Incorporating Police Provocation into the Fourth Amendment "Reasonableness" Calculus: A Proposed Post-Mendez Agenda

*Ryan Hartzell C. Balisacan**

When police officers provoke a violent encounter that leads to the shooting of a civilian, should they be held liable for damages? Intuitive notions of justice suggest that they should, but Fourth Amendment jurisprudence has yet to provide a clear answer. Circuits split on whether courts can consider officers' earlier provocations. Using a "totality-of-the-circumstances" approach, some federal circuits hold that a police officer's prior provocative acts leading to a shooting should be factored into the Fourth Amendment "reasonableness" calculus. Using an "at-the-moment approach," other federal circuits limit their reasonableness analyses to the exact moment of the shooting, which excludes police officers' antecedent acts even if those acts arguably provoked the civilian. A third approach, under the Ninth Circuit's now-defunct "provocation rule," provides that police officers' provocative acts leading to the shooting can be considered only if those prior acts amount to independent Fourth Amendment violations. This circuit split raises procedural and ethical concerns. This Note argues that this discord in Fourth Amendment jurisprudence should be resolved in favor of the totality-of-the-circumstances approach. Police officers should not be deemed to have acted reasonably under the Fourth Amendment if they themselves created the situation that necessitated their use of violent force. This Note further proposes a blueprint for moving the law in this direction using lessons from the 2017 case Los Angeles v. Mendez. *Proceeding from the holdings of the* Mendez *court, this Note outlines and provides legal support for a three-fold agenda: first, for the Ninth Circuit to adopt the totality-of-the-circumstances approach in the wake of the demise of its provocation rule; second, for litigants to follow the* Mendez *court's suggestion of using the proximate cause approach to alleging police provocation more often—i.e., to assert that police officers' previous acts proximately caused the resulting injury, as compared to arguing that those acts affect the reasonableness of their eventual use of force; third, for the Supreme Court, at the first available opportunity, to declare the totality-of-the-circumstances approach as the uniform Fourth Amendment standard in all courts, incorporating police provocation into the reasonableness calculus.*

Table of Contents

* LL.M., 2018, Harvard Law School; B.A., 2005, J.D., 2009, M.P.A., 2017, University of the Philippines. The author is a prosecutor with the anti-corruption agency of the Philippines and a law lecturer at the University of the Philippines and University of the East. He is grateful to Professor Andrew Manuel Crespo, who supervised the LL.M. paper on which this Note was largely based. For comments on earlier drafts, the author thanks the convenors and participants of the LL.M. Writing Workshop at Harvard Law School and the editors of the *Harvard Civil Rights-Civil Liberties Law Review.*

INTRODUCTION

There is an epidemic of police violence in the United States.[1] Due in part to frequent and widely-reported deaths of citizens at the hands of the police[2]—deaths which have been shown to disproportionately impact people

[1] *See, e.g.*, Carl Dix, *Police Violence: Rising Epidemic, Raising Resistance*, 1 THE BLACK SCHOLAR 59 (1997); Charles M. Blow, *Police Violence: American Epidemic, American Consent*, N.Y. TIMES: OPINION, Sept. 26, 2016, https://www.nytimes.com/2016/09/26/opinion/police-violence-american-epidemic-american-consent.html, *archived at* https://perma.cc/EM8D-XY3A; Jeff Smith, *Dallas Police Lieutenant Calls Police Brutality A Growing 'Epidemic' That Must Be Addressed*, NBC DALLAS-FORT WORTH NEWS (Sept. 23, 2016), https://www.nbcdfw.com/news/local/Dallas-Police-Lieutenant-Calls-Police-Brutality-A-Growing-Epidemic-That-Must-Be-Addressed-394496821.html, *archived at* https://perma.cc/8W8K-TAGD; John M. Whitehead, *The Growing Epidemic of Police Violence: Is It Time to De-Militarize Police Forces?*, HUFFINGTON POST, Aug. 4, 2014, https://www.huffingtonpost.com/john-w-whitehead/just-shoot-the-mindset-re_b_5432716.html, *archived at* https://perma.cc/6GLK-RAKE.

[2] As of August 30, 2018, the Washington Post's database of police deaths lists 732 cases in 2018 and 987 in 2017. *See* Washington Post, *Fatal Force*, WASH. POST (Aug. 30, 2018, 3:50 PM), https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.67f15a2fb09b. This database, started in 2015, documents "only those shootings in

of color and the poor[3]—Americans' level of confidence in the police has dropped to an historic low.[4] If not halted, this decline in confidence will make effective policing extremely challenging, as law enforcement depends largely on mutual trust and cooperation between the police and the communities in which they work.[5] This problem of police violence clearly deserves the close attention of scholars and the broader American public in order to develop solutions we so urgently need.[6]

This Note focuses on legal solutions to a specific scenario of police violence: one where a citizen's injury arose from police officers' own antecedent, provocative acts at the onset of the encounter. By focusing on cases involving police provocation, this Note teases out distinct legal issues that do not arise from other cases of police violence.

While each case has its own unique story, police violence narratives often follow similar frameworks: a police officer guns down a person who refuses to be placed in police custody,[7] or is thought to be armed,[8] or acts in self-defense.[9] Some or all of these circumstances may even concur in one incident. But in all these cases, the courts and the general public look for a

---

which a police officer, in the line of duty, shoots and kills a civilian—the circumstances that most closely parallel the 2014 killing of Michael Brown in Ferguson, Mo., which began the protest movement culminating in Black Lives Matter and an increased focus on police accountability nationwide." *Id.*

[3] *See* Brief for the Georgetown University Law Center Chapter of the Black Law Students Association as *Amicus Curiae* Supporting Respondents at 20–27, County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369).

