RECALIBRATING THE *GRAHAM* STANDARD USING AN EVIDENCE-BACKED, COMMUNITY-BASED MODEL

*DiAsia Dozier**

ABSTRACT

Millions of protestors across the world have marched and rallied to denounce the police violence that led to the murders of George Floyd and Breonna Taylor. However, Floyd and Taylor represent only two names of the countless lives lost to police killings each year. Many go unreported and forgotten, save for loved ones and activists who hope to keep their name in the public consciousness. The 2020 protests galvanized the country into reimagining policing, even prompting Congress to push for police reform. However, excessive force jurisprudence has remained relatively stagnant for the past thirty years. Now is the perfect time for the Supreme Court to modernize the excessive force doctrine by incorporating evidence of the full police encounter as well as judging officers' conduct by their own internal standards. Ultimately, police violence should not be tolerated as a fact of life. Political will, societal rejection, and a willingness by the Supreme Court are needed to end it.

TABLE OF CONTENTS

INTRODUCTION 124
I. SUPREME COURT'S EXCESSIVE FORCE JURISPRUDENCE 128
A. Tennessee v. Garner 133
B. Graham v. Connor 134
C. County of Los Angeles v. Mendez 136
II. FEDERAL COURT RESPONSE TO *GRAHAM* AMBIGUITY 139

* J.D., 2021, Drexel University Thomas R. Kline School of Law. Thank you to the editors from *Drexel Law Review* for their feedback that helped shape this Note. Most importantly, I want to thank my loved ones, Jahhan, Linda, and Hershel Stewart who encouraged me every step of the way.

A. *Narrow Interpretation of* Graham: *Fifth Circuit Approach* 141
B. *Broad Interpretation of* Graham: *Tenth Circuit Approach* 143
III. REFORM EFFORTS AND MOVING FORWARD WITH A BROAD INTERPRETATION OF *GRAHAM* 146
A. *Comprehensive Reform Efforts* 147
B. *Reform Efforts to the Constitutional Standards* 149
1. Extended timeframe 151
a. Full encounter 151
b. Criticism of the Tenth Circuit's expanded universe 154
2. Training within the totality analysis 157
a. Use of force at the federal level 158
b. Tenth Circuit's approach to police training 160
c. Applying the Immediately Connected Test to *Rockwell v. Brown* 162
CONCLUSION 164

INTRODUCTION

What do Deborah Danner, Kenneth Chamberlain, and Adam Trammell all have in common? They were all black Americans who died at the hands of the police or while in police custody. And they were all also disabled.

Sixty-six-year-old Deborah Danner had been living with schizophrenia for more than three decades in her New York apartment.[1] She was very outspoken, even about her mental health.[2] On the night of October 18, 2016, an NYPD officer

1. Corky Siemaszko, *Troubled Bronx Woman Deborah Danner Was Battling Own Family When She Was Killed by Cop*, NBC NEWS (Oct. 21, 2016, 3:27 PM), https://www.nbcnews.com/news/us-news/troubled-bronx-woman-deborah-danner-was-battling-own-family-when-n670826.

2. *See id.* In writing about the stigma surrounding mental health, Danner, unfortunately, predicated the circumstances of her own death to an extent. In her essay titled, "Living With Schizophrenia," Danner wrote, "[w]e are all aware of the all too frequent news stories about the mentally ill who come up against law enforcement instead of mental health professionals and end up dead." *Id.*; Deborah Danner, *Living With Schizophrenia*, (Jan. 28, 2012), https://s3.documentcloud.org/documents/3146953/Living-With-Schizophrenia-by-Deborah-Danner.pdf.

responded to a security guard's call that Deborah was behaving oddly.[3] Within minutes of arriving, Deborah was dead, having been fatally shot after allegedly grabbing a baseball bat.[4]

On November 19, 2011, Kenneth Chamberlain Sr., a sixty-six-year-old former Marine with bipolar disorder, accidentally triggered his medical alert pager.[5] Police were dispatched, and when they arrived Kenneth was adamant "that he did not call them, [he] did not require assistance, [and he] was not having a medical emergency."[6] However, the police persisted and eventually broke down the door.[7] It is disputed whether Kenneth charged at the officers with a knife, but it is undisputed that police fatally shot the senior citizen.[8]

Twenty-two-year-old Adam Trammell was in the shower when police broke into his home and surrounded him.[9] A neighbor had reported earlier that she had seen him naked in the hallway of the apartment complex.[10] Adam suffered from schizophrenia and would often take showers to help calm himself down.[11] Adam was naked, unarmed, and not behaving in a threatening manner, yet he was still killed by police after failing to comply with orders to exit the shower.[12]

These are only a handful of the names of the hundreds of disabled, black Americans who were killed at the hands of police or who died while in police custody.[13] Currently, there is

3. *See* James C. McKinley Jr., *Was the Police Shooting of Psychotic Woman Justified? D.A. Says No*, N.Y. TIMES (Jan. 30, 2018), https://www.nytimes.com/2018/01/30/nyregion/fatal-police-shooting-trial.html.

4. *Id.*

5. Univ. of Mich., *Kenneth Chamberlain*, SEVEN LAST WORDS OF THE UNARMED, https://sevenlastwords.org/seven-lives/kenneth-chamberlain/ (last visited Nov. 8, 2021).

6. *Id.*

7. *Id.*

8. *Id.*

9. Aleem Maqbool, *Don't Shoot, I'm Disabled*, BBC NEWS (Oct. 4, 2018), https://www.bbc.com/news/stories-45739335.

10. *Id.*

11. *Id.*

12. *Id.*

13. *See* Dominic Bradley & Sarah Katz, Opinion, *Sandra Bland, Eric Garner, Freddie Gray: The Toll of Police Violence on Disabled Americans*, THE GUARDIAN (June 9, 2020, 6:30 AM),

no published federal data on police use of force.[14] In 2019, the FBI launched the National Use-of-Force Data Collection project to track this information.[15] However, as of 2020, no findings have been released because only 40% of police agencies have voluntarily submitted any information.[16] Due to the lack of participation, the only source for nationwide data on police use of force comes from private parties.[17] For example, in 2015, the Washington Post created an online database tracking fatal police shootings.[18] The Guardian has also compiled data on the number of people killed during police encounters in 2015 and 2016.[19] These databases, however, cannot provide an accurate depiction of the extent of police violence as they rely on media reports and public record requests.[20] Due to this lack of federal record-keeping, it is hard to know precisely how many people are killed by police in a given year, let alone how many of them

https://www.theguardian.com/commentisfree/2020/jun/09/sandra-bland-eric-garner-freddie-gray-the-toll-of-police-violence-on-disabled-americans.

14. Tom Jackman, *FBI Launched Database on Police Use of Force Last Year, but Only 40 Percent of Police Participated*, WASH. POST (June 17, 2020), https://www.washingtonpost.com/crime-law/2020/06/17/fbi-launched-database-police-use-force-last-year-only-40-percent-police-participated/.

15. *Id.*

16. *Id.*

17. *Id.*

18. Julie Tate, Jennifer Jenkins & Steven Rich, *Fatal Force*, WASH. POST (Oct. 30, 2020), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [hereinafter *Fatal Force*].

19. Jon Swaine, Oliver Laughland, Jamiles Lartey & Ciara McCarthy, *The Counted: People Killed by Police in the US*, THE GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database (last visited Nov. 8, 2021) [hereinafter *The Counted*].

20. Jackman, *supra* note 14.

were disabled.[21] Nevertheless, it is estimated that between 30-50% of people that die at the hands of police are disabled.[22]

The #BlackLivesMatter movement has forced racialized police violence into public view.[23] But in light of this cultural awakening, disability is often left out of the police brutality narrative.[24] This Note addresses the law surrounding police use of force through the intersectional lenses of race and disability. The goal of this Note is to raise awareness to the non-disabled public regarding the necessity of addressing both race and disability within the fight against police brutality.

This Note examines encounters between law enforcement officers and individuals experiencing a mental health crisis. Part I introduces the legal framework for excessive force claims and reviews the Supreme Court's establishment of the objective reasonableness standard. Part II analyzes the decades-long circuit split surrounding the use of pre-seizure evidence in a Section 1983 claim, and juxtaposes the Fifth and Tenth Circuits, which have recently taken contradictory approaches to the use of pre-seizure evidence. Federal courts in the Fifth Circuit have

21. *See* Abigail Abrams, *Black, Disabled and at Risk: The Overlooked Problem of Police Violence Against Americans with Disabilities,* (June 30, 2020), https://time.com/5857438/police-violence-black-disabled/ (Although "[t]here is no reliable national database tracking how many people with disabilities" are killed by police each year, studies suggest disabled persons account for between one-third and one-half of total police killings."). Further, due to the "combination of disability and skin color," both "racial justice and disability rights [advocates] say Black Americans are especially at risk." *Id*. Even if databases began to track those with disabilities, it would still lead to undercounting because some disabilities are "silent" and may go undetected or misdiagnosed. *See* Casey Rentz, *Black and Latino Children are Often Overlooked When It Comes to Autism*, NPR (Mar. 19, 2018, 3:24 PM), https://www.npr.org/sections/health-shots/2018/03/19/587249339/black-and-latino-children-are-often-overlooked-when-it-comes-to-autism (citing study which found that African American children were 5.1 times more likely to be misdiagnosed with conduct disorders before being diagnosed with autism spectrum disorder).

22. DAVID M. PERRY & LAWRENCE CARTER-LONG, THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY 7 (2016), https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf.

23. *See, e.g.*, Jamillah Bowman Williams, Naomi Mezey, & Lisa Singh, *#BlackLivesMatter – Getting from Contemporary Social Movements to Structural Change*, 12 CALIF. L. REV. ONLINE 1 (2021), (discussing the movement's approach to using social media to raise awareness and mobilize people).

24. *See* PERRY & CARTER-LONG, *supra* note 22, at 1, 5, 9–11.

adopted a narrow view of the objective reasonableness standard and limit the scope of the excessive force examination to facts that occur only at the moment force was used by the officer.[25] In contrast, federal courts in the Tenth Circuit review all relevant facts leading up to the use of force, such as an officer's training and whether the officer recklessly escalated the situation.[26] Finally, Part III argues that the Tenth Circuit approach offers a favorable middle ground to the pre-seizure conduct debate and is more adept at incorporating officer training and potential officer culpability into the objective reasonableness analysis than other approaches.

