discretionary decisions are those which allow for independent judgment and weighing of constitutional options.[422] Conversely, ministerial actions do not allow for such weighing of constitutional options.[423] *Harlow* established that judges should engage in an analysis similar to that used when determining whether police officers are entitled to qualified immunity. Thus, courts should determine (1) what the current applicable law is, and (2) whether that law was clearly established at the time the action occurred.[424] Government officials share the same protection as police officers.

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418 *Id.* at 807.

419 *Id.* at 815-16.

420 *Id.* at 815 (citation omitted) (emphasis added).

421 *Id.* at 815-17.

422 Harlow v. Fitgerald, 457 U.S. 800, 815-17 (1982).

423 *Id.* at 817.

424 *Id.* "[S]ummary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors." *Id.*

Qualified immunity will not protect government action that is facially unconstitutional. The Court held in *Groh v. Ramirez*[425] that an Alcohol, Tobacco, and Firearms (ATF) agent who executed a warrant that was so deficient on its face that, "even a cursory reading of the warrant in this case—perhaps just a simple glance—would have revealed [to] any reasonable police officer" that the warrant was "constitutionally fatal," was not entitled to qualified immunity.[426] Although qualified immunity will cover simple negligence or error in judgment, blatant violation of law is outside of its protection.[427]

Applying these cases to police departments under *Monell*, a police department does not have absolute immunity but is not liable under *respondeat superior*.[428] Under *Owen*, the police department cannot assert good faith immunity due to the actions of its officers.[429] Under *Harlow*, officers, employees, and leaders of the police department can claim qualified immunity if they acted in good faith and did not violate clearly established law in forming or implementing policies or customs through the use of their discretionary power to act within their official duties.[430]

In *City of Oklahoma City v. Tuttle*, the Court heard a case—three years after it decided *Harlow*—in which the plaintiff asserted that a single incident resulting from a government policy can establish civil liability.[431] The Court wrote that "respondent's theory of liability was that the 'policy' in question was the city's policy of training and supervising police officers, and that this 'policy' resulted in inadequate training, and the constitutional violations alleged."[432] Specifically, the respondent asserted that the training was inadequate—although it was in line with the training policy—and that it led to the death of Tuttle.[433] The trial court instructed "the jury [it] could 'infer,' from a single, unusually excessive use of force . . . that it was attributable to inadequate training or supervision amounting to 'deliberate indiffer-

425 Groh v. Ramirez, 540 U.S. 551 (2004).

426 *Id.* at 563-64.

427 *Id.* at 565 (quoting United States v. Leon, 468 U.S. 897, 923 ("[A] warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or things to be seized—that the executing officers cannot reasonably presume it to be valid.").

428 Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 691 (2018).

429 Owen v. City of Independence, Mo., 445 U.S. 622, 638 (1980).

430 Harlow v. Fitgerald, 457 U.S. 800, 815-17 (1982).

431 City of Okla. City v. Tuttle, 471 U.S. 808, 810 (1985).

432 *Id.* at 820.

433 *Id.* at 820.

ence' or 'gross negligence' on the part of the officials in charge."[434] The Court reversed the court of appeals affirmance because one incident of a constitutional violation—without proof of an existing unconstitutional policy supporting the officer's actions—does not establish a custom or policy.[435] The Court made clear that to establish a § 1983 case against a municipality based on its policy, the plaintiff must prove "the existence of a particular official municipal policy or established custom [and] that this policy or custom "subjected" or "caused him to be subjected" to a deprivation of a constitutional right."[436] The Court explained that proof of a policy that subjects a person to a deprivation of a constitutional right cannot be established through a single incident because "[a] jury finding of liability based on this theory would unduly threaten petitioner's immunity from *respondeat superior* liability."[437] The only way a single incident can establish a constitutional violation is if the specific conduct is linked to a specific policy that authorized the unconstitutional conduct.[438] Because, "without some evidence of municipal policy or custom independent of the police officer's misconduct, there is no way of knowing whether the city is at fault."[439]

In defining the "policy" of the police department regarding police training, the Court explained that "it is therefore difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from *conscious choice*—that is, proof that the *policymakers deliberately chose a training program which would prove inadequate*."[440] Under *Monell*, "there must be an affirmative link between the policy and the particular constitutional violation

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434 *Id.* at 821.