[4] *See* Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP: POLITICS (June 19, 2015), https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx, *archived at* https://perma.cc/CD33-L4MW.

[5] *See* Brief for the Georgetown University Law Center Chapter of the Black Law Students Association, *supra* note 3, at 28 ("The violence police visits [sic] upon communities of color creates fear, mistrust, and resentment of police officers among the very people who have the most pressing need of law enforcement services, and upon whom police most urgently rely in order to be effective.").

[6] For insightful analyses of police violence, see generally L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961 (2015); Jelani Jefferson Exum, *Nearsighted and Colorblind: The Perspective Problems of Police Deadly Force Cases*, 65 CLEV. ST. L. REV. 491 (2017); Daria Roithmayr, *The Dynamics of Excessive Force*, 2016 U. CHI. L. FORUM 407 (2016); Josephine Ross, *Cops on Trial: Did Fourth Amendment Case Law Help George Zimmerman's Claim of Self-Defense?*, 40 SEATTLE L. REV. 1 (2016); Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 SUP. CT. REV. 157 (2016).

[7] *See, e.g.*, Mark Berman, *Former South Carolina Police Officer Who Shot Walter Scott Sentenced to 20 Years*, WASH. POST: POST NATION, Dec. 7, 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/12/07/former-south-carolina-police-officer-who-shot-walter-scott-sentenced-to-20-years/?utm_term=.0f1458ab8345, *archived at* https://perma.cc/ZX3M-R2JJ.

[8] *See, e.g.*, Eric Heisig, *Tamir Rice Shooting: A Breakdown of the Events that Led to the 12-Year-Old's Death*, CLEVELAND.COM: COURT & JUST. (Jan. 18, 2017), https://www.cleveland.com/court-justice/index.ssf/2017/01/tamir_rice_shooting_a_breakdow.html, *archived at* https://perma.cc/F6XL-8K6W.

[9] *See, e.g.,* Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, CNN (June 21, 2017), https://www.cnn.com/2017/06/20/us/philando-castile-shooting-dashcam/index.html, *archived at* https://perma.cc/RP27-9W2K.

reason to blame the victim for the violence they experienced: did they try to escape, threaten the police officers, or otherwise display aggressive behavior that justified the use of force against them?[10] In contrast, cases involving police provocation shine a spotlight on the police officers: was the encounter's tragic conclusion precipitated by the officers' own antecedent provocative acts?

Intuitive notions of justice suggest that when police officers instigate a violent altercation, they should incur some form of liability. This, however, is not the law of the land. In *Graham v. Connor*,[11] the Supreme Court enunciated the test that determines whether a seizure,[12] including a violent bodily one, is reasonable under the Fourth Amendment, and therefore cannot be made the basis of criminal or civil liability.[13] This test requires an examination of the reasonableness of police conduct 1) from the point of view of an objective observer, 2) in light of the circumstances surrounding the seizure, and 3) with particular solicitude to the split-second judgments police officers make. The *Graham* test is somewhat amorphous, and since it was pronounced, lower courts have diverged in its application to cases involving police provocation.

Five federal circuits follow the "totality-of-the-circumstances" approach.[14] Under this approach, all occurrences during an encounter—including antecedent, provocative acts of the police—are relevant to the *Graham* test.[15] But five other federal circuits follow the "at-the-moment" approach—in which courts consider only those circumstances surrounding the exact

---

[10] While these questions may be answered through objective assessments of the facts established in each case, it has also been shown that implicit bias can influence how persons purportedly defending themselves, including police officers, perceive the threat being posed by the other person. *See, e.g.*, L. Song Richardson & Phillip Atiba Goff, *Self Defense and the Suspicion Heuristic*, 98 Iowa L. Rev. 293 (2012). As Richardson and Goff write, the "suspicion heuristic posits that, when attempting to predict the likelihood that a person poses a threat, individuals may rely upon the availability and representativeness heuristics to make that determination." *Id.* at 313. Threat assessments are thus influenced by readily-available stereotypes, which serve as "heuristics" or cognitive shortcuts for making quick decisions or calculations. Examples of such stereotypes, as Richardson and Goff point out, are: "Latinos (or those appearing to be) are stereotyped as drug dealers, gang members, and undocumented immigrants; people believed to be Muslim are stereotyped as terrorists; and Whites are stereotyped as drug buyers when they are in nonwhite neighborhoods." *Id.* at 310–11.

[11] 490 U.S. 386 (1989).

[12] Under the law, a person is considered "seized" within the meaning of the Fourth Amendment when, in view of the all the circumstances surrounding the incident, he or she was not free to leave. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980). A Fourth Amendment seizure also transpires when a person is apprehended by the use of deadly force. *See* Tennessee v. Garner, 471 U.S. 1 (1985).

[13] Graham, 490 U.S. at 395 (". . . *all* claims that law enforcement officers have used excessive force–deadly or not–in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach.").

[14] First, Third, Seventh, Tenth, and Eleventh Circuits.