I. SUPREME COURT'S EXCESSIVE FORCE JURISPRUDENCE

The Fourth Amendment protects against unlawful searches and seizures.[27] At its core, the Fourth Amendment serves as a constitutional boundary that protects civilians against abusive police practices.[28] In addition to this constitutional boundary, abusive police practices are curbed by civil and criminal provisions.[29] One such protection includes the Civil Rights Act of 1871, normally referred to as "Section 1983," which provides a legal remedy for those who have had their federal rights violated by state officials acting under state law.[30] A plaintiff

25. *See infra* notes 103–109 and accompanying text.

26. *See infra* Section II.B.

27. U.S CONST. amend. IV.

28. *See* Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that the Fourth Amendment provides "an explicit textual source of constitutional protection" against intrusive police conduct).

29. *See* 42 U.S.C. § 1983 (creating private right of action against government officials acting under color of state law); 18 U.S.C. § 242 (criminal enforcement); 34 U.S.C. § 12601 (DOJ civil enforcement).

30. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

See CTR. FOR CONST. RTS. AND THE NAT'L LAWS. GUILD, THE JAILHOUSE LAWYERS HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON 5 (5th ed. 2010) ("Section 1983 was originally known as Section 1 of the Ku Klux Klan Act of 1871.

(or, for the purpose of this Note, a victim of excessive force) may bring a Section 1983 claim against a police officer for violating his federal right to be free from excessive force.[31] Relief under Section 1983 is commonly pursued, but victims of police violence may also seek justice through federal or state criminal law.[32]

Why, then, are black and disabled Americans so often likely to be the victims of police violence?[33] Why are police officers seldom prosecuted for the acts of violence they commit?[34] And

Section 1983 does not mention race, and it is available for use by people of any color, but it was originally passed specifically to help African Americans enforce the new constitutional rights they won after the Civil War. . . .").

31. 142 U.S.C. § 1983 (noting right to bring a claim for violation of federal rights); MICHAEL A. FOSTER, LSB10516, POLICE USE OF FORCE: OVERVIEW AND CONSIDERATIONS FOR CONGRESS 2 (July 10, 2020), https://sgp.fas.org/crs/misc/LSB10516.pdf (noting Constitutional right to "'be free from the use of excessive force in the course of an arrest'").

32. *See* 42 U.S.C. § 241 (criminal enforcement for conspiracy against rights); 42 U.S.C. § 242 provides in relevant part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined . . . or imprisoned not more than one year . . . and if bodily injury results . . . shall be fined . . . or imprisoned not more than ten years . . . and if death results . . . shall be fined . . . or imprisoned for any term of years or for life, or both, or may be sentenced to death.

See also Ryan Hartzell C. Balisacan, *Incorporating Police Provocation into the Fourth Amendment "Reasonableness" Calculus: A Proposed Post-Mendez Agenda* 54 HARV. C.R.-C.L. L. REV. 328, 334 (2019). Section 1983 had a negligible effect when initially passed in 1871, however its use ballooned after the Supreme Court decision of *Monroe v. Pape*. 365 U.S. 167 (1961); *see* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 17–18 (4th ed. 2018) ("[T]he past four decades witnessed unprecedented growth with respect to both the volume and types of cases filed under [Section] 1983. While only 270 federal civil rights actions were filed in 1961, today between 40,000 and 50,000 [Section] 1983 actions are commenced in federal court each year."). Section 1983 remains the most preferred method for victims of police misconduct because there is a lower burden of proof and potential monetary compensation if successful, unlike a criminal action that primarily punishes the offending police officer. KAMI N. CHAVIS & CONOR DEGNAN, AM. CONST. SOC'Y FOR L. & POL'Y, CURBING EXCESSIVE FORCE: PRIMER ON BARRIERS TO POLICE ACCOUNTABILITY 7 (2017), https://www.acslaw.org/wp-content/uploads/2017/04/Curbing_Excessive_Force.pdf.

33. *See Fatal Force*, *supra* note 18 (statistics on fatal force used on those with mental illnesses; *The Counted*, *supra* note 19 (statistics on police fatal force generally); s*ee* Abrams, *supra* note 21 (discussing likelihood of police us of force against black and disabled Americans).

34. *See* Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/ (discussing the unlikelihood of police prosecution, lack of police convictions, and reluctance to impose heavy sentences on police officers).

why, when officers are prosecuted, are they seldomly held accountable by judges and juries?[35] These continued injustices are the result of courts' overreliance on officers' subjective justification for use of force.[36] Rather than assessing the totality of the circumstances that may have necessitated the use of force, courts often only examine the events immediately preceding an officer's decision to use force.[37] These court decisions fail to account for many of the experiences of law enforcement, such as an officer's training and any deviation from such training.[38] Notably, some courts limit their review to only a single moment in a complex series of events and only admit evidence that inevitably hurts the plaintiff.[39]

Rather than evaluating all the evidence of a police encounter to determine how a reasonable officer may act in a given situation, judges often defer to an officer's version of events, reasoning that an officer knows best because of the inherent danger of law enforcement work.[40] But this is a misapplication of the standard announced in *Graham v. Connor*. The *Graham* Court directed the lower courts to judge an officer's actions from his perspective at the time of the incident.[41] At no point in *Graham*, or in any of the Supreme Court's subsequent excessive force decisions, did the Court direct the lower courts to limit the

35. *See id.* ("Jurors are very reluctant to punish police officers, tending to view them as guardians of order.").

36. *Id.*; *see* Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 627–29 (2020). At times, courts fail to provide any evidentiary rationale for ruling in favor of officers. *Id.* at 628. And many times, when a reason is provided, it comes across as conclusory that an officer's actions were reasonable simply because the officer asserted that it was. *Id.*

37. *See infra* notes 103–09 and accompanying text.

38. *See infra* Part III.

39. *See* SCHWARTZ, *supra* note 32, at 54 ("Some courts 'freeze the time frame' and consider only actions immediately before force was used, holding that the officer's preshooting conduct is 'not relevant and inadmissible.'").

40. *See* Zamoff, *supra* note 36, at 608 (criticizing lower courts' application of the reasonable officer on the scene standard).

41. Graham v. Connor, 490 U.S. 386, 396–97 (1989) ("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 [and] . . . the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them.").

reasonableness inquiry to the *precise moment* force was deployed.[42] On the contrary, *Graham*'s reasonableness inquiry appears to reject such a narrow reading. The *Graham* Court explicitly enumerated the totality of the circumstances to be considered, which are non-exclusive.[43] Although the Court did mention that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments," this consideration represents the Court warning that the officer's actions must be judged objectively rather than with a view of the events that seem obvious in hindsight while within a peaceful judge's chambers.[44]

In determining whether an officer's use of force was excessive, courts should examine the officer's pre-seizure conduct because the use of force does not occur spontaneously.[45] Rather, a series of interactions occur between a civilian and an officer before an officer decides that the use of force is necessary.[46] Officers are trained to handle interactions between themselves and the public.[47] Additionally, officers may

42. *See id.*

43. *Id.* at 396 ("[P]roper application requires careful attention to the facts and circumstances of each particular case, *including* the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (emphasis added)).

44. *Id.* at 396–97.

45. *See infra* Part II. The beginning of most police encounters start from the initial emergency call. From there, officers are informed by dispatch what scenario they will potentially encounter and to prepare for such scenario. And once officers arrive at the scene, they must assess the emergency situation. They do this by often obtaining additional information from those already at the scene. Unfortunately, many times, as seen in this Note, officers respond to an emergency call by using lethal force within minutes of their arrival. *See, e.g.*, Estate of Ceballos v. Husk, 919 F.3d 1204 (10th Cir. 2019); *see also* Joshua M. Minner, *Deadly Force in the Tenth Circuit*, 43 OKLA. CITY U. L. REV. 171, 176–77 (2019).

46. *See generally* Seth W. Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014), https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/ (describing a series of interactions between a civilian and a police officer used during training).

47. *See* Zamoff, *supra* note 36, at 602–04 (categorizing police training into academy training, field training, and in-service training); *see generally* BRIAN A. REAVES, U.S. DEP'T OF JUST., NJC249784, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2013 at 2 (Irene Cooperman & Jill Thomas eds., 2016) ("[Using] data from the Bureau of Justice Statistics' (BJS)

even receive training on how to respond to a mental health crisis.[48] As such, the series of events that lead to the use of force, including any adherence or deviation from training, should be fully examined under a reasonableness inquiry. Because the reasonableness standard is objective, courts should consider officer training as a way to provide objective criteria under which the court can compare an officer's actions with that of his or her training.[49]

For more than thirty years the Supreme Court has gradually developed its excessive force jurisprudence.[50] It was not until the Court heard *Tennessee v. Garner*[51] and *Graham v. Connor*[52] in the 1980s that it truly began to develop the modern framework for when police can and cannot use deadly force. Coincidentally, these cases both involved black men—including one with a disability.[53]

2013 Census of Law Enforcement Training Academies (CLETA) to describe basic training programs for new recruits based on their content, instructors, and teaching methods.").

48. *See* REAVES, *supra* note 47, at 7 ("More than 90% of [surveyed state and local law enforcement] academies included training on . . . mental illness (10 hours).").

49. Zamoff, *supra* note 36, at 586 (offering officer training, experience, and level of compliance with procedures as probative evidence).

50. Excessive force jurisprudence can be traced back to *Garner*, decided in 1985. *See* Minner, *supra* note 45, at 175. *Mendez* is the Court's most recent seminal case. County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017). *See* John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. C.L. & C.R. 155, 157 (2016) ("The United States Supreme Court seldom addresses the issue of police officer use of force; when the issue is addressed, legal justifications for the use of force, and the limitations on when the use of force is appropriate are not analyzed or discussed in any great detail."); *see also* Minner, *supra* note 45, at 175 ("[T]he [Supreme] Court has issued ten significant opinions [on the application of deadly force], most of them within the past decade.").

51. *See generally* Tennessee v. Garner, 471 U.S. 1, 20–21 (1985) (holding that the Fourth Amendment prohibits the use of deadly force to prevent escape of a suspect unless he poses a significant threat of death or serious physical harm to the arresting officer or others).

52. *See* Graham v. Connor, 490 U.S. 386, 394–95 (1989) ("[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' or a free citizens should be analyzed under the Fourth Amendment and its 'reasonableness standard'.").

53. Dethrone Graham was diabetic and was experiencing severe hypoglycemia symptoms when he was stopped by the police for questioning. ELIANA R. FLEISCHER, A LICENSE TO KILL: THE INSTITUTIONAL FAILURE OF THE LEGAL SYSTEM TO HOLD POLICE ACCOUNTABLE 49–50 (2020).