435 The Court concluded,

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy and its origin must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the "policy" and the constitutional deprivation

Id. at 823-24.

436 *Tuttle*, 471 U.S. at 829-30.

437 *Id.* at 830.

438 *Id.* at 830-31.

439 *Id.* at 831.

440 *Id.* at 823 (emphasis added).

alleged," and both must be directly linked to a specific policy maker.[441] The Court found that an unconstitutional act of an employee—senior or not—does not create an unconstitutional decision by the municipality per se. The law requires a causal link between the act of the employee and a policy decision knowingly made by the municipality, both of which are directly linked to the constitutional deprivation.

While in previous cases the Court has held that a policymaker's single—clearly unconstitutional—official act could form liability, this was limited under *Pembaur v. City of Cincinnati*.[442] In *Pembaur*, the Court held that municipal liability only attaches when the decision-maker has final authority.[443] Thus, a constitutional injury directly linked to a policy will not establish municipal liability if the policy did not originate with an official "responsible for establishing final policy" for the municipality.[444]

Two years later—in *City of St. Louis v. Praprotnik*—the Court summarized the factors that establish municipal liability.[445] The Court summarized the holding in *Pembaur* into the following factors: (1) only specific acts that are officially sanctioned by the municipality can establish liability; (2) "only those municipal officials who have 'final policymaking authority' may by their actions subject the [municipality to civil liability];" (3) "whether a particular official has 'final policymaking authority' is a question of state law;" and (4) "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business."[446]

In *Praprotnik*, the Court clarified that a plaintiff may prove the existence of an unwritten custom or practice by showing the existence of a "permanent" and "well-settled" policy, amounting to a "custom or usage with the force of law."[447] Regarding who makes the final

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441 *Id.* at 823-24. ("Proof of *a single incident of unconstitutional activity is not sufficient* to impose liability under *Monell*, *unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.*") (emphasis added).

442 *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 482 (1986); Owen v. City of Independence, Mo., 445 U.S. 622, 638 (1980).

443 *Pembaur*, 475 U.S. at 482.

444 *Id.*

445 *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988).

446 *Id.*

447 *Id.* at 127.

policy—in comparison to those who have the authority to set procedures in implementing that policy—the Court held a policy is only made by the highest governing "final policymaking authority" or official.[448] In other words, in a situation in which a captain creates a procedure—which enforces a policy ordered by the police chief, and which is approved by the police chief—the police chief's policy and approval of the procedure, is the final municipal policy with regard to § 1983 litigation, even though the captain's procedure may cause the constitutional injury. In *Praprotnik*, the Court held that—even if it were true that a constitutional violation occurred— municipal liability must be found in the specific actions of those who, under local or state law, are final authority in taking actions.[449] The Court clarified this point in *Ashcroft v. Iqbal*, when it held not only that a supervisor is not liable for the acts of a subordinate but also that, in claims of discrimination or violation of constitutional rights, a specific intent is required.[450]

In *Collins v. City of Harker Heights*, the Court reviewed a case concerning a widow suing the city for the death of her husband, who suffocated in an underground sewer, and claiming that the city's failure to train her husband—and to provide a safe environment for him—created a constitutional tort under § 1983.[451] The Court affirmed the Court of Appeal's rejection of her claim, in part, on the theory that a constitutional tort is not created by an injury resulting from policy choices that are not arbitrary.[452] The Court held that political decisions—in which competing interests produce policies—are not subject to civil liability.[453] The Court used the case to clarify the applicability of *Monell* with regard to local agencies.[454] The Court held that the threshold for a civil liability action against a municipality resulting from the actions of a police policy is "deliberate indiffer-

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448 *Id.*

449 *Id.* at 128.