[15] In this Note, "encounter" will refer to the period from the time police officers search, seize, or stop an individual up until the individual is killed or injured by police force.

moment police deployed force, holding any antecedent events irrelevant.[16] In addition, for around fifteen years, the Ninth Circuit applied yet another *Graham* interpretation—the "provocation rule," where police provocation may be taken into account only when it constitutes an independent Fourth Amendment violation.[17]

This circuit split is clearly problematic. Under this regime, it is possible for police officers in certain federal circuits to freely engage in provocative conduct, and then use force against the very same citizens they provoked, without incurring any liability. Such abuses run counter to Fourth Amendment touchstone notions of "reasonableness," as discussed by Aaron Kimber,[18] William Heinke,[19] and Cara McClellan.[20] This Note builds on their work, and advances their call to dispose of our present police provocation jurisprudence in favor of a Fourth Amendment rule that accommodates police provocation claims in the reasonableness calculus. This Note updates and advances these arguments by accounting for the state of the law after *Los Angeles v. Mendez*[21], a recent Supreme Court decision that provides a useful blueprint for an agenda going forward.

In *Los Angeles v. Mendez*, the Supreme Court declared the Ninth Circuit's provocation rule unconstitutional and reversed an award of damages to two seriously injured victims of police violence. According to the Court, the provocation rule deviated from Fourth Amendment jurisprudence because it allowed a two-tiered reasonableness test.[22] The first tier is confined to the precise moment when force was used, and examines the reasonableness of police conduct only during that time. When police conduct was found to be reasonable at the first tier, courts would then make a further inquiry into whether the officers committed *antecedent* acts that independently violated

---

[16] Second, Fourth, Fifth, Sixth, and Eighth Circuits.

[17] The Fourth Amendment enshrines the right of the people against unreasonable searches and seizures. It reads in full: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. "Independent Fourth Amendment violations," as referred to in this Note, typically take the form of the most common violations of the right: an unlawful search or an unlawful arrest. For an example of how the "independent Fourth Amendment violation" standard was applied pre-*Mendez*, see Alexander v. San Francisco, 29 F.3d 1355, 1366–67 (9th Cir. 1994) ("While shooting a resident [who made threats about getting a gun and using it] may be reasonable, it can still fail the *Graham* reasonableness test if the ultimate violent confrontation was provoked by an unlawful, not to mention unnecessarily forcible, entry into a home for the mere purpose of inspecting a reported sewage leak.")

[18] *See generally* Aaron Kimber, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651, 676 (2004).

[19] *See generally* William Heinke, *Deadly Force: Differing Approaches to Arrestee Excessive Force Claims*, 26 S. CAL. REV. L. & SOC. JUST. 155, 171 (2017).

[20] *See generally* Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1 (2017).

[21] 137 S. Ct. 1539 (2017).

[22] *See id.* at 1546.

the Fourth Amendment before they used force. If they did, the police officers' actions were deemed "unreasonable," notwithstanding the finding at the first tier of inquiry. The *Mendez* Court held that the second tier of inquiry rendered the provocation rule inconsistent with the Fourth Amendment, because the Fourth Amendment does not sanction the modification of a previous finding that police use of force was reasonable.[23]

On its face, the *Mendez* decision appears to be a step backward for police accountability and stricter regulation of police conduct. After all, the provocation rule *that Mendez* abandoned had effectively served to compensate victims injured by antecedent, provocative police acts. However, this Note proposes that a closer reading of *Mendez* yields valuable lessons that can lay the foundation for a future reform agenda. First, *Mendez*'s rejection of the provocation rule provided an opportunity for the Ninth Circuit to adopt the totality-of-the-circumstances approach, which is even more favorable to police violence victims.[24] The *Mendez* Court likewise does not preclude holding police officers liable for damages caused by their provocative acts, noting that police provocation can still be a source of Fourth Amendment liability if it proximately caused the resulting injury.[25] By using "proximate cause," litigants can advance an alternative theory and minimize the difficulties that they may encounter when dealing with the varying interpretations of *Graham*. Finally, the Court did not reject outright the totality-of-the-circumstances approach.[26] This means that there is still a possibility for other federal circuit courts or state courts to adopt this approach.

Part I of this Note provides an overview of 42 U.S.C. § 1983 ("Section 1983"), the civil remedy most commonly pursued by victims of police violence. It also describes the substantive right on which this remedy is predicated—the Fourth Amendment protection against unreasonable searches and seizures, as enforced through the *Graham* standard. Part II maps the pre-*Mendez* doctrinal terrain, discussing how different federal circuits have applied the *Graham* test and how these different doctrinal approaches impacted outcomes. Part III discusses and analyzes *Mendez*. Part IV proposes a post-*Mendez* agenda for litigants and the courts, one which seeks to strengthen Fourth Amendment protections by holding police officers liable for their provocative acts.

I. Overview of Rights and Remedies of Police Violence Victims

Police provocation cases typically commence with police officers committing unlawful acts—like attempting to enter a residence unlawfully,[27] or

---

[23] *See id.* at 1547.
[24] *See id.* at 1546.
[25] *See id.* at 1548–49.
[26] *See id.* at 1547, n.*.
[27] *See, e.g.*, Mark Joseph Stern, *Appeals Court: Officer Who Shot and Killed Innocent Man in His Own Home Cannot Be Sued*, Slate (Mar. 17, 2017), http://www.slate.com/blogs/the_

employing unnecessary force in taking a citizen into custody.[28] These provocations can trigger a rapid exchange of escalating reactions and counter-reactions. First, the citizen may resist or retaliate against the provocation. Second, the police officers, viewing such resistance or retaliation as a threat, may deploy force to subdue the citizen or to defend themselves.[29] The common approach for victims in such cases is to bring a Section 1983 claim against the provoking police officer. This claim would allege a violation of the victim's Fourth Amendment right against unreasonable searches and seizures.[30] The following sections outline the components of this remedy.

