DEADLY FORCE: DIFFERING APPROACHES TO ARRESTEE EXCESSIVE FORCE CLAIMS

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ABSTRACT

"Peace cannot be kept by force. It can only be achieved by understanding."[1]

Excessive force has become a hot button issue in American news and politics in recent years. Videos of civilians being fatally shot by those charged with a duty to protect and serve society have sparked protests, riots, and even civil rights movements – most notably Black Lives Matter. The legal remedies available to the families and loved ones of the victims of these tragedies are an important part of mending relationships between communities and law enforcement, as well as restoring a sense of justice. This paper analyzes how the United States Courts of Appeals have interpreted Supreme Court rulings regarding § 1983 of the United States Code in the context of law enforcement use of deadly force. Finding that different U.S. Courts of Appeals have reached disparate interpretations, this note implores the United States Supreme Court to clarify the meaning of "totality of the circumstances" in the context of U.S.C. § 1983 lawsuits involving the use of excessive force.

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[1] Albert Einstein, Address to the New History Society (Dec. 14, 1930), *reprinted in* THE NEW QUOTABLE EINSTEIN 158 (Alice Calaprice ed., 2005) (emphasis added).

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I. INTRODUCTION

In 2015, somewhere between 991[2] and 1146[3] people were fatally shot by police in the United States. Surprisingly, no governmental agency yet keeps track of the number of civilians shot by police, and the handful of news organizations that do keep track offer slightly varying figures.[4] In January of 2016 alone, approximately eighty-one people were shot to death by police.[5] Approximately twenty-five-percent of people shot by police are unarmed.[6] Although the vast majority of police shootings have

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[2] *2015 Washington Post database of police shootings*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings/ (last visited March 17, 2017).

[3] *The Counted: People killed by police in the US*, THE GUARDIAN, http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database (follow "2015" hyperlink) (last visited March 17, 2017).

[4] *Justice Department Will Track Police Killings And Use Of Force*, NPR (Oct. 13, 2016 4:04 PM) http://www.npr.org/sections/thetwo-way/2016/10/13/497850361/justice-department-will-track-police-killings-and-use-of-force (noting that "[t]he Justice Department plans to have a pilot program collecting data in early 2017" and that "a lack of a national database became a sticking point in recent years").

[5] *Police shootings 2016 database*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (follow "Jan." hyperlink under "Number of Those Fatally Shot by Police") (last visited Feb. 13, 2017).

[6] Sheila McLaughlin, *What happens when officers use deadly force?*, U.S.A. TODAY (Feb. 21, 2014, 2:49 PM), http://www.usatoday.com/story/news/nation/2014/02/21/police-deadly-force-accountability/5697611/ (stating that "one in four police shootings involve an unarmed civilian"). *See also* Jon Swaine et al., *Black Americans killed by police twice as likely to be unarmed as white people* (June 1, 2015, 8:38 AM), https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis (stating that "[a]n analysis of public records, local news reports and Guardian reporting found that 32% of black people killed

received only local media attention, a handful of them have captivated the attention of the entire nation. Walter Scott,[7] Samuel DuBose,[8] Ezell Ford,[9] and Michael Brown[10] are just a few names on the ever-growing roster of unarmed people who have been shot to death by police. Countless reasons exist as to why these specific incidents have gained the attention of the national media out of the hundreds of officer-involved shootings that take place in America every year. Community outrage, fueled by a perceived racial motivation on behalf of an officer involved in a shooting, is often a crucial component of the media frenzy that drives certain shootings to the forefront of national attention.[11] However, the underlying characteristic that seems to thrust particular cases into the media spotlight is a sense of injustice.[12]

Although incidents that call into question an officer's motive regarding race tend to garner more attention than others,[13] it is the shocking rarity of criminal charges brought against police officers[14] that can incite otherwise peaceful protestors to violence. In September of 2001, a white police officer was acquitted after killing an unarmed black

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by police in 2015 were unarmed, as were 25% of Hispanic and Latino people, compared with 15% of white people killed").

[7] Catherine E. Shoichet & Chandler Friedman, *Walter Scott case: Michael Slager released from jail after posting bond*, CNN (Jan. 5, 2016, 9:01 AM), http://www.cnn.com/2016/01/04/us/south-carolina-michael-slager-bail/.

[8] Kevin Williams et al., *University of Cincinnati police officer who shot man during traffic stop charged with murder*, WASH. POST (July 29, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/07/29/prosecutors-to-announce-conclusion-of-probe-into-cincinnati-campus-police-shooting/?tid=a_inl.