450 Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009) ("[I]n the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.").

451 Collins v. City of Harker Heights, 503 US 115, 117-18 (1989).

452 *Id.* at 128-30.

453 *Id.*

454 *Id.* at 120.

ence."[455] The significance of the "deliberate indifference" burden of proof is to relieve a municipality of liability established through *respondeat superior*.

In the same year, in *Will v. Michigan Department of State Police*, the Court answered the question of who is a "person" subject to liability under § 1983 and held that a state agency—and employees of a state agency who are acting within their official capacity—are not persons subject to § 1983.[456] The Court held that

> We observe initially that if a State is a 'person' within the meaning of § 1983, the section is to be read as saying that 'every person, including a State, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects . . . .' That would be a decidedly awkward way of expressing an intent to subject the States to liability.[457]

The Court held that the text of § 1983 does not include the states and that Congress did not affirmatively waive state sovereign immunity, which would be required for state liability to be imposed.[458] The significance of *Will* is that "it does not follow that if municipalities are persons, then so are States. States are protected by the Eleventh Amendment, while municipalities are not . . ."[459] Moreover, the Court held that state officials are legally the state; therefore, a suit against a state official in their official capacity is a suit against the state and not the individual.[460] The Court subsequently held in *McMillan v. Monroe County, Alabama* that state law governs whether an official is a state or county official.[461]

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455 *Id.* at 122-24.

456 Will v. Mich. Dep't of State Police, 491 US 58, 61-62 (1989) ("Prior to *Monell v. New York City Department of Social Services*, 436 U. S. 658 (1978), the question whether a State is a person within the meaning of § 1983 had been answered by this Court in the negative. In *Monroe v. Pape*, 365 U. S. 167, 365 U. S. 187-191 (1961), the Court had held that a municipality was not a person under § 1983. '[T]hat being the case,' we reasoned, § 1983 'could not have been intended to include States as parties defendant.' Fitzpatrick v. Bitzer, 427 U. S. 445, 427 U. S. 452 (1976).")).

457 *Id.* at 64.

458 *Id.* at 66 ("Congress did not provide such a federal forum for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983.").

459 *Id.* at 70.

460 *Id.* at 71 (citation omitted).

461 McMillan v. Monroe Cty., Ala., 520 U.S. 781, 795 (1997).

Returning to the issue of policy and its causal link to a claimed constitutional injury, the Court found in *Collins*[462]—along with its decisions in *Albright v. Oliver*[463], *County of Sacramento v. Lewis*[464], and *Town of Castle Rock v. Gonzales*[465]—that the Fifth and the Fourteenth Amendment Due Process Clauses provide very limited support for a § 1983 claim. In *Albright v. Oliver*, the Court held that there is no substantive or procedural Due Process right to be free from criminal prosecution in the absence of probable cause.[466] In *Lewis*, the Court held that for a claim of police use of force, in this case a car pursuit, to rise to a substantive Due Process violation, the use of force by police must include a malevolent intent—similar to the need of harm in an Eighth Amendment riot case, harm is needed in a Due Process pursuit case.[467] Therefore, the Court held that when a driver in a high-speed chase does not have an intent to harm, there is no liability under the Fourteenth Amendment.[468] In *Town of Castle Rock v. Gonzales,* the Court concluded "the framers of the Fourteenth Amendment and the Civil Rights Act of 1871 did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented . . . ."[469]

> Nine years after the Court issued its decision in *Praprotnik*, the Court in *Board of County Commissioners v. Brown* addressed a case involving an allegation by the plaintiff that the police agency had hired a police officer with a history of assault and battery, public drunkenness and other misdemeanors without conducting a background check.[470] At trial, the jury concluded that the police agency's hiring practices were so inadequate as to constitute "deliberate indifference" towards the plaintiff's constitutional rights.[471] The Court noted that it is not enough for a plaintiff to show that particular "conduct [is] attributable

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462 Collins v. Harker Heights, Tex., 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this unchartered area are scarce and open-ended.").