A. Remedies: Section 1983 and Alternatives

Section 1983 authorizes parties to seek damages against state officials or agents who violate their federal rights while acting under color of state law.[31] The watershed moment for Section 1983 litigation came with *Monroe v. Pape*, in which the Supreme Court held that state officials, even if acting *contrary* to state law, are deemed acting "under color" of state law for Section 1983 purposes.[32] The *Monroe* Court further held that the availability of a state law remedy in tort does not preclude an injured party from bringing a federal civil rights suit under Section 1983.[33] The Court's expansive reading

---

slatest/2017/03/17/appeals_court_rules_officer_who_killed_man_in_his_own_home_cannot_be_sued.html, *archived at* https://perma.cc/BWG9-G6JW.

[28] *See, e.g.*, German Lopez, *East Pittsburgh Police Officer Charged for Shooting of 17-Year-Old Antwon Rose*, Vox (June 27, 2018), https://www.vox.com/identities/2018/6/20/17484480/antwon-rose-east-pittsburgh-police-shooting-video, *archived at* https://perma.cc/WW5N-B8QM.

[29] The case of Todd Hastings illustrates this point. *See infra* notes 80–108 and accompanying text.

[30] *See* Philip M. Stinson & Steven L. Brewer, Jr., Federal Civil Rights Litigation Pursuant to 42 U.S.C. §1983 as a Correlate of Police Crime 7 (2016), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&http-sredir=1&article=1067&context=crim_just_pub, *archived at* https://perma.cc/Q6XY-QB8E ("Section 1983 is now the cornerstone of federal police liability litigation against police officers, their employing law enforcement agencies, and municipalities.").

[31] The statute reads in full: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983 (2012).

[32] 365 U.S. 167 (1961).

[33] *Id.* at 184 ("It is no answer that the State has a law which, if enforced, would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."); *see also* Martin A. Schwartz, Section 1983 Litigation 2 (3rd ed. 2014).

of Section 1983 caused Section 1983 claims to balloon post-*Monroe*.[34] Currently, suits against police officers are mostly brought under Section 1983,[35] with "a large percentage of [Section] 1983 claims alleg[ing] some form of police misconduct."[36]

Section 1983 is the most preferred remedy available to victims of police violence, but it is not the only remedy.[37] Offending police officers can also be criminally prosecuted under Section 1983's federal criminal law counterpart, 42 U.S.C. § 242,[38] or under state criminal laws.[39] Unfortunately, according to one study,[40] less than one percent of federal criminal complaints arising from police violence referred to the U.S. Department of Justice (DOJ) actually lead to indictments, which makes this a less desirable route for accountability.[41] Criminal prosecution of unjustified police violence is

---

[34] MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 17–18 (4th ed. 2018) (". . . the 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 [the year *Monroe* was decided], today between 40,000 and 50,000 [Section] 1983 actions are commenced in federal court each year.").

[35] *See* John V. Berry, *Section 1983 Defense for Officers*, THE POLICE LAW BLOG (June 2, 2015), http://www.policelawblog.com/blog/section-1983-defense-for-officers/, *archived at* https://perma.cc/5286-F4ND ("Lawsuits under Section 1983 are the most common against law enforcement officers . . . .").

[36] SCHWARTZ, *supra* note 34, at 18.

[37] KAMI N. CHAVIS & CONOR DEGNAN, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, CURBING EXCESSIVE FORCE: A PRIMER ON BARRIERS TO POLICE ACCOUNTABILITY, ISSUE BRIEF 7 (Apr. 2017) (explaining that Section 1983 is a preferable remedy because, as a civil action, it requires a low burden of proof and may compel monetary compensation for victims, unlike a criminal action that focuses primarily on punishing the offending police officer).

[38] The criminal law statute reads in part: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be" fined, or imprisoned, or both, with the amounts and terms dependent on the extent of injuries and attendant circumstances.

[39] *See*, *e.g.*, Taylor Kaye Brown, *The Cases Where US Police Have Faced Killing Charges,* BBC (April 8, 2015), https://www.bbc.com/news/world-us-canada-30339943, *archived at* https://perma.cc/HPD4-UJK5 (citing cases where police officers were charged under state law for crimes like manslaughter or assault).

[40] HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 162 (1998).

[41] *Id*. Among other reasons, indictments are rare because of the high *mens rea* threshold of willfulness required by Section 242. *See* Screws v. United States, 325 U.S. 91, 101–07 (1945) (holding that complainants must show "the specific intent of violating the law" on the part of the police officers, and establish that their acts were committed "in open defiance or in reckless disregard of a constitutional requirement which has been made specific or definite"); *see also* United States v. McClean, 528 F.2d 1250, 1255 (2d Cir. 1976) (holding that inadvertence or mistake is inconsistent with willfulness).

also rare at the state level.[42] State prosecutors may be particularly reluctant to investigate the local police officers on whom they rely to do their jobs.[43]

Addressing *systemic* (rather than individual) police misconduct could also hold officers more accountable. A party may petition a court to prospectively enjoin a police practice or policy when there is evidence of abuse.[44] In some instances, injunctive relief is a viable means of changing police practices: for instance, it was used with some success to challenge the New York City Police Department's "stop and frisk" program.[45] Due to evidentiary requirements, however, this remedy can be difficult to deploy effectively against policies and practices less widespread and less openly endorsed than "stop and frisk."[46] An alternative systemic remedy is provided by 42 U.S.C. § 14141 ("Section 14141"), which authorizes the DOJ to investigate an entire police department for an allegedly unconstitutional "pattern or practice of conduct," and to sue for equitable relief to correct the institutional practice.[47] But, as Kami N. Chavis and Conor Degnan conclude, Section 14141 is "all bark and no bite."[48] This authority of the DOJ—which does not often result in actual litigation[49]—remains an "unrealized potential,"[50] partly be-

---

[42] *Id*.