[9] *Full Coverage Ezell Ford shooting*, L.A. TIMES (Dec. 29, 2014, 11:03 AM), http://www.latimes.com/local/lanow/la-me-ezell-ford-shooting-sg-storygallery.html.

[10] Larry Buchanan et al., *What happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html.

[11] *See, e.g.*, *Why Some Police Shootings Get Media Attention While Others Don't*, Morning Edition, NPR (July 25, 5:10 AM), http://www.npr.org/2016/07/25/487303066/why-some-police-shootings-get-media-attention-while-others-dont (suggesting that "[t]he ones that editors and reporters immediately react to are the cases in which somebody gets harmed or shot or killed who did not deserve it").

[12] *See, e.g.*, Nicole Flatow, *What Has Changed About Police Brutality In America, From Rodney King To Michael Brown*, THINKPROGRESS (Sept. 11, 2014), https://thinkprogress.org/what-has-changed-about-police-brutality-in-america-from-rodney-king-to-michael-brown-e6b29a2feff8.

[13] *See, e.g.*, Abby Phillip, *An 'unarmed' white teen was shot dead by police. His family asks: Where is the outrage?*, WASH. POST (Aug. 7, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/08/06/an-unarmed-white-teen-was-shot-dead-by-police-his-family-asks-where-is-the-outrage/.

[14] McLaughlin, *supra* note 6.

man in Cincinnati, Ohio, "sparking the city's worst racial unrest in three decades," according to the New York Times.[15] Following the verdict in that case, protestors gathered outside the courthouse and at City Hall to chant "[n]o justice, no peace."[16] In 2014, when a grand jury in Clayton, Missouri, decided not to bring criminal charges against Darren Wilson, the police officer who fatally shot Michael Brown, protestors in Ferguson, Missouri, became violent, throwing rocks and bottles at police, breaking windows of local businesses, and even burning buildings and police cars.[17] This cry of outrage is a succinct and quintessential representation of the sentiment of those affected by a police shooting, since those affected by such incidents often feel demoralized in the face of a perceived miscarriage of justice.[18]

Despite their historic rarity, criminal charges against police officers have recently become much more common.[19] In 2015, more than three times as many murder and manslaughter charges were brought against police officers for on-duty shootings than in any other year in the past decade.[20] One explanation for the disparity is that police body cameras, like the one that captured the shooting of Samuel DuBose,[21] and the proliferation of video-camera-equipped smart phones, like the one that filmed the shooting of Walter Scott,[22] can be instrumental in bringing criminal charges against police officers.[23] However, even when chargers are brought against police officers involved in a shooting, convictions are

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[15] Associated Press, *Cincinnati Officer Is Acquitted in Killing That Ignited Unrest*, N.Y. TIMES (Sept. 27, 2001), http://www.nytimes.com/2001/09/27/us/cincinnati-officer-is-acquitted-in-killing-that-ignited-unrest.html.

[16] *Id.*

[17] Monica Davey & Julie Bosman, *Protest Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html.

[18] KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION (2016) (discussing the wave of mass protests in the wake of Eric Garner and Michael Brown's death).

[19] Andrea Noble, *Murder, Manslaughter Charges Against Police Spike After Fatal Shootings in 2015*, WASH. TIMES (Dec. 27, 2015), http://www.washingtontimes.com/news/2015/dec/27/police-shootings-result-in-more-charges-for-office/.

[20] *Id.*

[21] Charles M. Blow, Op-Ed., *The Shooting of Samuel DuBose*, N.Y. TIMES (July 29, 2015), http://www.nytimes.com/2015/07/30/opinion/charles-blow-the-shooting-of-samuel-dubose.html.

[22] Catherine E. Shoichet & Mayra Cuevas, *Walter Scott shooting case: Court documents reveal new details*, CNN (Sept. 10, 2015), http://www.cnn.com/2015/09/08/us/south-carolina-walter-scott-shooting-michael-slager/.

[23] *See* Josh Sanburn, *How Body Cams on Cops Brought a Murder Charge in New Mexico*, TIME (Jan. 14, 2015), http://time.com/3667089/albuquerque-police-murder-charge-body-cameras/.

not guaranteed, and punishments for police officers may seem insufficient to the family members of the fallen.[24] When the families of individuals shot by police feel that the criminal justice system has failed them, one of the only options left is to seek redress and justice through civil lawsuits.[25]

By analyzing the wide disparities in how courts have treated excessive force claims brought by arrestees under federal law, I will advocate in this Note for a uniform approach to these claims that seeks greater police accountability and public trust. In section II, I will explain the evolution of excessive force claims with a focus on how different federal circuits have diverged in their treatment of such claims. In Section III, I will show that the Fourth Amendment's reasonableness test varies so widely between different federal circuits that the interpretation alone can be dispositive of certain claims. Ultimately, I will suggest a solution to these apparent discrepancies and argue for a uniform approach.