A. Tennessee v. Garner

One night in 1974, Edward Garner attempted to flee police by climbing over a six-foot chain-link fence.[54] The responding officer saw no weapon and was "reasonably sure" that the slightly built teen was unarmed.[55] Despite this, the officer shot the fleeing teen in the back of the head to prevent his escape, killing him.[56] He was only fifteen years-old and had only a stolen purse and ten dollars in his possession.[57]

To defend his actions, the shooting officer relied on a Tennessee statute that authorized an officer to "use all the necessary means" to effect the arrest of an individual whom the officer suspected was fleeing or forcibly resisting arrest.[58] The Supreme Court struck down the statute, holding that the use of deadly force to prevent the escape of a non-threatening, fleeing suspect was constitutionally unreasonable.[59] The Court further explained that an officer may not seize an unarmed and non-threatening suspect by "shooting him dead."[60] However, the Court also held that the Fourth Amendment may authorize the use of deadly force against a fleeing suspect if an officer was threatened with a weapon or there was probable cause that a crime involving serious physical harm had occurred.[61] The Court's reasoning, at least in part, was predicated on the fact that most police departments only authorized deadly force in

54. *Garner*, 471 U.S. at 3–4; *see also* Stacey Barchenger, *How a Tennessee Case Forever Changed Police Shootings*, TENNESSEAN (Aug. 23, 2015, 11:21 PM), https://www.tennessean.com/story/news/2015/08/21/how-tennessee-case-forever-changed-police-shootings/31848333/.

55. *Garner*, 471 U.S. at 3.

56. *Id.* at 4.

57. *Id.* at n.2.

58. *Id.* at 4–5.

59. *Id.* at 11.

60. *Id.* ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.").

61. *Id.* at 11–12.

defense of human life or to protect any person, including the officer, from serious physical injury.[62]

In the dissent, Justice O'Connor introduced a more restrictive approach to the reasonableness standard.[63] Unlike the majority, O'Connor contended that the Fourth Amendment does not prohibit an officer from using deadly force on a fleeing burglary suspect.[64] She noted that the reasonableness of an officer's conduct cannot be evaluated against "what later appears to have been a preferable course of police action."[65] Justice O'Connor was critical of the majority's "silence on critical factors in the decision to use deadly force" because it invited "second-guessing of difficult police decisions that must be made quickly."[66] The Court subsequently incorporated Justice O'Connor's restrictive approach in *Graham*, effectively giving extreme deference to police officers.[67]

B. Graham v. Connor

Four years later, the Court reaffirmed that the use of force by police officers is subject to the Fourth Amendment's reasonableness requirement in *Graham v. Connor*.[68]

On November 12, 1984, Dethorne Graham—a diabetic—attempted to buy orange juice from a convenience store to

62. *Id.* at 18–19.

63. *See id.* at 32 (O'Connor, J., dissenting).

64. *Id.* at 23 ("By disregarding the serious and dangerous nature of residential burglaries and the longstanding practice of many States, the Court effectively creates a Fourth Amendment right allowing a burglary suspect to flee unimpeded from a police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape. I do not believe that the Fourth Amendment supports such a right, and I accordingly dissent.").

65. *Id.* at 29.

66. *Id.* at 32.

67. *See* Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of* Graham v. Connor, 112 NW. U. L. REV. 1465, 1476 (2018) (contending that Justice O'Connor's dissent in *Garner* set the foundation for a restricted approach on the police excessive force doctrine focused solely on a reasonableness standard).

68. Graham v. Connor, 490 U.S. 386, 395 (1989).

counter an insulin reaction.[69] When he noticed that the line inside was too long, he quickly exited the store.[70] A nearby officer thought the act of walking inside a store and quickly exiting was "suspicious."[71] Despite being informed that Graham was simply suffering from a "sugar reaction," the officer detained Graham and requested backup.[72] Meanwhile, Graham's insulin reaction grew more severe and eventually caused him to temporarily pass out.[73] Instead of recognizing that Graham was experiencing a medical emergency, the officers mistook him for being intoxicated and handcuffed him.[74] The officers refused to check his wallet for a diabetic decal and denied him orange juice to treat his insulin reaction.[75] He sustained multiple injuries from the encounter and, in response, filed a Section 1983 claim that alleged that the police had used excessive force in violation of his Fourteenth Amendment rights.[76]

The Supreme Court upheld the officers' actions and unanimously held that excessive force claims should be analyzed using an "objective reasonableness" standard under the Fourth Amendment as opposed to a "substantive due process" standard.[77] The Court explained that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather

69. *Id.* at 388.

70. *Id.* at 388–89.

71. *Id.* at 389.

72. *Id.*

73. *See id.*

74. *Id.*

75. *Id.*

76. *Id.* at 390. At that time, a plaintiff had to prove malicious intent tied to excessive force. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) ("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."), *overruled by Graham*, 490 U.S. at 393–94.

77. *Graham*, 490 U.S. at 388.

than with the 20/20 vision of hindsight."[78] Further, this calculus must take into account that officers make "split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving."[79]

Although the Supreme Court's decision in *Graham* considerably reduced the plaintiff's burden in a Section 1983 claim, the resulting reasonableness standard paradoxically added additional protections for police officers.[80] Moreover, the standard leaves relevant questions unanswered. What if the officer's conduct escalates the situation? What are the criteria for a reasonable officer? Is reasonableness based on an officer's training and department policies, or is it based on how a judge and jury assume a reasonable officer would have reacted? The vagueness of the *Graham* standard has resulted in a framework that is highly deferential to police officers when the court considers whether the use of force—deadly or not—is justified.[81] The decision to use deadly force is left entirely up to the individual officer, and judges and juries are encouraged to give an officer the benefit of the doubt.[82]

C. County of Los Angeles v. Mendez

Graham's amorphous reasonableness standard created a decades-long jurisdictional split regarding whether police conduct leading up to or provoking the need for force is relevant to a Fourth Amendment reasonableness inquiry.[83] The Supreme Court's decision to hear *County of Los Angeles v.*

78. *Id.* at 396.

79. *Id.* at 397.

80. *See id.* at 396–97.

81. *See* discussion *infra* Part II.

82. *See* discussion *infra* Part II; *see also* Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Apr. 12, 2021) https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html (describing how few officers are charged and convicted in excessive force or murder cases).

83. *See* discussion *infra* Part II.

Mendez[84] presented an opportunity to finally correct the jurisdictional discord.

In *Mendez*, officers searching a property for a parolee-at-large entered a shack in the backyard of the property, unannounced, and without a warrant.[85] Mendez, who was sleeping in the shack with his pregnant girlfriend, arose from bed with his BB gun.[86] Upon seeing the gun, officers immediately opened fire on the couple, shooting a total of fifteen rounds of ammunition.[87] Both Mendez and Garcia sustained severe injuries; Mr. Mendez's leg was amputated due to the shooting.[88]

The plaintiffs sued the officers for excessive force.[89] In addressing the excessive force claim, the district court held that, under *Graham*, the officers' use of force was reasonable given their belief that a man was holding a firearm and thus posed a potential fatal threat.[90] Nevertheless, the district court held that the officers were liable for excessive force under the Ninth Circuit's provocation rule.[91] Under the provocation rule:

> [I]f the police committed an independent Fourth Amendment violation by using unreasonable force to enter the house, then they could be held liable for shooting [a suspect]—even though they reasonably shot him at the moment of the shooting—because they "used excessive force in creating the situation which caused [the suspect] to take the actions he did."[92]

The district court held, and the court of appeals affirmed, that per the provocation rule, the officers were liable for their use of

84. County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017).

85. *Id.* at 1544.

86. *Id.* at 1544–45.

87. *Id.* at 1545.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Billington v. Smith, 292 F.3d 1177, 1188 (9th Cir. 2002), *abrogated by Mendez*, 137 S. Ct. at 1549.

force because their intentional and reckless entry caused the shooting.[93] Thus, the officers in *Mendez* acted reasonably in the moment of the shooting, but their antecedent, independent Fourth Amendment violations (entering without a warrant) provoked the shooting, making them liable for excessive force.[94]

The Supreme Court rejected the ruling and the Ninth Circuit's provocation rule as being inconsistent with *Graham*.[95] Further, the Court held that once it is established that an officer used reasonable force under the circumstances, a court cannot attach a distinct Fourth Amendment violation that occurred prior to the use of force in order to hold the party liable.[96] Instead of "dress[ing] up every Fourth Amendment claim as an excessive force claim,"[97] these antecedent independent Fourth Amendment violations must be litigated separately.

The *Mendez* decision failed to resolve the circuit split over whether an officer's pre-seizure conduct is relevant to the reasonableness analysis.[98] Although the Court explicitly rejected the provocation rule which looked for an independent Fourth Amendment violation, it notably did not prohibit courts from reviewing an officer's conduct prior to an application of deadly force that foreseeably created the need to use it.[99] The Supreme Court has yet to address this issue and clarify the *Graham* standard. For now, a plaintiff's success in a Section 1983 claim may undoubtedly depend on whether he is in a jurisdiction where an officer's pre-seizure conduct is deemed relevant to the analysis.[100]

93. *Mendez*, 137 S. Ct. at 1545–46.

94. *Id.*; Balisacan, *supra* note 32, at 347–48.

95. *See Mendez*, 137 S. Ct. at 1546.

96. *See id.* at 1547.

97. *Id.* at 1548.

98. *See id.*; *see also* City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1775 (2015) (Supreme Court declining to resolve this issue because the "question ha[d] not been adequately briefed").

99. *Mendez*, 137 S. Ct. at 1547 n.*.

100. *See* discussion *infra* Section III.B.2.C.