[43] CHAVIS & DEGNAN, *supra* note 37, at 3 ("Local prosecutors are often unwilling to investigate and prosecute local law enforcers because they have a symbiotic relationship and continuously work together in local criminal enforcement activities.").

[44] *See* FED. R. CIV. P. 65.

[45] *See* Floyd v. New York, 959 F. Supp. 2d 540 (2013) (holding, in part, that the New York City Police Department's stop-question-frisk program sanctions stops not supported by reasonable suspicion, and disproportionately affects African-American and Latino populations, both in violation of the Constitution).

[46] *See* RONALD JAY ALLEN, ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 339–40 (3rd ed. 2016) (discussing the requirement, laid down in Los Angeles v. Lyons, 461 U.S. 95 (1983), to prove that (1) the petitioner would be involved in another encounter with the police, in which the practice or policy being questioned would again be used; (2) the practice or policy being questioned is uniformly used against all citizens being arrested, cited, or questioned; and (3) the concerned police department authorized or ordered officers to act in such manner).

[47] The statute reads, in full: "(a) *Unlawful conduct*. It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. (b) *Civil action by Attorney General*. Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice."

[48] CHAVIS & DEGNAN, *supra* note 37, at 10.

[49] *See id*. at 10–11 (explaining the DOJ's preference to merely use the *threat* of litigation to compel negotiated settlements rather than to expend resources on actual lawsuits); *see also* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 15–16 (explaining that, in practice, Section 14141 investigations are resolved out of court, through agreements about mandatory reforms or through technical assistance letters from the DOJ which list recommended policy reforms).

[50] *See id.* at 9. *But see* Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV.

cause the DOJ's work is often hampered by the accuracy of self-reported data.[51]

Victims of police violence therefore have good reason to prefer using Section 1983 to vindicate their rights.[52] But Section 1983 is merely a vehicle for bringing a claim; it does not create a right or establish an entitlement. "Section 1983 by itself does not protect anyone against anything."[53] It must be anchored to a substantive federal right.

B. Substantive Right: The Fourth Amendment and the Graham *Reasonableness Standard*

Historically, Section 1983 claims against police officers have been litigated under the Fourth, Eighth, and Fourteenth Amendments.[54] Today, however, all cases alleging excessive force during an arrest, investigatory stop, or other form of seizure are brought *exclusively* under the Fourth Amendment, per the Supreme Court's rule in *Graham v. Connor*.[55] Other constitutional rights can still be used as predicates for a Section 1983 claim, but only in use of force contexts not covered by *Graham.*[56] For instance, incarcerated people can invoke the right against cruel and unusual punishment under the Eighth Amendment against alleged abuses by state prison officers.[57]

In limiting the available grounds for 1983 claims, the *Graham* Court built on the *Tennessee v. Garner*[58] decision rendered four years earlier. In *Garner*, the Court relied on the Fourth Amendment to establish the rule that a police officer can deploy lethal force when (1) a suspect is escaping, and (2) the police officer has probable cause to believe the suspect poses a threat of serious physical harm to the officer or to others.[59] *Graham* echoed and

---

3 (2003) (presenting a more optimistic view of the prospects of Section 14141 as a reform instrument).

[51] CHAVIS & DEGNAN, *supra* note 37, at 9–13 (discussing how the DOJ is unable to identify "problem police departments" because it has to work with inaccurate self-reported data).

[52] *But see* Harmon, *supra* note 49, at 11–12 (noting that Section 1983 has been successful in inducing system-wide reform in other civil rights contexts, but in the context of police use of force, it has been a "weaker tool"). *See also* ALLEN, ET AL., *supra* note 46, at 340 ("[d]amages awards do not always prompt timely reform in police operations–partly because the damages rarely come out of police budgets. . . ."); discussions *infra*, especially in Part IV.C.2.c, about the challenges brought about by "qualified immunity," a doctrine applicable only in tort suits.

[53] Chapman v. Houston Welfare Rts. Org., 441 U.S. 600, 618 (1979).

[54] *See* SCHWARTZ, *supra* note 34, at 652.

[55] 490 U.S. 386, 395 (1989) (". . . *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (emphasis in the original)).

[56] *See* SCHWARTZ, *supra* note 34, at 653.

[57] *See, e.g.*, Whitley v. Albers, 475 U.S. 312 (1986).

[58] 471 U.S. 1 (1985).

[59] *Id.* at 11.

expanded *Garner's* analysis, which takes into account circumstances surrounding the moment when force was deployed.

The *Graham* Court held that the focal inquiry in excessive force claims is whether a police officer's actions were *reasonable*. The Court then laid out the following guidelines for analyzing whether the force used by a police officer was reasonable under the Fourth Amendment.

First, the Court held that the key question is "whether the totality of the circumstances justified a particular sort of . . . seizure."[60] To answer this, courts should consider: "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."[61] In other words, the *Graham* Court prescribes a reasonableness test that accounts for the circumstances surrounding the seizure.

Second, the Court held that "[t]he '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,"[62] 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."[63] Courts therefore give deference to "split-second" decisions that police officers make on the scene.

Third, the Court held that the reasonableness test does not take into account the police officers' intent: "[t]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[64] Even well-meaning police officers, therefore, can incur liability if they employ objectively excessive force; conversely, officers who apply objectively reasonable force can avoid liability, even if plaintiffs have evidence of their actual bad faith.