II. FEDERAL EXCESSIVE FORCE CLAIMS

Federal excessive force claims are based on the Constitution's Bill of Rights. Essentially, excessive force is considered to be a breach of the civil rights of a citizen who was subjected to such force. The Ku Klux Act of 1871 promulgated United States Code §1983 (hereinafter referred to as "§ 1983").[26] It was created in order to provide a civil legal remedy in federal courts for victims of civil rights abuses at the hands of Ku Klux Klan members.[27] Many crimes perpetrated by the Ku Klux Klan were ignored by local law enforcement, and the Ku Klux Act of 1871 was the federal government's attempt at ensuring that the group's members would be held liable for their actions.[28] Thus, § 1983 is a mechanism that allows a citizen to sue another citizen for "deprivation of any rights, privileges, or immunities secured by the Constitution[.]"[29]

In order to establish a federal excessive force claim against a police officer, a plaintiff must establish that the officer violated the alleger's

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[24] *Id.*

[25] Marc Fisher et al., *Uneven Justice*, WASH. POST (Nov. 3, 2015), http://www.washingtonpost.com/sf/investigative/2015/11/03/uneven-justice/.

[26] Monroe v. Pape, 365 U.S. 167, 171 (1961) *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

[27] *See id.*

[28] *See* Wilson v. Garcia, 471 U.S. 261, 276 (1985).

[29] 42 U.S.C. § 1983 (1996).

constitutionally derived civil rights.[30] This means that the actual right violated depends on the stage of detainment during which the excessive force is alleged to have occurred.[31] The Eight Amendment and its guarantees against cruel and unusual punishment govern claims of excessive force made by incarcerated persons;[32] the Fourteenth Amendment's substantive due process analysis is applied to claims of excessive force made by pretrial detainees;[33] and the Fourth Amendment's "reasonableness" test is used to examine excessive force alleged to have occurred during the course of an arrest or other "seizure."[34]

The Supreme Court first began to analyze pre-arrest excessive force claims in the context of the Fourth Amendment's protection against unreasonable searches and seizures in 1985, in its decision in *Tennessee v. Garner*.[35] Prior to the *Garner* decision, use of force by police officers during an arrest was analyzed under the Fourteenth Amendment's "substantive due process" standard, which "prohibited only force that was intentional, unjustified, brutal, and offensive to human dignity."[36] While the *Garner* decision may have been the first to consider pre-arrest excessive force claims under the Fourth Amendment's protections against unreasonable searches and seizures, the Supreme Court's decision later in *Graham v. Connor* explicitly invalidated "substantive due process" as a test for analyzing such claims and adopted a Fourth Amendment "objective reasonableness" test as the proper tool for analyzing pre-arrest excessive force claims.[37] The court reasoned that the Fourth Amendment "provides an explicit textual source of constitutional protection against excessive force" applied during an arrest, as opposed to the "more generalized notion of 'substantive due process,'" making the Fourth Amendment the appropriate constitutional authority under which claims of excessive force during an arrest or other "seizure" should be analyzed.[38]

The Fourth Amendment's "reasonableness" standard makes it less

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[30] *Id.*

[31] Andrews v. Neer, 253 F.3d 1052, 1060 (8th Cir. 2001); *see* Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (citing Bell *v.* Wolfish, 441 U.S. 520, 535-39 (1979); and Whitley v. Albers, 475 U.S. 312, 327 (1986)).

[32] *Graham*, 490 U.S. at 395 (citing *Whitley*, 475 U.S. at 327).

[33] *See id.* (citing *Wolfish*, 441 U.S. at 535-39).

[34] Tenn. v. Garner, 471 U.S. 1, 8 (1985).

[35] Palmer v. Sanderson, 9 F.3d 1433, 1436 (9th Cir. 1993) (citing *Garner*, 471 U.S. at 8).

[36] *Id.* (quoting Rinker v. County of Napa, 831 F.2d 829, 831-32 (9th Cir. 1987)).

[37] *Graham*, 490 U.S. at 392-95.

[38] *Id.* at 395 n.4.

difficult for litigants to prevail in a claim of pre-arrest excessive force as it establishes a lower burden of proof than the "substantive due process" standard.[39] The Fourth Amendment standard does not require a litigant to prove any "underlying intent or motivation" of an officer alleged to have used excessive force.[40] Proving the subjective intentions of a police officer acting in the line of duty, or indeed of anyone, is a particularly difficult task.[41] Determining whether an officer's actions were reasonable under the circumstances, however, is not nearly as difficult as proving that an officer acted "maliciously and sadistically to cause harm[,]" and is, consequently, a lower burden of proof.