II. FEDERAL COURT RESPONSE TO *GRAHAM* AMBIGUITY

How should a court analyze the objective, reasonable officer standard? Based on the Supreme Court's excessive force jurisprudence, a court must weigh the totality of the circumstances while also providing deference to an officer's split-second judgment.[101] Although this "dual mandate" provides the structure of the reasonableness standard, it fails to provide adequate guidance as to the extent to which a court should give deference to an officer's quick thinking when examining the totality of the circumstances in a reasonableness inquiry. As a result, there is a circuit split on whether the "totality of the circumstances" language in *Graham* should be broadly interpreted to encompass police conduct leading up to the need for force in the reasonableness inquiry, or whether the language should be narrowly interpreted and only the police conduct at the *precise moment* force was deployed is relevant to a Fourth Amendment reasonableness inquiry.[102]

The Second,[103] Fourth,[104] Fifth,[105] Sixth,[106] and Eighth[107] Circuits have adopted a narrow approach that only considers the moments immediately preceding the use of force. These circuits interpret *Graham's* phrasing of "at the moment" and "split-second judgments" to mean that, when determining the reasonableness of an officer's conduct, a court should focus exclusively on the conduct at the precise moment the officer decided to use force.[108] Under this approach, an officer's conduct leading up to the use of force is irrelevant and inadmissible in a reasonableness inquiry.[109]

101. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989).
102. *See* SCHWARTZ, *supra* note 32, at 6.
103. *See, e.g.*, Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996).
104. *See, e.g.*, Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991).
105. *See, e.g.*, Rockwell v. Brown, 664 F.3d 985, 992–93 (5th Cir. 2011).
106. *See, e.g.*, Dickerson v. McClellan, 101 F.3d 1151, 1161 (6th Cir. 1996).
107. *See, e.g.*, Schulz v. Long, 44 F.3d 643, 648–49 (8th Cir. 1995).
108. *See, e.g.*, *Greenidge*, 927 F.2d at 791–92.
109. *See id.* at 793; Zamoff, *supra* note 36, at 637–38.

In contrast, the First,[110] Third,[111] Seventh,[112] Tenth,[113] and Eleventh[114] Circuits have adopted a broader view that considers officer conduct prior to the use of force, including any conduct that deviated from department procedures, when examining the totality of the circumstances. These circuits place an emphasis on the language in *Garner*, incorporated in *Graham*, that called for the consideration of the totality of the circumstances in an excessive force claim.[115]

These divergent approaches to *Graham* illustrate the federal courts' struggle in complying with *Graham's* dual mandate in weighing the totality of the circumstances and providing deference to officers who are forced to make split-second judgments.[116] While most circuits attempt to keep away from either extreme, the circuits that adopt the narrow approach both unfairly provide too much deference to officers' decision making and are ultimately detrimental to plaintiffs. The purpose of Section 1983 is to provide relief to individuals whose civil rights were violated by government officials, including victims of police violence.[117] In balancing the competing interest of *Graham's* dual mandate, the Tenth Circuit's variation on the totality of the circumstances test best reconciles these competing needs.[118]

110. *See* Jack Zouhary, *A Jedi Approach to Excessive Force Claims: May the Reasonable Force Be With You*, 50 U. TOL. L. REV. 1, 6 (2018).

111. *See id.*

112. *See* Balisacan, *supra* note 32, at 338.

113. *See, e.g.*, Allen v. Muskogee, 119 F.3d 837, 841–42 (10th Cir. 1997); Estate of Ceballos v. Husk, 919 F.3d 1204, 1231–32 (10th Cir. 2019); Bond v. City of Tahlequah, 981 F.3d 808, 824 (10th Cir. 2020).

114. *See* Balisacan, *supra* note 32, at 338.

115. *See, e.g.*, Sevier v. City of Lawrence, Kan., 60 F.3d 695, 699 (10th Cir. 1995).

116. *See* Zouhary, *supra* note 110, at 24.

117. *See supra* notes 27–31 and accompanying text.

118. *See* discussion *infra* Part III.

A. *Narrow Interpretation of* Graham: *Fifth Circuit Approach*

Rockwell v. Brown illustrates the use of the at-the-moment approach taken by the Fifth Circuit.[119] Under this approach, only the moment at which an officer employed force is considered.[120] This narrow approach excludes from the reasonableness analysis "any unreasonable pre-seizure conduct or deviations from department procedure[s]."[121]

On February 14, 2006, Scott Rockwell's parents called police to their home because of concerns over their son's mental health.[122] Scott, who suffered from bipolar disorder and schizophrenia, had barricaded himself in his room and refused to come out.[123] The first two responding officers were informed that Scott was suffering from bipolar disorder and schizophrenia, and was off of his medication.[124]

For several minutes, officers attempted to coax Scott out of his room; however, this did not work.[125] From his room, Scott threatened the officers, banged on the walls, and shook his door.[126] One officer was aware that the SWAT team had previously responded to a call at the home and had successfully taken Scott into custody.[127] He informed the other officers, but no decision was made to get SWAT involved.[128] Instead, officers breached the door.[129] Once the door was breached, Scott rushed at the officers while holding two knives, and, in response, the officers opened fire.[130] Within thirty minutes of their arrival,

119. Rockwell v. Brown, 664 F.3d 985 (5th Cir. 2011).
120. *See, e.g.*, *id.* at 993.
121. Zouhary, *supra* note 110, at 4–5.
122. *Rockwell*, 664 F.3d at 988–89.
123. *Id.*
124. *Id.* at 988.
125. *Id.* at 989.
126. *Id.*
127. *Id.*
128. *See id.* at 989–90.
129. *Id.* at 989.
130. *Id.* at 989–90.

officers fatally shot Scott within his own home, only a few feet away from his bedroom.[131]

Scott's estate later sued the officers for excessive force.[132] The court of appeals held that the use of deadly force was justified because the evidence showed that deadly force was not used until after Scott charged at the officers with deadly weapons.[133] On appeal, the Rockwells argued that the officers' conduct contravened the distinctive deadly force standard drawn in *Garner*.[134] However, the court declined to apply *Garner* to a set of facts where a suspect ran toward, rather than away from, officers.[135] In addition, the Rockwells argued that the actual moment of the use of deadly force occurred when the officers breached Scott's locked room door because it was the but-for cause of the resulting altercation between Scott and the officers.[136] Lastly, the Rockwells urged the Fifth Circuit to adopt the totality of the circumstances test and broadly examine the circumstances leading up to the use of deadly force.[137]

Nevertheless, the Fifth Circuit rejected the Rockwells' argument.[138] The court held that the excessive force inquiry is confined to whether someone was in danger at the moment of the threat that resulted in the officer's use of deadly force.[139] Because there was no Supreme Court or Fifth Circuit precedent that evaluated reasonableness as broadly as the Rockwells argued it should be, the court ruled that regardless of what had transpired up until the shooting itself, at the moment of the shooting Scott and the officers were engaged in an armed struggle.[140] Therefore, the officers had a reasonable belief that

131. *Id.* at 990, 996.
132. *Id.* at 990.
133. *Id.* at 991–92 (citing Tennessee v. Garner, 471 U.S. 1, 11–12 (1985)).
134. *Id.*
135. *Id.*
136. *Id.* at 992.
137. *Id.*
138. *Id.*
139. *Id.* at 993.
140. *See id.*

Scott posed an imminent risk of serious harm to the officers.[141] Consequently, in the Fifth Circuit, any police conduct leading up to the need for force is irrelevant to a reasonableness analysis in an excessive force claim.[142]

B. *Broad Interpretation of* Graham*: Tenth Circuit Approach*

The First, Third, Seventh, Ninth, Tenth, and Eleventh Circuits have taken a different position on whether police conduct leading up to the need for force should be considered in an excessive force claim.[143] These circuits, which apply a broader reasonableness inquiry, examine the actions of the officers leading up to the seizure, and in some cases examine officer training and the extent to which officers adhered to or deviated from that training during the incident.[144] However, these circuits vary on whether the totality of the circumstances test should be interpreted broadly versus narrowly.[145] For instance, courts in the First and Third Circuits examine all the events that transpired during a police encounter to assess the reasonableness of an officer's use of force.[146] The Ninth Circuit expands upon this approach and may hold an officer liable for excessive force even if it is decided that the force was reasonable when it was exercised.[147] The Tenth Circuit developed its own

141. *Id.*

142. *See id.*

143. *See supra* notes 110–14.

144. *Id.*

145. *See id.*

146. *See* Abraham v. Raso, 183 F.3d 279, 292 (3d Cir. 1999); St. Hilaire v. City of Laconia, 71 F.3d 20, 26–27 (1st Cir. 1995).

147. The Ninth Circuit's now defunct provocation rule allowed consideration of police officers' antecedent, provocative acts, but only if those acts amounted to an independent Fourth Amendment violation. Balisacan, *supra* note 32 at 331. Under the provocation theory, an officer was precluded from qualified immunity if a court found that he provoked a violent confrontation. County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1549 (2017). Consequently, an officer could be held liable for excessive force, even when the force was reasonable at the moment it was deployed. *Id.* at 1546. The provocation rule represents the outermost boundary of the broad approach because it allowed courts to consider pre-seizure conduct and attach liability through an independent Fourth Amendment violation. *See, e.g.*, Billington v. Smith, 292 F.3d 1177, 1188 (9th Cir. 2002). However, in 2017 this rule was declared unconstitutional by the Supreme Court. *Mendez*, 137 S. Ct. at 1546.

distinct test, the immediately connected test, to evaluate reasonableness of an officer's conduct.[148] Unlike the Fifth Circuit's at-the-moment approach, the Tenth Circuit expands the relevant timeframe to include an officer's pre-seizure conduct.[149] Courts in this circuit focus on whether the officer was in danger at the precise moment force was used, but courts also consider whether the officer's own reckless or deliberate conduct created the need to use force.[150] Any conduct characterized as "[m]ere negligence or conduct attenuated by time or intervening events" is not examined.[151] Here, officers are potentially liable for the foreseeable consequences of their conduct if their pre-seizure conduct was reckless, deliberate, and immediately connected to the use of force.[152] *Estate of Ceballos v. Husk* provides yet another illustration of a fatal encounter between law enforcement and an emotionally disturbed individual.[153]

On August 30, 2013, Jamie Ceballos' wife called 9-1-1 because he was erratically pacing the driveway with a baseball bat.[154] Officers Husk, Snook, Ward, and Commander Carbone were the responding officers.[155] Dispatch sent officers further information over the Computer-Aided Dispatch (CAD) system, including information that Ceballos had threatened his wife months earlier and that he was not taking his anti-depressant

148. Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997). Compared to the First, Third, Seventh, and Eleventh Circuits, the Tenth Circuit adds a reckless element to the reasonableness analysis. Like the other approaches it broadly considers the full police encounter, but it limits liability to only conduct that recklessly provoked the use of force. *See supra* notes 103–07.

149. *See, e.g.*, *Muskogee*, 119 F.3d at 841.

150. *Id*. (holding a reasonable jury could conclude officers' reckless conduct precipitated the need to use deadly force); Bond v. City of Tahlequah, 981 F.3d 808, 824 (10th Cir. 2020) (finding officers' deliberate or reckless conduct precipitated the defendant's use of force).