II. The Doctrinal Terrain Before *Mendez:* Discord in Interpreting *Graham*

Graham's Fourth Amendment reasonableness analysis is now central to police violence claims, and, perhaps inevitably, the frequency with which courts have ruled on the *Graham* standard has blurred its contours. Furthermore, the standard itself is inexact and leaves ample room for discretion. How much leeway must be given to police officers' split-second choices?

---

[60] *Graham,* 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8–9).
[61] *Id.* at 396.
[62] *Id.*
[63] *Graham*, 490 U.S. at 397.
[64] *Id.* (citing Scott v. United States, 436 U.S. 128, 137–139 (1978) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.").

How should one operationalize the "objective, reasonable observer" perspective? After years of *Graham* litigation, a "systematic conceptual framework" for what constitutes excessive force remains elusive.[65] What prevails instead is a regime where judges profess compliance with *Graham* but actually render decisions based on their subjective intuitions.[66]

This Part discusses how *Graham*'s malleability bears on the litigation of Section 1983 claims involving police provocation. The amorphous *Graham* standard has led federal circuits to three main conclusions regarding the relationship between police officers' antecedent provocative acts and the reasonableness of their uses of force. One expansive *Graham* interpretation—the totality-of-the-circumstances approach—accommodates claims of police provocation. A second, restrictive *Graham* interpretation—the at-the-moment approach—completely forecloses such claims. A third interpretation—the provocation rule—limits such claims. These approaches comprise the three-way doctrinal discord in the federal circuit courts' *Graham* jurisprudence, discussed briefly below.

Courts in the First Circuit,[67] Third Circuit,[68] Seventh Circuit,[69] Tenth Circuit,[70] and Eleventh Circuit[71] adopted the *Graham* Court's explanation that "the *totality of the circumstances* justifie[s] a particular sort of . . . seizure."[72] These circuits have interpreted this sentence to mean that all police actions during the encounter, including provocative behavior that leads to a police shooting, may be taken into account.

---

[65] *See* Nathan R. Pittman, *Unintentional Levels of Force in Sec. 1983 Excessive Force Claims*, 53 Wm. & Mary L. Rev. 2107, 2122 (2012).

[66] *See* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U. L. Rev. 1119, 1132 (2008) ("[L]ower federal courts have recited *Graham* as if it were a mantra and then gone on to try to make sense of the facts of individual cases using intuitions about what is reasonable for officers to do.").

[67] *See* Schwartz, *supra* note 34, at 687–88; *see also* Kimber, *supra* note 18, at 672–73.

[68] *See* Schwartz, *supra* note 34, at 672 ("Even under this [totality-of-the-circumstances] view, not all events preceding the shooting are relevant; some may have too attenuated a connection to the use of force under established principles of causation."); *see also* Kimber, *supra* note 18, at 673.

[69] *See, e.g.*, Weimann v. McClone, 787 F.3d 444, 448–51 (7th Cir. 2015) (A police officer kicked down a door and immediately shot a person believed to be suicidal, who was sitting on a chair with a gun in his lap. Since the police officer provoked the violence by forcibly entering the room and shooting indiscriminately, the Seventh Circuit Court of Appeals held that his actions disqualified him from invoking qualified immunity.); *see also* Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993) (holding that police officers are liable when they unreasonably create the threatening situations in which they subsequently use lethal force); Schwartz, *supra* note 34, at 691–92 (discussing similar cases).

[70] *See* Heinke, *supra* note 19, at 168–69; Kimber, *supra* note 18, at 670–72; *see also* Schwartz, *supra* note 34, at 672, nn.2227–29 (discussing relevant Tenth Circuit cases).

[71] *See, e.g.*, Grazier v. Philadelphia, 328 F.3d 120 (3d Cir. 2003) (stating that the Seventh and Eleventh Circuits have adopted the theory that an officer acts unreasonably if improper conduct creates the situation necessitating the use of deadly force); *see also* Schwartz, *supra* note 34, at 680–81.

[72] *Graham*, 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8–9) (emphasis added).

In contrast, courts in the Second Circuit,[73] Fourth Circuit,[74] Fifth Circuit,[75] Sixth Circuit,[76] and Eighth Circuit[77] followed the *Graham* Court's reasoning that "with respect to a claim of excessive force, the same standard of reasonableness *at the moment* applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment."[78] Under these circuits' at-the-moment approach, the question is whether, at the precise moment that an officer decided to use force, police officers were reasonably responding to an imminent threat posed by the citizen. This restricted analysis of an isolated moment leaves out any provocative actions by police that later escalated into violence.

In the midst of this circuit split, the Ninth Circuit developed its own approach: the "provocation rule." The Ninth Circuit held that "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 *otherwise defensive use* of deadly force."[79] This rule blends the totality-of-the-circumstances and the at-the-moment approaches. The provocation rule, like the at-the-moment approach, inquires into whether the police officer used lethal force in self-defense. But unlike the at-the-moment approach, the provocation rule requires as an additional line of inquiry as to whether the police officer provoked the violent confrontation, and whether that provocation was an independent Fourth Amendment violation. If so, the police officer's acts may still be unreasonable as a matter of law, notwithstanding the reasonable use of defensive force at the conclusion of the encounter.