The Fourth Amendment standard requires courts to ask whether "the manner in which a . . . seizure is conducted" was reasonable.[42] Whether or not such force was reasonable requires courts to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the governmental interest at stake.[43] More specifically, courts must determine whether the force applied was necessary "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[44] Courts often refer to this "reasonable officer on the scene" language as the "objective reasonableness" test.[45] The *Garner* decision suggests that a police officer's use of deadly force is "reasonable" when the officer has "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[46] However, the decision also emphasizes that "the question [is] whether the totality of the circumstances justifie[s] a particular sort of search or seizure" when balancing an individual's Fourth Amendment rights with the nature and quality of a governmental intrusion.[47] The court concludes that "[t]he use of deadly force is a self-defeating way of

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[39] *E.g.*, E. Bryan MacDonald, Graham v. Connor*: A Reasonable Approach to Excessive Force Claims Against Police Officers*, 22 PAC. L.J. 157, 179-80 (1990).

[40] *Graham*, 490 U.S. at 397 (citing Scott v. United States, 436 U.S. 128, 137-39 (1978)).

[41] *See* Chad S.C. Stover, *Best Practices in Proving Specific Intent and Malice. What Can Civil and Criminal Litigators Learn from One Another?*, ABA Section of Litigation Annual Conference, (Apr. 9-11, 2014,) at 1–2, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/best_practices.authcheckdam.pdf [http://perma.cc/EGV9-TAHF].

[42] *Palmer*, 9 F.3d at 1436 (quoting *Garner*, 471 U.S. at 8).

[43] *Garner*, 471 U.S. at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

[44] *Graham*, 490 U.S. at 396 (citing Terry v. Ohio, 392 U.S. 1, 20–22 (1968)).

[45] *Id.* at 399.

[46] *Garner*, 471 U.S. at 3.

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

apprehending a suspect," and that police should err on the side of apprehending suspects alive so that suspects may be subject to the "judicial determination of guilt and punishment."[48]

The *Graham* decision also highlights the "totality of the circumstances" analysis discussed in *Garner*.[49] In *Graham*, the Supreme Court expands on the balancing test involved in assessing alleged Fourth Amendment violations and develops a three-factor test for courts to consider when weighing the facts of a particular case.[50] The *Graham* three-factor approach to pre-arrest Fourth Amendment violations considers: (1) "the severity of the crime at issue"; (2) "whether [a] suspect poses an immediate threat to the safety of the officers or others"; and (3) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."[51] The greater the severity of the crime, the greater the threat of the suspect's conduct causing injury to officers or the public. Likewise, the more actively a suspect is resisting arrest or evading officers, the more likely that more severe measures of force will be found to be reasonable. The court in *Graham* cites *Garner* as its basis for the three-factor balancing test, and includes the following parenthetical that quotes *Garner* to explain its citation to that case: "the question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure[.]'"[52] The *Graham* decision does not elaborate further on the exact meaning of "totality of the circumstances." Consequently, various appellate courts have treated the idea of "totality of the circumstances" very differently when analyzing claims of excessive force in the pre-arrest context post-*Graham*.

A. THE NINTH CIRCUIT'S NARROW VIEW OF "TOTALITY OF THE CIRCUMSTANCES"

The Ninth Circuit's opinion in *Billington v. Smith* establishes the precedent that "even if an officer negligently *provokes* a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation."[53] The facts of the case are as follows. David Smith, a detective in the Boise City Police

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[48] *Id.* at 9-10.

[49] *Graham*, 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8-9).

[50] *Id.*

[51] *Id.*

[52] *Id.* (citing *Garner*, 471 U.S. at 8-9).

[53] Billington v. Smith, 292 F.3d 1177, 1190 (9th Cir. 2002).

Department, was on his way home with his wife and daughter in his unmarked police car. The decedent Ryan Hennessey passed Detective Smith and his family, squealing his tires and almost causing a head-on collision in the process. Detective Smith turned on his police lights and siren and proceeded to chase Hennessey. Hennessey turned off his headlights and sped up in an attempt to evade his pursuer. Detective Smith radioed dispatch to alert them of the chase and give them his location. Dispatch radioed additional units for backup. Hennessey then crashed into a curb, rendering his vehicle un-drivable. Before police backup arrived, Detective Smith exited his vehicle and approached Hennessey's vehicle with his service weapon in one hand and a large metal flashlight in the other. Hennessey attempted to drive away after identifying Detective Smith's police badge, at which point Detective Smith reached into the car to turn off the ignition. Smith yelled to his daughter to bring him his handcuffs, since he was in plain clothes and was not wearing his utility belt. As Detective Smith began to attempt to handcuff Hennessey, Hennessey began hitting Detective Smith. Hennessey held Detective Smith's throat with one hand and his tie with his other hand and pulled himself through the open car window as Detective Smith backed away.[54]