151. Estate of Ceballos v. Husk, 919 F.3d 1204, 1214 (10th Cir. 2019) (citing Hastings v. Barnes, 252 F. App'x. 197, 203 (10th Cir. 2007)); *see* 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, 672 (2004).

152. *See Bond*, 981 F.3d at 823–24.

153. *See Husk*, 919 F.3d at 1208–09. It is also another example of an emergency call made out of concern for the emotionally disturbed individual turned fatal. *See id.*

154. *Id.*

155. *Id.* at 1209–10.

medication.[156] However, Officer Husk did not view the information displayed on the CAD.[157] Dispatch further reported that Ceballos had been a "walkaway" from a medical center the night before.[158]

When officers arrived on the scene, rather than obtaining more information from Ceballos' family and friends, they immediately approached Ceballos—who was pacing, screaming, and swinging a baseball bat in his driveway.[159] Officer Snook recognized Ceballos from the walkaway incident the night before, [160] and later testified that Ceballos "didn't seem right."[161] Officers shouted commands at Ceballos, but he ignored those commands and instead yelled back at officers.[162] Ceballos entered his garage and when he reemerged, he began to approach the officers.[163] It was at this time that Officer Husk fired his gun and Officer Ward deployed his taser.[164] Within a minute of their arrival, officers shot Ceballos to death in front of his home.[165]

His estate later filed a Section 1983 suit against Officer Husk.[166] The district court denied Officer Husk's motion for summary judgment based on qualified immunity because there was evidence that he recklessly approached an emotionally disturbed individual, which created the need for deadly force.[167]

156. *Id.* at 1209 (citation omitted).

157. *Id.*

158. *Id.*

159. *Id.* at 1210.

160. *Id.* at 1209–10 (recalling an incident where "[r]adio traffic" reported that "Ceballos had been a 'walkaway' from [a nearby medical center]").

161. *Id.* at 1210.

162. *Id.*

163. *Id.*

164. *Id.* at 1211.

165. *Id.* at 1209.

166. *Id.* at 1211.

167. Estate of Ceballos v. Husk, No. 15-cv-01783-RPM, 2017 U.S. Dist. LEXIS 84309, at *12–14 (D. Colo. June 1, 2017). Ceballos did not pose an immediate threat that required lethal force. He was in his driveway alone; his wife in the house and his friends and neighbors far enough away from him. De-escalation rather than lethal force could have been exercised to apprehend Ceballos.

The court came to this conclusion after examining the department's Crisis Intervention Training (CIT) and, specifically, the defendant's lack of training and his deviation from the CIT-approved standards for use of force.[168] Moreover, the district court determined that everything the officers did was immediately connected to the decision to use force as the entire encounter lasted less than a minute.[169] Therefore, it was proper for the court to expand the timeframe to include evidence of the officers' actions leading to the confrontation.[170]

III. REFORM EFFORTS AND MOVING FORWARD WITH A BROAD INTERPRETATION OF *GRAHAM*

As debates and protests regarding police brutality rage across the country, now is the time to address whether law enforcement, alone, is the best first responder for a mental health call. Generally, law enforcement's only tools are the use of force, citation, or arrest.[171] But for individuals in a mental health crisis, these tools are not effective[172] and, at worst, can be deadly.[173] In their roles as first responders, officers are often called on to handle everything, ranging from violent crimes to petty neighbor disputes.[174] On average, officers receive 840 hours of basic training, of which forty-three hours are allocated

168. *See id*. at *8–9.

169. *Id.* at *13.

170. *See id*., *aff'd in part*, 919 F.3d 1204 (10th Cir. 2019).

171. Sam Tabachnik, *How Do Cops Spend Their Time? As Denver Debates Police Funding These Numbers Offer an Inside Look*, DENVER POST (Sept. 6, 2020, 9:17 PM), https://www.denverpost.com/2020/09/06/denver-police-officer-time-job-funding-data/.

172. Amos Irwin & Betsy Pearl, *The Community Responder Model*, CTR. FOR AM. PROGRESS (Oct. 28, 2020, 9:06 AM), https://www.americanprogress.org/issues/criminal-justice/reports/2020/10/28/492492/community-responder-model/ ("Because the police are not set up to provide the necessary quality of service, police response can create negative outcomes for people with disabilities and those with chronic or acute behavioral health conditions. Often, these individuals are arrested and booked into jail, which can exacerbate their medical needs.").

173. *See, e.g.*, Rockwell v. Brown, 664 F.3d 985, 990 (5th Cir. 2011); Estate of Ceballos v. Husk, 919 F.3d 1204, 1209 (10th Cir. 2019).

174. *See* Tabachnik, *supra* note 171; Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (June 19, 2020),
https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html.

to community policing and just ten hours address mental illness.[175] The bulk of police training covers the use of force.[176] A recent report comprised of data from several cities revealed that the majority of emergency calls were for non-emergency incidents, whereas 1–4% of calls related to violent crimes.[177] Estimates vary as to the percentage of emergency calls related to mental and behavioral health.[178] But given their disproportionate representation in the criminal justice system, it is likely that officers often interact with individuals who have a mental disorder, whether they are perceived as having one or not.[179] If not, is there a source that provides this number?

A. *Comprehensive Reform Efforts*

Politicians and activists agree that police should respond to fewer behavioral and mental health emergency calls.[180] Activists advocate for defunding police departments,[181] with the intention being that such funds would be redistributed to expanding social services that can better respond to community needs.[182] In response to calls for police reform, bills were

175. REAVES, *supra* note 47, at 4, 7.

176. *See id.* at 8 (illustrating how more than sixty hours are dedicated to firearm skills in basic training instructions).

177. *See* Irwin & Pearl, *supra* note 172; Asher & Horwitz, *supra* note 174.

178. A study in 2016 that analyzed emergency calls found that one percent of dispatched calls involved a mental health crisis. James D. Livingston, *Contact Between Police and People with Mental Disorders: A Review of Rates*, 67 PSYCHIATRIC SERVS. 850, 852 (Aug. 2016). The Vera Institute of Justice's analysis of 911 data from select cities found that behavioral health calls ranged from 1.4% to 2.4%. MAWIA KHOGALI, FRANKIE WUNSCHEL, SARAH SCAFFIDI & S. REBECCA NEUSTETER, VERA INST. OF JUST., *Chapter 5, Section 2: Site-Specific Analysis*, *in* UNDERSTANDING POLICE ENFORCEMENT: A MULTICITY 911 ANALYSIS 133, 136 (2020), https://www.vera.org/downloads/publications/understanding-police-enforcement-911-analysis.pdf.

179. LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., SURVEY OF PRISON INMATES, 2016: DISABILITIES REPORTED BY PRISONERS 2 (2021), https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016 (indicating that 38% of incarcerated individuals in 2016 had reported at least one disability compared to 15% of the general population).

180. *See generally* Tabachnik, *supra* note 171.

181. *See* Annie Lowrey, *Defund the Police*, THE ATLANTIC (June 5, 2020), https://www.theatlantic.com/ideas/archive/2020/06/defund-police/612682/.

182. *See id.*

introduced in both the House of Representatives and Senate.[183] The Democratic-led House of Representatives introduced the George Floyd Justice in Policing Act of 2020, which would most notably severely limit qualified immunity,[184] whereas Senate Republicans introduced the Justice Act, which would leave qualified immunity intact.[185]

Unfortunately, bipartisan police reform at the federal level has stalled due to ideological differences between conservatives and progressives.[186] In 2020, there was a wave of state and local level reforms in response to community-led movements calling for police reform.[187] But the transformative change that most hoped for has yet to occur.[188] If police are to remain as the default first responders for mental health-related calls, cities can improve outcomes and reduce the need for police response by establishing and expanding non-police first responder programs.[189] Further, police departments should continue to

183. *See* JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10486, CONGRESS AND POLICE REFORM: CURRENT LAW AND RECENT PROPOSALS 6–7 (2020).

184. *See id.* at 6.

185. *Id.* at 7 (stating the reforms proposed by the bill, which mention nothing about qualified immunity); James Copland & Rafael Mangual, *Evaluating the GOP's JUSTICE Act*, MANHATTAN INST. (June 23, 2020), https://www.manhattan-institute.org/evaluating-the-republican-justice-act ("Conspicuously absent from the JUSTICE Act is any mention of 'qualified immunity,' a legal doctrine that the Democrats' bill would eliminate as applied to police.").

186. *See* Alana Wise, *Lawmakers Reach A Bipartisan Agreement on Police Reform*, NPR (June 24, 2021, 8:46 PM), https://www.npr.org/2021/06/24/1010088400/lawmakers-reach-a-bipartisan-agreement-on-police-reform;20; *see also* Nicholas Fandos & Catie Edmondson, *Policing Reform Negotiations Sputter in Congress Amid Partisan Bickering*, N.Y. TIMES (June 10, 2021), https://www.nytimes.com/2021/06/10/us/politics/policing-reform-congress.html.

187. *See* Steve Eder, Michael H. Keller & Blacki Migliozzi, *As New Police Reform Laws Sweep Across the U.S., Some Ask: Are They Enough?*, N.Y. Times, (June 23, 2021), https://www.nytimes.com/2021/04/18/us/police-reform-bills.html; *see also* Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder.

188. *See* Subramanian & Arzy, *supra* note 187.

189. The Crisis Assistance Helping Out on the Streets ("CAHOOTS") and the Crisis Now programs are nationally recognized models that serve as an alternative to police responders. *See* Elliot Williams, *Montgomery County Is Reimaging How Police Officers Respond to Mental Health Crises*, NPR (Mar. 24, 2021),
https://www.npr.org/local/305/2021/03/24/980756591/montgomery-county-is-reimagining-how-police-officers-respond-to-mental-health-crises. A growing number of cities are experimenting with mobile crisis teams to provide better outcomes for mental health

provide relevant police training to officers and ensure proper training techniques are adhered to in the field. Lastly, the Supreme Court should revisit its excessive force jurisprudence to clarify the *Graham's* ambiguities. In doing so, the Court should reaffirm that the totality of the circumstances includes the full police encounter, and it should incorporate police training as a relevant factor.