These divergent applications of *Graham* to cases involving police provocation compromise intuitive notions of justice and fairness. Under this scheme, different circuits offer different relief to victims of police violence. The following sections illustrate the disparate application and impact of the three *Graham* interpretations. As courts apply these discordant legal doctrines, it becomes clear that the totality-of-the-circumstances approach is most in accord with intuitive notions of justice and fairness; casts the widest analytical net; and hews closest to the Fourth Amendment's reasonableness standard.

---

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

[74] *See* SCHWARTZ, *supra* note 34, at 689–90; *see also* Heinke, *supra* note 19, at 166–67; Kimber, *supra* note 18, at 667–68.

[75] *See, e.g.*, Rockwell v. Brown, 664 F.3d 985 (5th Cir. 2011); *see also* SCHWARTZ, *supra* note 34, at 690; Kimber, *supra* note 18, at 669–70.

[76] *See* SCHWARTZ, *supra* note 34, at 690–91; *see also* Kimber, *supra* note 18, at 668–69.

[77] *See* SCHWARTZ, *supra* note 34, at 692–93; *see also* Kimber, *supra* note 18, at 666–67.

[78] SCHWARTZ, *supra* note 34, at 692–93 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)) (emphasis added).

[79] Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002) (emphasis added).

A. The Case of Todd Hastings: Totality-of-the-Circumstances Approach

The case of Todd Hastings illustrates how the totality-of-the-circumstances approach is applied.[80] On August 23, 2002, Mr. Hastings, an Oklahoma resident, was having suicidal thoughts. He called Family and Children Services (FCS) for counseling.[81] With Mr. Hastings's permission, an FCS social services officer contacted Community Outreach Psychiatric Emergency Services (COPES), which in turn called 911 and requested police officers be deployed.[82] Deputy Cristopher Yerton, Officers Michael Barnes and Shane Davis, and Reserve Officer David Bigley went to Mr. Hastings's home to conduct a "well-being check."[83]

The officers described Mr. Hastings as looking "real nervous," "agitated," and "a little evasive" when he answered the door.[84] Deputy Yerton asked him to step out, but Mr. Hastings said he needed his shoes first. Deputy Yerton insisted he step out immediately. Mr. Hastings tried to slam the door, but Deputy Yerton placed his foot on the threshold.[85] Mr. Hastings ran; the police officers ran after him to his bedroom. When Deputy Yerton opened the bedroom door, he saw Mr. Hastings holding a Samurai sword.[86] Mr. Hastings was ordered to drop the sword, but he did not.[87] He picked up his bedroom telephone and said "help me" or "they are trying to get me."[88]

Officer Barnes pepper-sprayed Mr. Hastings directly in the face for one to two seconds.[89] According to Officers Barnes and Davis (but not Deputy Yerton), Mr. Hastings was enraged after being pepper-sprayed,[90] and he moved towards the police officers with his sword.[91] The police officers reported that the bedroom's doorway was too crowded, and they were unable to retreat.[92] Officer Barnes shot Mr. Hastings once; then Officer Davis shot

---

[80] Hastings v. Barnes, 252 F. App'x 197, 200 (10th Cir. 2007).

[81] *Id.* at 198.

[82] *Id.*

[83] *Id.* at 198–99.

[84] *Id.* at 199.

[85] *Id.*

[86] *Id.* (detailing how Deputy Yerton yelled "knife!" to warn the other officers, and then drew his weapon). *But see id.* at n.4 (pointing out the inconsistent statements of Deputy Yerton as to when he first drew his weapon—upon entering Mr. Hastings's home or only upon seeing him holding the sword).

[87] *Id.* at 200.

[88] *Id.* The circuit court noted that, based on witness testimonies, it was established Mr. Hastings was still speaking with the FCS social services officer during the entire incident. The social services officer heard the police officers' orders for Mr. Hastings to drop the sword, and the subsequent gunshots. *See id.* at n.7.

[89] *Id.* at 200 ("Although pepper-spray generally causes immediate blindness in the subject sprayed, it did not have such effect on Todd.").

[90] *See id.* at n.5 (noting that while Mr. Hastings's alleged rage after being pepper-sprayed was testified to by Officers Barnes and Davis, Deputy Yerton testified that he did not notice any change in Mr. Hastings's demeanor).

[91] *Id.* at 200.

[92] *Id.*

him twice, and then one more time.[93] In less than four minutes, Mr. Hastings was killed by police officers deployed to protect him.[94] His estate later filed a Section 1983 suit against Officers Barnes and Davis.[95]

Officers Barnes and Davis moved for summary judgment in Federal District Court based on the doctrine of qualified immunity.[96] This doctrine shields public officers as long as their official conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known.[97] Granting a motion for summary judgment based on qualified immunity results in the dismissal of the suit before it goes to trial.

The district court denied the motion for summary judgment, and the Court of Appeals for the Tenth Circuit affirmed.[98] In denying summary judgment, the Tenth Circuit held that the case required a jury determination as to whether the officers' actions "unreasonably escalated the situation to the point [at which] deadly force was required."[99] Notably, Mr. Hastings's estate did not contest the officers' self-defense claim; the estate's only assertion was that "[Officers] Barnes and Davis' actions *preceding* the shooting *precipitated their need to use deadly force*, thereby rendering their use of such force unreasonable."[100]

For the Tenth Circuit, even a finding that the officers acted in self-defense would not necessarily strip them of liability. The court made clear that the officers' conduct *prior* to fatally shooting Mr. Hastings must be considered in a jury's *Graham* analysis.[101] The jury could consider whether the police officers' forceful commands aggravated rather than mitigated the situation.[102]

---

[93] *See id.* at n.6 ("According to Barnes, he attempted to retreat but backed into the hallway wall. He testified Todd had walked 3-4 steps toward him and was within five feet when he shot him. He fired his weapon as he was falling over Bigley, who had tripped over debris left in the hallway. At the same time Barnes fired at Todd, Davis shot Todd twice. Because Todd continued to move toward the officers, Davis shot him a third time . . . .").