A fight ensued between Hennessey and Detective Smith. By all witness accounts, Hennessey was the aggressor and Detective Smith was losing the fight. Detective Smith testified that Hennessey was grappling for his service weapon at various points during the fight. He further testified that Hennessey was grappling for his gun at the moment the shot was fired, but witness accounts varied as to the veracity of this statement. The fingerprints on Detective Smith's gun were not identifiable as either Hennessey's or Detective Smith's. Based on powder residue, the Bureau of Alcohol, Tobacco and Firearms laboratory concluded "that Hennessey was shot from a distance of eight to fourteen inches."[55]

At the very moment Detective Smith fired his weapon, he was clearly in a situation that, at the very least, put him at significant risk of serious injury. According to the holding of *Garner*, a significant risk of serious injury or death is sufficient to find an officer's use of deadly force reasonable.[56] However, courts must consider "the reasonableness of the manner in which a search or seizure is conducted" when analyzing the

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[54] *Id.* at 1181.

[55] *Id.* at 1182.

[56] *Garner*, 471 U.S. at 1.

alleged Fourth Amendment violation.[57] Additionally, courts must consider the three-factor test announced in *Graham* when analyzing potential Fourth Amendment violations according to both *Graham* and *Garner*.[58] Acknowledging this precedent, the *Billington* decision analyzed various tactical errors made by Detective Smith that the plaintiffs alleged resulted in the ultimate necessity to use deadly force.[59] The plaintiffs argued that were it not for the tactical errors made by Detective Smith, there would have been no need for the use of force in effecting the arrest of the decedent.[60]

The plaintiffs alleged at least seven tactical errors made by Detective Smith that culminated in the eventual use of deadly force.[61] The court concluded that two of the alleged tactical errors were unsupported by the record and did not discuss them further.[62] Before addressing the remaining five alleged tactical errors, the court discussed the plaintiffs' reliance on the Tenth Circuit's approach to the "totality of the circumstances" aspect of the analysis of an alleged Fourth Amendment violation.[63] The Ninth Circuit compared this approach to the various approaches of other circuits with respect to how broadly different jurisdictions construe "totality of the circumstances" in an excessive force scenario.[64]

After this discussion of various approaches to the "totality of the circumstances" test, the Ninth Circuit concluded that it did not need to rely on the interpretation of any other circuit, since it had previously decided cases that controlled the issue.[65] The court concluded that its previous decisions resulted in the following holding: "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his

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[57] *Id.* at 7-8.

[58] *Id.* at 8-9. (citing *Garner*, 471 U.S. at 8-9).

[59] *Billington*, 292 F.3d at 1186.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* (Analyzing excessive force claims "[u]nder the Fourth Amendment's reasonableness standard. We balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake' and ask whether, under the circumstances, 'including the severity of the crime at issue, the suspect poses an immediate threat to the safety of the officers or others, or whether he is actively resisting arrest or attempting to evade arrest by flight'").

[64] *Id.*

[65] *Id.* at 1188.

otherwise defensive use of deadly force."[66] This holding means that negligent police officer conduct during arrest is insufficient to result in liability under the Fourth Amendment, so long as the deadly force applied was objectively reasonable at the moment it was applied. Only police provocation that is either intentional or reckless, along with an independent violation of the Fourth Amendment, prior to the use of deadly force, can result in civil liability in a pre-arrest deadly force scenario. The court explained that the "intentional or reckless" requirement must be considered in light of the Fourth Amendment's objective reasonableness standard.[67] Therefore, a police officer that provokes a violent response from a suspect is not liable for any resulting use of force, regardless of the officer's underlying motive or intent, so long as the officer's actions were objectively reasonable.[68] Whereas, an officer who provokes a violent response from a suspect and whose provocations are found to be objectively unreasonable would incur liability under the Fourth Amendment for the subsequent use of deadly force.[69] The court ultimately concluded that Detective Smith did not provoke Hennessey and did not commit an independent Fourth Amendment violation.[70]