463 *See* Albright v. Oliver, 510 U.S. 266, 267 (1994).

464 *See* Cty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998).

465 *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005).

466 *See Albright*, 510 U.S. at 268.

467 *See Lewis*, 523 U.S. at 849.

468 *Id.* at 854.

469 Town of Castle Rock v. Gonzales, 545 U.S. 748, 768-69 (2005).

470 Bd. of Cty. Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 401 (1997).

471 *Id.*

> to the municipality"; rather, she must show that the municipality acted deliberately and was "the driving force" behind the injury.[472] The Court further noted where a plaintiff fails to establish that the municipality directly inflicted the injury but, nevertheless, "caused the employee to do so," courts must apply "rigorous standards of culpability and causation to ensure that the municipality is not held liable solely for the actions of its employee."[473]

The Court held that when a case involves an alleged violation of a constitutional right caused by the implementation of a facially lawful policy, the showing of a constitutional injury alone will not establish liability because, in such a showing, "the plaintiff will simply have shown that the employee acted culpably . . . ."[474] Thus, in such a case, the plaintiff must also establish that the municipality acted with "deliberate indifference" with respect to the "known or obvious consequences" of its actions.[475]

The Court, in *Board of County Commissioners v. Brown*, explained that when a plaintiff alleges that the municipality's failure to train its personnel resulted in a constitutional injury, the plaintiff must establish that the municipality had notice that the policy implementing the training was constitutionally flawed[476], and the disregard of that notice must be deliberate indifference to the notice of the known risk.[477] The Court held that the "deliberate indifference" must be directly connected to a specific risk of constitutional injury not "a generalized showing of risk" of theoretical or logical injury.[478] The Court explained that even if a single incident of ineffective screening could rise to the level of municipal liability—for example, that the inadequate screening practice would lead to a deprivation of rights by

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472 *Id.* at 404.

473 *Id.* at 405 (citing City of Canton, Ohio, 489 U.S. 378, 391-92 (1989)).

474 *Id.* at 406-07.

475 *Id.*

476 *Brown*, 520 U.S. at 407 (citing City of Canton, Ohio v. Harris, 489 U.S. 378 (1989)).

477 *Id.* at 408-09 ("Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability.").

478 *Id.* at 410-12 ("[A] finding of culpability simply cannot depend on the mere probability that any officer inadequately screened will inflict any constitutional injury. Rather, it must depend on a finding that this officer was highly likely to inflict the particular injury suffered by the plaintiff. The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong.").

the officer not properly screened—the plaintiff would still be required to prove the officer "disregarded a known or obvious risk of injury."[479] The Court looked at all of Burns' records to find whether the sheriff should have found that Burns' use of force was a "plainly obvious consequence of the hiring decision."[480] To do so, the Court held that the plaintiff must establish that the particular background of the officer is linked to the specific constitutional injury the plaintiff suffered.[481] A general threat of injury linked to a specific injury will not meet the deliberate indifference standard—a "conscious disregard for the known and obvious consequences of his actions."[482]

The requirement that "'deliberate indifference' [only] exists where adequate scrutiny . . . would lead a reasonable supervisor to conclude that the plainly obvious consequences of the decision to hire would be the deprivation of a third party's constitutional rights"[483] —and that the plaintiff must establish "a strong connection between the background of the particular applicant and the specific violation alleged such that the hired officer was highly likely to inflict the particular type of injury suffered [and a] showing of simple or even heightened negligence will not suffice"[484] —has led to some absurd results. For example, the Fifth Circuit explained that

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. Indeed, detainees in jails and prisons are restricted in their ability to fend for themselves . . . officers in detention facilities are often able to exercise almost complete control over detainees, which creates real risks that officers will sexually assault the people in their care. These risks [are] well-known to corrections officials. Accordingly, when hiring officers for detention facilities, officials must be careful to thor-

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479 *Id.* at 412-13.