B. *Reform Efforts to the Constitutional Standards*

In a time of increased public awareness over police brutality and the growing demand for police accountability, it is more important than ever that the country promptly shift to a fairer standard that holistically considers all relevant circumstances when determining the reasonableness of an officer's use of force. Over thirty years ago, the Supreme Court began to sketch the outlines of its excessive force jurisprudence, but in that time, it has failed to provide meaningful guidance regarding the relevancy of police conduct leading up to or provoking the need for force when conducting a reasonableness inquiry.[190] Due to diverging interpretations of *Graham* and depending upon the forum, victims of police violence may be limited in their ability to introduce evidence of police misconduct that occurred prior to an officer's decision to use force.[191] Ultimately, plaintiffs that bring their federal civil suits in jurisdictions that have adopted the at-the-moment approach have a harder time overcoming qualified immunity compared to plaintiffs in circuits adopting the totality of the circumstances approach.[192]

emergencies. *See* Sarah Holder & Kara Harris, *Where Calling the Police Isn't the Only Option*, BLOOMBERG (Sept. 3, 2020, 7:38 PM), https://www.bloomberg.com/news/articles/2020-09-03/alternative-policing-models-emerge-in-u-s-cities. If successful, there should be better outcomes in all police encounters because police would no longer have to overextend themselves by handling every single emergency call. As these programs expand, when calls are channeled to the appropriate responders, police could dedicate their time to fully combatting crime. *Id.*

190. *See supra* Part II.

191. *See id.*

192. Qualified immunity ordinarily shields public officials, including police officers, from personal liability for civil damages insofar as their conduct does not violate clearly established

If the justice system is serious about police reform, then a revision of excessive force jurisprudence is necessary to ensure that decisions regarding the reasonableness of the use of force are based on the holistic considerations of the circumstances of the police encounter, rather than on the seconds immediately preceding the use of force, which if examined out of context will favor the officer.[193] Police violence continues to be a leading cause of death among black Americans, many of whom are disabled or suffer from some mental illness.[194] Moreover,

constitutional rights which a reasonable person would have known. Zamoff, *supra* note 36, at 595. The doctrine operates to protect officers from the sometimes "hazy border between excessive and acceptable force." Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 271 (2003) (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)). To overcome the defense of qualified immunity, the plaintiff must demonstrate that a constitutional right was violated and that it was clearly established at the time of the violation. Zamoff, *supra* note 36, at 596. Courts have discretion in which prong to address first. *Id.* The qualified immunity analysis represents a negative feedback loop because even if the first prong is answered positively, if the clearly established prong is answered in the negative courts may grant an officer qualified immunity. *See id.* In general, circuits adopting the totality of the circumstances approach will consider evidence of police training and the compliance or deviation from such training. *See supra* Part II.B. Therefore, "[w]hen an officer's action is contrary to her training, or when it is contrary to the training that a reasonable officer would have received, the infringement of individual rights may, although not invariably, fail to meet the Fourth Amendment reasonableness standard." Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 299 (2017); *see also* Zamoff, *supra* note 36, at 638–39 (concurring that training protocols are dispositive of the first prong to a qualified immunity analysis). *But see* City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1777 (2015) (noting that even an officer that acts "imprudent, inappropriate, or even reckless" may be granted qualified immunity). Alternatively, in a circuit where objective evidence of training is irrelevant, a plaintiff is less likely to clear the clearly established hurdle because without objective criteria as to what is reasonable there remains a hazy border between excessive and acceptable force. *See* Avery, *supra*, at 271.

193. *See supra* notes 138–42 and accompanying text.

194. *See* PERRY & CARTER-LONG, *supra* note 22; Irwin & Pearl, *supra* note 172 ("Police use of force is among the leading causes of death for Black men and boys, who are 2 1/2 times more likely than their white peers to be killed by law enforcement."). Moreover, due to misdiagnosis and underdiagnosis of mental health disorders in the black community, it is likely that many (more than reported) fatal police encounters are in fact between police and the disabled. *See, e.g.*, *African-Americans More Likely to be Misdiagnosed with Schizophrenia, Study Finds*, SCI. DAILY (Mar. 21, 2019), https://www.sciencedaily.com/releases/2019/03/190321130300.htm; *see also* Rentz, *supra* note 21 (prevalence of underdiagnosis of autism in Black and Latino youth). Black and Latinos, regardless of their mental status, face heightened law enforcement scrutiny in comparison to their White counterparts. Due to negative racial stereotypes, certain behaviors are perceived as defiance or disrespect to law enforcement and can result in an officer responding with excessive force. Similarly, in some instances, officers react with violence to

officers are often the first responders to mental health crisis calls.[195] When a police encounter becomes fatal, questions arise regarding whether the civilian or the officer acted reasonably, given the circumstances. The Supreme Court has the opportunity to resolve the circuit split and, in doing so, clarify the expectation of police behavior throughout the country. Section 1983 should not provide blanket protection in the form of qualified immunity to an officer when that officer's own unconstitutional conduct precipitated the need to use lethal force. Courts should be permitted to analyze an officer's pre-seizure conduct, along with the actual use of lethal force. Accordingly, the "immediately connected" test developed in the Tenth Circuit should be adopted by the Supreme Court.

1. Extended timeframe

Presuming the Supreme Court is willing to evaluate the entire police encounter instead of a single moment, how far back in the encounter should it be willing to examine and what conduct should the Court look for?

a. Full encounter

Although the totality of the circumstances has been applied unevenly by the various circuits, there remains a general understanding that circumstances a court deems relevant must be analyzed in the balancing test.[196] The full police encounter will always encapsulate relevant facts. The facts a court does

suspects they perceive as "crazy." *See generally* Camille A. Nelson, *Frontlines: Policing at the Nexus of Race and Mental Health*, 43 FORDHAM URBAN L.J. 615 (2016) (addressing correlation between race, mental health, and policing).

195. *See* Eric Westervelt, *Mental Health and Police Violence: How Crisis Intervention Teams Are Failing*, NPR (Sept. 18, 2020, 5:00 AM), https://www.npr.org/2020/09/18/913229469/mental-health-and-police-violence-how-crisis-intervention-teams-are-failing (estimating that approximately twenty percent of police calls are responding to mental health and/or substance abuse crises).

196. *See supra* Part II. All circuits consider the actions of the plaintiff as part of the totality of the circumstances. Some circuits emphasize the emergent circumstances confronting the officer, whereas others consider relevant the actions of the officers' preceding conduct. *See id.*

not consider relevant can be tossed aside. Thus, the full police encounter, from its inception through the moment officers employed force, should be properly considered as part of the totality of the circumstances.

Because the nature and extent of contact between police and civilians vary by the circumstances, a police encounter cannot be confined to the mere seconds before the decision to use force was made. When courts refuse to consider an officer's actions leading up to the use of force, they unfairly ignore that in some circumstances an officer's own reckless conduct brought about the need for force.[197] Given that courts consider pre-seizure events that favor defendants, logically, the courts can also consider pre-seizure events that may not always portray the officer in the best light.[198] By failing to consider pre-seizure conduct, courts in the Second, Fourth, Fifth, Sixth, and Eighth Circuits inadvertently send the message that police officers are insulated from the consequences of their reckless conduct. When such conduct leads to the death of a civilian, officers argue, and courts often agree, that it is the victim's fault for not remaining perfectly calm in a tense police encounter.[199] The relevant timeframe in a reasonableness inquiry should include the actions of both officer and civilian. Expanding the relevant timeframe provides a more accurate representation of events, enabling courts and juries to better determine whether an officer's actions were truly reasonable.

197. *See* Zamoff, *supra* note 36, at 590 ("The result is not only that the *Graham* standard has been applied in an uneven, one-sided manner that usually favors the police, but there is sparse evidentiary support for many decisions purporting to determine the perspective of a reasonable officer on the scene.").

198. *See supra* discussion Part II.A.

199. It should be noted that members of the public that disproportionately experience fatal police encounters suffer from mental illness or disability. Marti Hause & Ari Melber, *Half of People Killed by Police Have a Disability: Report*, NBC NEWS (Mar. 14, 2016, 9:13 PM), https://www.nbcnews.com/news/us-news/half-people-killed-police-suffer-mental-disability-report-n538371. The expectation that individuals must remain calm during police encounters is complicated by various individual factors, including mental health and disability.

The Tenth Circuit applies the totality of the circumstances to the full police encounter.[200] In practice, this means that officers' conduct is immediately connected and thus open to review when officers arrive on the scene and within minutes use force—fatal or otherwise.[201] However, there are too few reported Tenth Circuit cases that involve a police chase or standoff occurring over several hours to properly illustrate how the immediately connected test would apply to such situations.[202] One possible solution is to view the event as one encounter rather than a series of discrete events drawn out over an extended period of time.[203] A clear starting point for the

200. *See, e.g.*, Allen v. Muskogee, 119 F.3d 837, 841 (10th Cir. 1997); Estate of Ceballos v. Husk, 919 F.3d 1204, 1213–14 (10th Cir. 2019); Bond v. City of Tahlequah, 981 F.3d 808, 824 (10th Cir. 2020).

201. *See, e.g.*, *Allen*, 119 F.3d at 841 ("The entire incident, from the time [the officer] arrived to the time of the shooting, took only ninety seconds. Clearly, the officers' preceding actions were so 'immediately connected' to Mr. Allen's threat of force that they should be included in the reasonableness inquiry."); Estate of Ceballos v. Husk, No. 15-cv-01783-RPM, 2017 U.S. Dist. LEXIS 84309, at *13 (D. Colo. June 1, 2017) ("Where the entire encounter lasted less than a minute, everything the officers did was 'immediately connected' to the decision to use force."), *aff'd in part and appeal dismissed in part*, 919 F.3d 1204 (10th Cir. 2019); Pauly v. White, 874 F.3d 1197, 1221 (10th Cir. 2017) (holding that officers' preceding actions were "immediately connected" and should be included in the reasonableness inquiry because the encounter lasted less than five minutes); Stewart v. City of Prairie Vill., 904 F. Supp. 2d 1143, 1151–55 (D. Kans. 2012) (considering officers' actions throughout the standoff that lasted at least twelve minutes).