When analyzing the "reasonableness" of police conduct in effecting an arrest, the Ninth Circuit did not explicitly state that the circumstances considered should be limited to the moment in which deadly force is applied. However, in *Billington*, the court severely limited what circumstances should be considered when evaluating police conduct in analyzing pre-arrest Fourth Amendment violations. The *Billington* decision effectively limited the analysis of whether an officer acted in an objectively reasonable manner, to the moment that deadly force is applied, since the only situation in which lower courts should analyze police officer conduct leading up to the application of deadly force is, when an officer 1) intentionally or reckless provokes a suspect, and 2) when that provocation is an independent constitutional violation.[71]

Given the forgoing analysis, under *Billington*, police officers would likely not be liable for the use of deadly force under the Fourth Amendment, even if they engaged in negligent conduct that provokes a violent response from an unarmed citizen, so long as the force was

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[66] *Id.* at 1189.
[67] *Id.* at 1190.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 1191.
[71] *Id.* at 1190-91.

reasonable at the moment it was applied. Therefore, in jurisdictions where *Billington* is controlling federal jurisprudence, police officers may engage in reckless or even intentional provocation of a citizen during an arrest—so long as that provocation is not an independent constitutional violation —without triggering Fourth Amendment liability for subsequent use of deadly force as self-defense. In both of the aforementioned situations, the police officer's use of deadly force must be objectively reasonable at the moment the force is applied. Any use of deadly force that cannot be construed as objectively reasonable, at the moment it is applied, is necessarily a violation of the victim's Fourth Amendment rights and triggers civil liability in federal courts under § 1983.

B. THE FOURTH CIRCUIT'S EVEN MORE NARROW INTERPRETATION OF "TOTALITY OF THE CIRCUMSTANCES"

In *Greenridge v. Ruffin*, the Fourth Circuit concluded that the events leading up to an officer's decision to discharge her weapon on a civilian were "not relevant" and "inadmissible."[72] The facts of *Greenridge* are as follows. Ernestine Ruffin, a Baltimore City Police Officer working for the vice squad, observed a prostitute enter the vehicle of a presumed customer. Officer Ruffin, accompanied by three other officers, all in plain clothes, in an unmarked police vehicle, followed the car until it parked. The officers approached the car from different directions and without flashlights. Officer Ruffin, who had her police badge hanging from her neck, observed that a sex act was indeed in progress and opened the door of the car. She identified herself as a police officer and ordered the two passengers to place their hands in view. When the passengers did not comply, Officer Ruffin pointed her service revolver into the vehicle and repeated her order. As one of the passengers reached for an object that Officer Ruffin believed to be a shotgun (it was a wooden nightstick), Ruffin fired her weapon. The bullet struck the passenger "in the jaw and lodged near the spinal cord, causing permanent injury."[73]

In the district court proceedings, the judge excluded evidence of Officer Ruffin's alleged violation of police procedures immediately preceding the arrest, which formed one of the bases for the plaintiffs' appeal.[74] The Fourth Circuit's opinion notes that the district court judge's decision to exclude this evidence was a procedural ruling that should only

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[72] Greenridge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991).

[73] *Id.* at 790.

[74] *Id.* at 791 (the other basis for the appeal is not relevant to the topic of this Note).

be overturned if it represents an abuse of discretion.[75] Nevertheless, the court goes on to announce its interpretation of *Graham*. The court quotes the three key factors to be considered when applying the "objective reasonableness" test prescribed by *Graham*.[76] The opinion then claims that in the *Graham* opinion, "reasonableness" meant the "standard of reasonableness *at the moment*," and that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation."[77]

Under this interpretation of "objective reasonableness," the court rejects the plaintiffs' argument that the court should track "the chain of events . . . backward to the officer's misconduct of failing to comply with the standard police procedures for night time prostitution arrests" in determining whether the officer's conduct was "objectively reasonable."[78] The opinion then references two Seventh Circuit opinions which held that liability for excessive force should be based "*exclusively* upon . . . the information [the officers] possessed *immediately prior to and at the very moment*" that force was used.[79] Essentially, in the Fourth Circuit's view, any negligent, reckless, or even deliberate police misconduct during an arrest is "not relevant and . . . inadmissible" for the purposes of determining whether an officer's use of force was a Fourth Amendment violation.[80] The only relevant consideration, according to these circuit courts, is whether an officer's use of force was reasonable at the moment the force was used. Such an interpretation of *Graham* begs the question why "totality of the circumstances" was mentioned at all, if the only circumstances to be considered are those existing at the moment that force was applied.

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[75] *Id.* (citing Persinger v. Norfolk & Western Ry. Co., 920 F.2d 1185, 1187 (4th Cir. 1990)).

[76] *Id.* (citing *Graham*, 490 U.S. at 395) (The court does not mention the direct quote from the *Garner* opinion in the parenthetical following the three-factor test, which discusses the "totality of the circumstances").