480 *Id.*

481 *Id.* at 412.

482 *Brown*, 520 U.S. at 413.

483 *Id.* at 433–34

484 Rivera v. Mull, Fifth Circuit Court of Appeals No. 16-10675 (July 6, 2017) at 5 (internal citation and quotation marks omitted).

> oughly examine applicants' backgrounds and diligently inquire about the conduct underlying any prior offenses.[485]

In the same case, the Fifth Circuit explained that

> [e]ven if the County had done a thorough job of investigating the jailer's background, it would have required an enormous leap to connect 'improper advances' towards female [high school] students to the sexual assault. Consequently, there were no grounds to find that the alleged rape in question was a plainly obvious consequence of hiring him.[486]

In *Rivera v. Mull*, the Fifth Circuit held that a municipality that hired a guard with an arrest history involving unlawful sexual contact with a girl under the age of consent—and who later raped a female detainee—was not liable for the assault due to the hiring.[487] The court held that the arrest for the sexual assault occurred when the guard was a minor himself, and thus the case could have involved two juveniles in non-coercive sexual contact.[488] Because the juvenile record was "vague and inconclusive" about the facts and details of the incident, the court concluded "a jury could not find that a plainly obvious consequence of hiring Fierros was that he would sexually assault a detainee."[489] The "specific circumstances of this case, the connection between Fierros's prior arrests and the injury to Rivera is not strong enough to show that Appellees were deliberately indifferent in hiring him."[490] The fact that—as the court admitted— the guards's absolute power leaves detainees defenseless to rape, plus a prior incident of sexual abuse committed by a guard position candidate, plus the county's failure to fully develop a history of the prior incident, did not give fair warning to the hiring agency that the candidate was likely to commit rape, and did not establish deliberate indifference.[491]

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485 *Id.* at 7-8 (citing DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989) and Hare v. City of Corinth, 74 F.3d 633, 639 (5th Cir. 1996) (internal quotation marks omitted)).

486 *Id.* at 7 (internal citation and quotation marks omitted and added)(citing Hardeman v. Kerr County, 244 F. App'x 593, 596 (5th Cir. 2007)).

487 Rivera v. Bonner, 691 Fed. App'x. 234, 235-36, 239-40 (5th Cir. 2017)

488 *Id.* at 239.

489 *Id.* at 240.

490 *Id.* at 239.

491 *Id.* at 238-40.

Regarding failure to train and supervise as a means to establish civil liability, the plaintiff must establish: (1) that training and supervision is required, (2) that the municipality knew its training was inadequate, (3) that the failure was deliberately indifferent to the risk of constitutional injury, and (4) that the deliberate indifference directly resulted in the constitutional injury asserted by the plaintiff.[492] In *Rivera v. Mull*, the court held that the jail offered some level of training regarding the prohibition of sexual contact between detainees and guards, a prior incident of sexual assault that occurred in the jail occurred in a surveillance camera-observed area, the sexual assault asserted by the plaintiff occurred in a non-surveillance camera area used for attorney advising and mental health counseling, and prior case law could have left an impression with the jail administration that a prior incident of abuse does not require changes to prison operations.[493] As a result, the court concluded that "it was not clearly established at the time of the alleged misconduct that Appellees needed to make significant changes to their training, supervision, and policies in response to the July 2014 incident of sexual abuse."[494]

CONCLUSION

The Court has found that the Fourth Amendment covers both the decision to use force (justification) and how that force is used (method)—and that only the unreasonable use of force is prohibited. The use of force by the police resulting in the injury is insignificant; what is significant is the reason and justification for the force, as analyzed through an objective test.