202. *Compare* Bella v. Chamberlain, 24 F.3d 1251, 1256 (10th Cir. 1994) (declining to consider events that occurred an hour prior to the suspect's seizure), *with* Arnold v. City of Olathe, 413 F. Supp. 3d 1087, 1105–07 (D. Kan. 2019) (considering both the moment of fatal force and the preceding moments even though they were drawn out over an afternoon). Future courts should be more inclined to use the approach in *Arnold* because it is more on point to the type of cases that will come before the court. For example, *Arnold* involved a mentally unstable woman who barricaded herself in her home. *See Arnold*, 413 F. Supp. at 1095. Police standoffs often involve someone experiencing a mental health crisis. Theodore B. Feldmann, *The Role of Mental Health Consultants on Hostage Negotiation Teams*, PSYCHIATRIC TIMES (Dec. 1, 2004), https://www.psychiatrictimes.com/view/role-mental-health-consultants-hostage-negotiation-teams. Although occurring over the course of an afternoon, officers' reckless conduct during the entire police encounter was deemed immediately connected because they gradually precipitated the need for force. *See Arnold*, 413 F. Supp. at 1106. This is in juxtaposition to *Bella* which involved a kidnapping and lengthy helicopter chase. *Bella*, 24 F.3d at 1253. The court reasoned that police use of force occurring an hour prior to the seizure was not immediately connected to the seizure because a "lengthy helicopter chase intervened between the time of the shooting and the seizure." *Id.* at 1256 n.7. Therefore, a clear distinction for the application of the immediately connected test is whether another event served as an intervening event between officers' reckless pre-seizure actions and the seizure.

203. *See, e.g.*, *Arnold*, 413 F. Supp. at 1105–06.

temporal connection is when the officer arrives on the scene. This is the most logical approach as it is the beginning of the police encounter. Any concerns over this approach are alleviated by the immediately connected test's second limitation, which requires the officers to have recklessly escalated a non-lethal situation into a lethal one.[204]

b. Criticism of the Tenth Circuit's expanded universe

Yet, the immediately connected test has not gone without criticism. Professors Jack Zouhary and Michael Avery argue that the Tenth Circuit's decisions fail to clearly define pre-seizure conduct and its relevance to a reasonableness inquiry.[205] They argue that although a standard requiring immediacy appears practical and logical on its surface, in practice without a clear definition, the concept of immediacy can be used interchangeably with the seconds immediately preceding the use of force, as is used under the narrow at-the-moment approach.[206]

The immediately connected test, however, should not be rejected simply because the Tenth Circuit has yet to provide a bright-line rule on "immediacy." Notably, the Supreme Court has never recognized a clear demarcation on where excessive force begins or ends,[207] and it is unlikely that the Court will ever create such a bright-line rule when excessive force cases are so fact dependent.[208]

Further, "immediacy" in this context is distinguishable from the "preceding" moments considered in the at-the-moment

204. *See* Bond v. City of Tahlequah, 981 F.3d 808, 824 (10th Cir. 2020).

205. *See* Zouhary, *supra* note 110, at 20; Avery, *supra* note 192, at 278–79.

206. *See* Zouhary, *supra* note 110, at 20; Avery, *supra* note 192, at 278–79.

207. *See* Graham v. Connor, 490 U.S. 386, 396 (1989) (citing Bell v. Wolfish, 441 U.S. 520 (1979)) (explaining an officer's right to use force is governed by an amorphous reasonableness standard, which "is not capable of precise definition or mechanical application."); Scott v. Harris, 550 U.S. 372, 382 (2007) (rejecting notion of "a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force'").

208. *See* Cordova v. Aragon, 569 F.3d 1183, 1188 (10th Cir. 2009) ("There is no easy-to-apply legal test for whether an officer's use of deadly force is excessive; instead, we must 'slosh our way through the fact-bound morass of 'reasonableness.'") (quoting *Harris*, 550 U.S. at 383).

approach. For instance, the Second, Fourth, Fifth, Sixth, and Eighth Circuits' emphasis on the at-the-moment language of *Graham* refers to the exact moment at which force was used.[209] These circuits only evaluate the reasonableness of the officers' actions from the point at which the suspect threatened their lives or others.[210] In *Rockwell*, the court explained that the officers' use of deadly force was reasonable because at the moment they employed force they were engaged in an armed struggle with Mr. Rockwell.[211] Thus, the analysis began and ended at that precise moment in time.[212]

In stark juxtaposition, the Tenth Circuit examines pre-seizure conduct that is both contemporaneous and causally connected to an officer's use of force.[213] In *Estate of Ceballos*, the reasonableness analysis began at the precise moment force was used, but unlike the narrow approach which would end the analysis here, the Tenth Circuit worked its way backwards to give context to both the officers' and the victim's conduct.[214] Because the police encounter lasted approximately one minute, there was no question that the officers' preceding actions were so immediately connected to Mr. Ceballos' threat of force that they should be included in the reasonableness inquiry.[215]

The Tenth Circuit has yet to confine the contemporaneous pre-seizure events to minutes or hours, but it has provided some guideposts. The Circuit has repeatedly held that officers may be held liable for their use of force when their reckless or deliberate pre-seizure conduct occurred some minutes before the seizure.[216] This can range from as little as ninety seconds to

209. *See supra* text accompanying notes 103–08.

210. *See id.*

211. Rockwell v. Brown, 664 F.3d 985, 993 (5th Cir. 2011).

212. *See id.* ("We need not look at *any* other moment in time.") (emphasis added).

213. *See supra* Section II.B.

214. *See* Estate of Ceballos v. Husk, 919 F.3d 1204, 1214, 1216–17 (10th Cir. 2019).

215. Estate of Ceballos v. Husk, No. 15-CV-01783-RPM, 2017 U.S. Dist. LEXIS 84309, at *13 (D. Colo. June 1, 2017), *aff'd in part*, 919 F.3d 1204 (10th Cir. 2019).

216. *See* cases cited *supra* notes 202–03.

an afternoon standoff.[217] As the Circuit further refines its standard, an even longer timeframe for the Supreme Court's review may be available. The immediately connected test seamlessly blends *Graham's* mandate to weigh the totality of the circumstances without second-guessing an officer's split-second decision to use force. In practice, the test does not limit the excessive force analysis to the mere seconds before the threat of force occurred, which allows the plaintiff to introduce evidence that calls into question the officer's claim that the force was justified. Additionally, it provides judges with more context of the encounter between the police and the civilian, which allows for a more comprehensive reasonableness analysis.[218] Neither does the test require the courts to analyze a set of discrete events over the course of a day, which if done, may unnecessarily put every police action under a microscope.[219] Unlike the at-the-moment approach which overemphasizes officer discretion, and the other broad approaches which call into question every officer decision, the immediately connected test serves as a middle ground by examining the related events leading up to the use of force.[220]

Most importantly, the immediately connected test fills in the gaps left by the Supreme Court and answers the question of how much of the police encounter should be analyzed for reasonableness.[221] Additionally, the test answers what type of conduct is relevant to an excessive force analysis.[222] Even if an officer's pre-seizure conduct is contemporaneously connected to a seizure, the conduct under review is further limited to reckless conduct.[223]

217. *See id.*; *but see* Claro v. City of Sulphur, No. CIV-16-428-SPS, 2019 U.S. Dist. LEXIS 215789, at *30 (E.D. Okla. Dec. 16, 2019) (finding no excessive force used by officer when examining conduct during hours long standoff).

218. *See* Kimber, *supra* note 151, at 676–77 (contending that including the actions of the officer in a reasonableness analysis puts into context the actions of the suspect).

219. *See* Bella v. Chamberlain, 24 F.3d 1251, 1256 (10th Cir. 1994).

220. *See supra* Part II.

221. *See* Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997).

222. *Id.*

223. *Id.*

2. Training within the totality analysis

In addition to pre-seizure conduct, the fact finder should consider the officer's training and department procedures. Presently, the Supreme Court has failed to meaningfully implement objective criteria, such as police department policies, that could assess how a reasonable officer would react in a given situation.[224] Due to the lack of guidance, few federal courts consider the training an officer has received when conducting a reasonableness analysis, despite it being central to the reasonableness analysis.[225] While an expanded timeframe provides evidence of a temporal connection between relevant conduct and the eventual use of force because it encapsulates all relevant conduct,[226] department policies and police training provide the qualitative answer as to what conduct is relevant. An officer's conduct is relevant when it shows an adherence or deviation from received training, and a gross deviation could amount to recklessness.[227] "Conduct is reckless when done despite 'a known or obvious risk that was so great as to make it highly probable that harm would follow.'"[228] Adopting a recklessness standard will allow the courts to better examine the true totality of the circumstances in excessive force cases because it answers the question of whether the officer behaved reasonably, given that, by definition, reckless conduct is not reasonable. In the context of law enforcement, reckless conduct should be defined as the gross deviation from accepted department policies and procedures.

224. *See* Garrett & Stoughton, *supra* note 192, at 216 (critiquing *Sheehan*'s disregard for expert testimony and other relevant evidence); *see also* Zamoff, *supra* note 36, at 620–21.

225. *See* Zamoff, *supra* note 36, at 627–33 (examining lower court responses to *Graham*'s silence).

226. *See* discussion *supra* Section III.B.1.

227. *See* Zamoff, *supra* note 36, at 592 (explaining that evidence of an officer's training is essential to the question of police reasonableness and excessive force).

228. Finlinson v. Millard County, No. 2:16-cv-01009-TC, 2018 U.S. Dist. LEXIS 185262, at *53–54 (D. Utah Oct. 29, 2018) (quoting Safeco Ins. Co. v. Burr, 551 U.S. 47, 68 (2007) (citations omitted)).

a. Use of force at the federal level

Currently, there is no federal statute that governs police use of force.[229] Instead, use-of-force policies are governed by the individual states and their local police departments.[230] As such, "[t]here is a wide variation among jurisdictions with respect to the stringency and specificity of these policies."[231] Some jurisdictions have policies that mainly track the lower standards set by the Supreme Court's excessive force jurisprudence, whereas other jurisdictions have implemented forward-looking policies such as emphasizing de-escalation and use-of-force continuum.[232]

A statute or policy establishing specific standards for use of force is not necessarily determinative of what a court will consider reasonable.[233] Some circuits have noted that a violation of departmental policy may be relevant to whether a use of force is constitutionally reasonable under the totality of the circumstances,[234] while others have noted that whether a departmental policy forbids particular force tactics says nothing about whether such tactics are constitutional.[235] Thus, even though an officer's use of force violates a statute or departmental policy, such force may be found reasonable in a Section 1983 claim.[236]

A common defense in a Section 1983 claim is that the officer was forced to make a split-second decision under tense, uncertain, and rapidly evolving circumstances.[237] A reasonable officer, they claim, would have acted the same under similar

229. FOSTER, *supra* note 31, at 3.

230. *Id.*

231. *Id.*; *see also* AMNESTY INT'L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 4–5 (2015).

232. FOSTER, *supra* note 31, at 3.

233. *See id.* at 5.

234. These Circuits tend to track those that have adopted the broad approach. *See* discussion *supra* Section II.B.

235. *See, e.g.*, Abney v. Coe, 493 F.3d 412, 419 (4th Cir. 2007); *see also* discussion *supra* Section II.A.