[77] *Id.* (quoting *Graham*, 490 U.S. at 396).

[78] *Greenridge*, 927 F.2d at 792.

[79] *Id.* (quoting Ford v. Childers, 855 F.2d 1271, 1275 (7th Cir. 1988); Sherrod v. Berry, 856 F.2d 802, 804 (7th Cir. 1988)).

[80] *Id.* at 792.

C. THE TENTH CIRCUIT AND THE BROAD INTERPRETATION OF "TOTALITY OF THE CIRCUMSTANCES"

The Tenth Circuit, in *Allen v. Muskogee*, espoused the view that "[t]he excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force."[81] In *Allen*, police officers responded to a 911 call regarding a suicidal man, Mr. Allen. Upon arrival, Lt. Donald Smith ordered bystanders to disperse and encountered Mr. Allen in his car. Mr. Allen was seated in the driver's seat of his vehicle with a gun in his right hand, which was resting on the center console of the vehicle. Lt. Smith repeatedly ordered Mr. Allen to drop his gun. Lt. Smith was standing at the driver side door, when Officer Bentley McDonald arrived and positioned himself next to Lt. Smith. Lt. Smith attempted to reach into the vehicle and seize Mr. Allen's gun from his right hand, while Officer McDonald restrained Mr. Allen's left arm. At this point, Officer Bryan Farmer, who had arrived with Officer McDonald, began to open the passenger side door. In response, Mr. Allen pointed his gun at Officer Farmer, who took cover. Mr. Allen then swung his arm toward the driver side of the vehicle, at which point Lt. Smith and Officer McDonald fired twelve rounds into the vehicle. Four of those rounds struck Mr. Allen who died from his injuries. Ninety seconds elapsed from the time when Lt. Smith arrived to when Mr. Allen was killed.[82]

The Tenth Circuit acknowledged that "the use of force must be judged from the perspective of a reasonable officer 'on the scene,' who is 'often forced to make split-second judgments.'"[83] The court added that, based on the precedent established in *Sevier v. City of Lawrence*, the reckless or deliberate conduct engaged in by a police officer during a search or seizure can unreasonably create a situation that requires use of force in violation of a citizen's Fourth Amendment rights.[84] The question in the Tenth Circuit's view is, whether an officer's reckless or deliberate conduct during an arrest is "immediately connected" to a subsequent threat of force on behalf of the victim.[85] In *Medina v. Cram*, the Tenth Circuit

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[81] Allen v. Muskogee., 119 F.3d 837, 840 (10th Cir. 1997) (citing Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995)).

[82] *Id.* at 839.

[83] *Id.* at 840 (quoting *Graham*, 490 U.S. at 396-97).

[84] *Id.* at 839 (citing Sevier v. City of Lawrence, 60 F.3d at 699 (10th Cir. 1995)).

[85] Romero v. Board of County Comm'rs, 60 F.3d 702, 705 n.5 (10th Cir. 1995) (quoting Bella v. Chamberlain, 24 F.3d 1251, 1256 n.7 (10th Cir. 1994), cert. denied, 130 L. Ed. 2d 783, 115 S. Ct. 898 (1995)).

elaborates on this analysis, asserting that "conduct arguably creating the need for force must be immediately connected with the seizure and must rise to the level of recklessness, rather than negligence."[86] Thus, in the view of the Tenth Circuit, reckless and deliberate conduct should be considered in assessing the reasonableness of police action in the calculus of determining liability in a pre-arrest excessive force scenario, if such recklessness or deliberate action created a need to use force.

III. RECONCILING THE VARIOUS APPROACHES TO FEDERAL EXCESSIVE FORCE CLAIMS

How broadly or narrowly a court defines the totality of the circumstance or the scope of inquiry, when evaluating Fourth Amendment excessive force claims in the context of "an arrest, investigatory stop, or other 'seizure' of a free citizen,"[87] can be determinative to the outcome of a particular lawsuit. It is not uncommon for different United States Courts of Appeal to interpret a Supreme Court ruling asymmetrically. However, such a great disparity between circuit court interpretations begs clarification.

The Fourth Circuit's focus on the *exact* moment the force was applied, without any consideration of the reasonableness of police actions leading up to that moment, is very pro-defendant in its interpretation of the Fourth Amendment "reasonableness" standard. This interpretation of the "reasonableness" test limits the scope of inquiry to a mere moment in time. The "totality of the circumstances" in this framework only represents the information available to the officer at the time of the application of force. In other words, the totality of circumstances does not refer to the circumstances that culminated in forceful police conduct; it only refers to the information or knowledge officers possessed at the time they decided to use force.[88] Police officer conduct during an arrest, no matter how reckless or deliberate, is not even a valid consideration under this framework. The only valid consideration is whether a reasonable officer, possessing the same information as the officer who used force and standing in that officer's shoes at the very instant force was used, would have done the same thing. Under this framework, there is no leeway for courts to consider any casual chains of action initiated by police officers

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[86] Medina v. Cram, 252 F.3d 1124, 1132 (10th Cir. 2001) (citing Bella v. Chamberlain, 24 F.3d 1251, 1256 n.10 (10th Cir. 1994)).