Fourth Amendment analysis focuses on the police officer, asking whether a reasonable police officer in the officer's position should believe or should know that the actions taken were unreasonable given the totality of the specific circumstances. The Court has clarified that this analysis is not based on hindsight and that factual error does not create liability. The officer can be mistaken in his use of force—and yet have qualified immunity—if the mistake was reasonable under the circumstances. Qualified immunity will shield an officer

492 *See* City of Canton, Ohio v. Harris, 489 U.S. 378 (1989); Darrell L. Ross, "Emerging trends in police failure to train liability" 23(2) *Policing: An International Journal of Police Strategies & Management* 169 2000.

493 *See Harris*, 489 U.S. at 235-36, 243.

494 *Id.* at 243.

from civil liability even if he thought the person was reaching for a gun when—in reality—he was reaching for his wallet or for nothing at all.

The Fourth Amendment does not provide protection from seizure—ranging from being stopped by police to being shot by police. The Fourth Amendment only provides protection from being unreasonably stopped or shot. Although what is reasonable is a question of law for the court—and not for experts[495] or juries[496]—as practical matter, the factual analysis as to whether an act was reasonable gives the police the benefit of the doubt.

The tragic case of Tamir Rice, the young boy shot and killed by police while playing with a toy gun, demonstrates the lack of protection and remedy provided by the Fourth Amendment. The Fourth Amendment takes no account of police incompetence or overreaction. The Fourth Amendment requires that the police be obeyed and provides them with the power to enforce their will. Because the police have the benefit of the doubt, those confronted by the police should remember the following: In this "land of the free and home of the brave"—when engaged by the police, in that time and place—the person stopped is no longer in the former and it is better for such a person not to behave in the latter.

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495 *See* Carswell v. Borough of Homestead, 381 F.3d 235, 244 (3d Cir. 2004) ("[W]hether the decision as to the applicability of qualified immunity is a matter for the court or jury [this circuit has] held that qualified immunity is an objective question to be decided by the court as a matter of law. The jury, however, determines disputed historical facts material to the qualified immunity question. District Courts may use special interrogatories to allow juries to perform this function. The court must make the ultimate determination on the availability of qualified immunity as a matter of law. . . . The plaintiff's expert, Professor McCauley, thought that Snyder should not have pulled his gun but rather should have chosen to tackle or otherwise physically subdue the suspect. The expert's opinion did not refer to the question of mistake and consequently there is no dispute of fact. In any event, this is a question of law to be decided by the court as a matter of law rather than by expert opinion.") (Internal citation omitted).

496 *Id.* at 242. The court in Carswell noted that "[s]everal other Courts of Appeals have adopted a standard similar to ours. In contrast, other Courts of Appeals have held that District Courts may submit the issue of qualified immunity to the jury." For circuits in agreement that the question of qualified immunity is a question of law for the court, the court cited Rivera-Jimenez v. Pierluisi, 362 F.3d 87, 95 (1st Cir. 2004); Stephenson v. Doe, 332 F.3d 68, 80-81 (2d Cir. 2003); Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002); Knussman v. Maryland, 272 F.3d 625, 634 (4th Cir. 2001); Warlick v. Cross, 969 F.2d 303, 305 (7th Cir. 1992). For circuits that allow the question of qualified immunity to be submitted to the jury the court cited Maestas v. Lujan, 351 F.3d 1001, 1007-08 (10th Cir. 2003); Turner v. Arkansas Ins. Dept., 297 F.3d 751, 754 (8th Cir. 2002); McCoy v. Hernandez, 203 F.3d 371, 376 (5th Cir. 2000); Fisher v. City of Memphis, 234 F.3d 312, 317 (6th Cir. 2000); Ortega v. O'Connor, 146 F.3d 1149, 1155-56 (9th Cir. 1998).