236. FOSTER, *supra* note 31, at 4; *see also* Zamoff, *supra* note 36, at 629–30.

237. Zamoff, *supra* note 36, at 588.

circumstances. Why is it that judges (and juries, if the plaintiff ever survives summary judgment) overwhelmingly accept that trained police officers will shoot first and ask questions later? *Graham* may warn against hindsight, however, it never proposed that officers' conduct go unquestioned.[238] Despite this, many courts myopically focus only on the dangerousness of policing, which generally results in a decision to insulate officers from the consequences of their misconduct.[239] Because officers are professionals trained to react a certain way in any given situation, it makes sense for judges and juries to consider the officer's training and adherence to department policies and procedures.[240] This approach conforms with *Graham's* mandate to consider the totality of the circumstances. Also, it serves as a sufficient middle ground because it is not overly deferential to law enforcement. Neither does it place a judge's personal notions of proper police procedure as a proxy for reasonableness. Rather, it judges the reasonableness of an officer's conduct by their own standards.

Although *Graham* suggests some level of deference be granted to law enforcement because of the inherent dangerousness of policing, the Supreme Court could not have intended for judges to ignore evidence of the defendant officer's training and instead defer to an officer's boilerplate claim of self-defense.[241] Officers receive hours of training in a variety of stressful environments.[242] Officers even receive additional training for

238. *See generally* Graham v. Connor, 490 U.S. 386 (1989).

239. *Id.* at 590.

240. *See* KIMBERLY A. CRAWFORD, SUPERVISORY SPECIAL AGENT, FED. BUREAU OF INVESTIGATION, REVIEW OF DEADLY FORCE INCIDENT: TAMIR RICE 3–4, http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Tamir%20Rice%20Investigation/Crawford-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf (last visited Nov. 11, 2021).

241. In fact, *Garner* was predicated, in part, on the existence of police department policies across the country to determine whether the fleeing felon rule for the use of deadly force was constitutional. *See* Tennessee v. Garner, 471 U.S. 1, 10 (1985). *Garner* represents the beginning of excessive force jurisprudence in the United States, and as the doctrine has developed the Court noticeably does not base its decisions around expert testimony on police training. *See also* City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1777–78 (2015).

242. REAVES, *supra* note 47, at 1.

unique encounters like mental health issues.[243] In these situations, officers are required to remain calm and communicative to de-escalate an agitated individual.[244] But often, police officers treat what amounts to a mental health emergency as if it was a violent criminal act.[245] And when a Section 1983 claim is filed, many plaintiffs allege that officers failed to follow their own internal standards.[246] The federal courts should no longer blindly accept the excuse that officers had to exercise an extreme use of force. Because officers are trained to quickly respond to changing circumstances, it stands to reason that their training material is relevant, if not determinative, in how a reasonable officer would react in a situation. The Supreme Court should return to its excessive force roots and hold that training materials are relevant to an excessive force inquiry.

b. Tenth Circuit's approach to police training

The Tenth Circuit is one of the few circuits to hold its officers accountable when what was supposed to be a routine wellness check turns fatal.[247] Plaintiffs in this circuit can introduce evidence of department training materials and evidence of an officer's experience to show that an officer's pre-seizure conduct recklessly precipitated the use of the force.[248] In cases

243. *Id.* at 7.

244. CIT, which normally requires forty hours of classroom training, focuses on de-escalation and crisis intervention while emphasizing the safety of the first responder. Irwin & Pearl, *supra* note 172; *see also* Seth W. Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014),
https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/ (suggesting correlation between department policies emphasizing de-escalation over assertive policing and a decrease in officer use of forces).

245. Irwin & Pearl, *supra* note 172. *See* Nelson, *supra* note 194, at 620–22 (exploring criminalization of individuals with mental health disorders). It is not my contention that the victims in these instances are completely harmless. Rather it is that police are trained to identify a mental health crisis and react accordingly with de-escalating techniques.

246. *See e.g.*, Zamoff, *supra* note 36, at 620 (referencing the court's discussion of an officer's compliance with internal police procedure as a factor in determining qualified immunity).

247. *See* discussion *supra* Section II.B.

248. *See* Estate of Ceballos v. Husk, 919 F.3d 1204, 1211 (10th Cir. 2019).

involving mentally ill and emotionally disturbed individuals, officers may be found liable for using excessive force and creating the need for force when officers fail to follow appropriate police practices.[249] This can include the failure to take into account the emotional status of the individual, the failure to proceed cautiously and to utilize cover and containment, and the failure to employ proper tactics against an individual with a short-range weapon.[250] Commonalities amongst cases where plaintiffs overcame qualified immunity are that the trained officers knowingly approached an individual who was experiencing a mental health crisis, berated the suspect with commands, and threatened the individual with weapons and physical violence.[251] The officers engaged in these behaviors despite knowing that no one besides the suspect was potentially in harm's way.[252]

A reasonable officer is familiar with the police department's training materials. Additionally, a reasonable officer has received the average amount of training that is expected at that police department. Thus, the Tenth Circuit presumes that a reasonable officer acts in accordance with his training. The immediately connected test does not arbitrarily examine the full police encounter to catch officers in misconduct. Rather, the test examines the related events leading up to the threat of force by the suspect; and only if the officer was reckless in temporally and causally creating the need to use force will the officer be found liable in a Section 1983 claim.[253] As such, the officer's role is not only relevant, but it is determinative.[254]

While a modest deviation from training protocols may sometimes occur, this line of reasoning does not explain why courts are so reluctant to consider training at all. If *Graham's*

249. *Id.* at 1214.

250. *See* Avery, *supra* note 192, at 298–308 (surveying cases which demonstrate a failure to consider the mental status of the suspect).

251. *Id.*

252. *Id.*; *see e.g.*, *Avery*, *supra* note 192, at 273.

253. *See e.g.*, *Avery*, *supra* note 192, at 278.

254. Bond v. City of Tahlequah, 981 F.3d 808, 824 (10th Cir. 2020).

focus is on the reasonableness of an officer's actions under the Fourth Amendment, how could an officer's training and a department's policies and procedures be irrelevant to a reasonableness determination? Presumably, most reasonable officers would follow their training and presumably they are expected to adhere to department policies and procedures. Therefore, training is highly relevant to the reasonableness inquiry,[255] and with it, courts can finally fully answer whether an officer's actions were reasonable.

c. Applying the Immediately Connected Test to *Rockwell v. Brown*

The at-the-moment approach raises serious concerns regarding fairness in the application of the *Graham* standard.[256] By focusing only on the precise moment that force is deployed, only the actions of the victim will be unfairly scrutinized while the actions of the officers, which may have needlessly precipitated the need for the use of force, will go unchallenged.[257] The moments immediately preceding the use of force, while critical, cannot always capture the full picture.[258] Rather, when the actions of both the officer and plaintiff are put into context, what was originally considered reasonable force may in fact be unreasonable. An expanded timeframe, provided for under the Tenth Circuit approach, may reveal that officers recklessly escalated a non-lethal situation into a lethal one by deviating from department procedures. Of course, this will not always be true, but in some cases evidence of reckless officer conduct may allow an aggrieved party to succeed on an excessive force claim. It is possible that if Rockwell were decided in the Tenth rather than the Fifth Circuit, the outcome would have been different.

255. *See* FOSTER, *supra* note 31, at 4.

256. *See* discussion *supra* Section II.A.

257. *Id.*

258. *Id.*

In *Rockwell*, at the moment shots were fired, it was reasonable for officers to use deadly force.[259] But when the court examines the sequence of events from the point at which the first officer arrived, and examines whether the officers' actions deviated from department procedures, then the officers' decision to use lethal force appears less reasonable. The first officer arrived at Scott Rockwell's residence at 8:45 p.m. and five additional officers arrived a few minutes after.[260] They were all aware that Scott was experiencing a mental health crisis; the decision to arrest him was based partly on his unstable mental state and concern that he would harm himself.[261] Within thirty minutes, the decision was made to breach Scott's door even though Scott had not committed a crime, harmed anyone nor himself, and was not in an immediate position to do so as he had locked himself inside his room away from others.[262] By 9:15 p.m., Scott lay dying from four gunshot wounds.[263]

Had this occurred in the Tenth Circuit, the court would have considered the entire encounter because the use of force was immediately connected.[264] The court may have considered that the officers needlessly escalated the situation before even thirty minutes had passed by breaching Scott's bedroom door with guns drawn. The concurring judge in the *Rockwell* decision agreed on the law, advocated for better police training, and called for reform to Texas's "primitive" law.[265] Unlike the Fifth Circuit, the Tenth Circuit's approach promotes better police

259. Rockwell v. Brown, 664 F.3d 985, 989 (5th Cir. 2011).

260. *Id.*

261. *Id.*

262. *Id.* at 989–90.

263. *Id.* at 990.

264. The actions of the officers were temporally connected to their use of force as the encounter lasted approximately thirty minutes. Also, the officers' actions were causally connected to the shooting because they over the course of several minutes provoked the encounter and recklessly entered the room of an individual who they knew was in a vulnerable mental state

265. *Rockwell*, 664 F.3d at 996 (DeMoss, J., concurring).

training and de-escalation.[266] By examining the full police encounter for relevant facts leading to the eventual use of force, police can be held accountable for situations where they recklessly escalated the altercation.

CONCLUSION

The Supreme Court's excessive force origins come from the Court's desire to curb abusive police practices and hold officers accountable for engaging in those practices. However, as the jurisprudence developed, the original policy goals became overshadowed by the Court's new desire to shield officers for the same conduct they were once admonished for. The lower federal courts, wholly left to their devices, either modernized to stay attuned with social justice or continued to use the antiquated model that allowed for antiquated excuses. Cellphones and social media platforms have helped to shed light on injustices that many Americans never believed existed in this country. Yet, as the public organizes to fight injustice, the Supreme Court has remained surprisingly silent.

This Note argues that it is past time for the Court to revise its police use of force jurisprudence. The Supreme Court began its excessive force jurisprudence by considering evidence of police practices and training materials. The Court should return to this approach. The state of policing has developed drastically in the past thirty years, even more so in the past year. When officers intentionally or recklessly deviate from generally accepted department policies, the Court should no longer accept the de facto excuse, and instead should hold officers liable for grossly deviating from their own standard.

266. The potential to be held personally liable for reckless conduct may incentivize officers and police departments to promote de-escalation techniques.