[87] *Graham*, 490 U.S. at 386.

[88] *See Greenridge*, 927 F.2d at 792.

that caused a plaintiff to react violently. Only the moment of force itself can be considered in determining whether the use of force was objectively reasonable.

The Tenth Circuit's comparatively broad construction of the reasonableness standard allows courts to take into account reckless and deliberate police conduct, if it creates the need to use force. This framework is the polar opposite of the Fourth Circuit's framework for determining the scope of inquiry in a Fourth Amendment analysis. Under this interpretation, the scope of inquiry extends all the way back to any reckless or deliberate police actions that are "immediately connected" with the creation of a need to use force.[89] However, negligent police conduct that results in a need to use force is specifically excluded as a basis for finding liability under the Tenth Circuit's approach.

The only commonality between these two frameworks is that a police officer's use of force in the context of an alleged Fourth Amendment violation must be objectively reasonable at the moment the force was applied. The Fourth Circuit seeks to defer to the split-second decisions that police officers must make in deciding the appropriate level of force to be applied. The Tenth Circuit approach, on the other hand, attempts to allow plaintiffs to secure a favorable judgment, when police officers recklessly or deliberately *contribute* to the necessity to use force. While these goals are both laudable, they are products of inconsistent rules of law in the federal court system, despite their mutual bases on the same line of Supreme Court jurisprudence. This produces the somewhat absurd result that American citizens are more likely to prevail in a federal excessive force lawsuit, if they were shot by a police officer in Colorado, rather than if they were shot in Virginia, assuming identical fact patterns. In order to bring consistency to rulings on federal excessive force claims, the Supreme Court needs to clarify the correct scope of inquiry and the relevance of "totality of the circumstances," under the Fourth Amendment "reasonableness" analysis in pre-arrest excessive force claims based on § 1983 of the United States Code.

One of the goals of the legislation that created U.S.C. § 1983 was to bring uniformity to the legal remedies available to victims of civil rights violations perpetrated by the Ku Klux Klan.[90] Given that § 1983 has become the primary mechanism to provide a civil remedy in federal court to the victims of civil rights abuses at the hands of the police, the original

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[89] *Romero*, 60 F.3d at 705.

[90] *See Wilson*, 471 U.S. at 270.

goal of providing uniform legal remedies is still important in this context,[91] since state-level tort law regarding excessive force can vary widely from state to state.[92] Given the extreme variation in interpretations of the Fourth Amendment "reasonableness" standard, the Supreme Court should grant certiorari to an excessive force case and clarify what it identifies to be the correct interpretation.

IV. CONCLUSION

It is clear under the foregoing analysis that it is up to the Supreme Court to clarify its position on the correct interpretation of the Fourth Amendment "reasonableness" test, in the context of alleged excessive force by a police officer in effecting an arrest. Without such clarification, different circuits will continue to apply their widely varying proprietary tests to this question of law. As there is a "federal interest in uniformity and [an] interest in having 'firmly defined, easily applied rules[,]'"[93] these variations in the application of federal law are undesirable. The broad interpretation of "totality of the circumstances," which allows for a more inclusive scope of inquiry, would lend itself to greater police accountability. Allowing for the reckless and deliberate conduct of police during an arrest to be taken into account, when determining if a particular use of force was a civil rights violation would not only lead to greater police accountability, but would also help to restore faith in the public eye that reckless and deliberate police misconduct will not be ignored. The Supreme Court thus has an invaluable opportunity to help mend the breaches in trust between the public and the police in the United States.

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[91] *See, e.g.*, Richard P. Shafer, *When Does Police Officer's Use of Force During Arrest Become So Excessive As To Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil Rights Act of 1871 (42 U.S.C.A. § 1983)*, 60 A.L.R. FED. 204 (1982).

[92] *Compare* Hayes v. Cnty. of San Diego, 57 Cal. 4th 622, 639 (2013) (holding that "[l]aw enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability.") *with* State v. McAvoy, 417 S.E. 2d 489, 497 (N.C. 1992) (holding that one of the elements constituting perfect self-defense is "defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.").

[93] *Wilson*, 471 U.S. at 261 (quoting Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983)).