[94] *See id.* at 200.

[95] *See id.* (citing 42 U.S.C. § 1983).

[96] *See* Saucier v. Katz, 533 U.S. 194, 200 (2001) ("Where the defendant *seeks qualified immunity*, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.") (emphasis added).

[97] *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.").

[98] *Hastings*, 252 F. App'x at 197, 198 n.1 (10th Cir. 2007).

[99] *Id.* at 203.

[100] *Id.*

[101] *Id.* ("Our review of the record convinces us that whether Barnes and Davis' actions unreasonably precipitated their need to use deadly force calls for a jury determination.").

[102] *Id.* ("A reasonable jury could find that under these facts Barnes and Davis' actions unreasonably escalated the situation to the point deadly force was required.").

This totality-of-the-circumstances approach reflects the state of excessive force law in the Tenth Circuit.[103] To varying degrees, this is also the approach used in the First Circuit,[104] Third Circuit,[105] Seventh Circuit,[106] and Eleventh Circuit.[107] The reasonableness inquiry in these jurisdictions necessitates "zooming out and assessing the entirety of the situation, beginning with the officer's decision to approach and method of engagement."[108] Such a holistic evaluation can take into account an officer's antecedent, provocative acts.

B. The Case of Leonard Greenidge: At-the-Moment Approach

Mr. Hastings's case stands in stark contrast to that of Leonard Greenidge, which was decided using the at-the-moment approach. Under this approach, police officers pass the *Graham* test if they acted as a reasonable officer would *at the precise moment* of the shooting. The narrow focus on one specific temporal segment of the encounter—the point at which police officers deployed force—renders antecedent acts like police provocation irrelevant to the reasonableness analysis.

In *Greenidge v. Ruffin*, decided in the Fourth Circuit, Officer Ernestine Ruffin observed a suspected sex worker enter Mr. Greenidge's vehicle.[109] Officer Ruffin and three other police officers—all in plain clothes and driving unmarked cars—followed the vehicle until it parked.[110] Claiming to have observed "an illegal sex act in progress," the officers approached the car without using flashlights and opened the door without the passengers' consent.[111] Officer Ruffin identified herself as a police officer and ordered the

---

[103] *See* Heinke, *supra* note 19, at 168–69; *see also* Kimber, *supra* note 18, at 670–72; SCHWARTZ, *supra* note 34, at 672 (discussing relevant Tenth Circuit cases).

[104] *See* SCHWARTZ, *supra* note 34, at 687–88; *see also* Kimber, *supra* note 18, at 672–73.

[105] *See* SCHWARTZ, *supra* note 34, at 672 ("Even under this [totality-of-the-circumstances] view, not all events preceding the shooting are relevant; some may have too attenuated a connection to the use of force under established principles of causation."); *see also* Kimber, *supra* note 18, at 673.

[106] *See, e.g.*, Weimann v. McClone, 787 F.3d 444, 448–51 (7th Cir. 2015) (A police officer kicked down a door and immediately shot a person believed to be suicidal who was sitting on a chair with a gun in his lap. Since the police officer provoked the violence by forcibly entering the room and shooting indiscriminately, the Seventh Circuit Court of Appeals held that his actions disqualified him from invoking qualified immunity.); *see also* Starks v. Enyart, 5 F.3d 230, 235 (7th Cir. 1993) (holding that police officers cannot use lethal force with impunity when they themselves unreasonably created the threatening situation); SCHWARTZ, *supra* note 34, at 691–92.

[107] *See, e.g.*, Grazier ex rel. White v. Philadelphia, 328 F.3d 120, 127–28 (3d Cir. 2003) (noting that the Seventh and Eleventh Circuits have also adopted this doctrine, that an officer acts unreasonably if his improper conduct creates the situation making the use of deadly force necessary); *see also* SCHWARTZ, *supra* note 34, at 680–81.

[108] *See* Exum, *supra* note 6, at 495.

[109] 927 F.2d 789, 790 (4th Cir. 1991).

[110] *Id.* at 790.

[111] *Id.*

two passengers to place their hands in plain view.[112] Neither complied.[113] When Officer Ruffin repeated the command, Mr. Greenidge reached for what Officer Ruffin believed was a shotgun behind the seat.[114] Officer Ruffin shot Mr. Greenidge, causing him serious and permanent injury.[115] A jury declined to hold Officer Ruffin liable.[116]

Mr. Greenidge argued on appeal that Officer Ruffin violated standard police procedures for nighttime arrests of sex workers, recklessly creating the dangerous situation that led to the shooting.[117] Invoking *Graham*,[118] Mr. Greenidge urged the court to consider the totality of the circumstances surrounding the entire encounter.

The Fourth Circuit rejected Mr. Greenidge's argument. The court ruled that Officer Ruffin's actions leading up to her decision to shoot were not probative of that action's reasonableness.[119] Any evidence, therefore, that pertained to conduct outside of the specific moment in which the officer used force should be excluded from consideration.[120] The court, in discussing *Graham*, adopted the view that the Supreme Court's conception of reasonableness in that decision "meant the 'standard of reasonableness *at the moment*.'"[121] The court added:

> The [Supreme] Court seemed to have relied upon the "split-second judgments" that were required to be made and focused on the reasonableness of the conduct "at the moment" when the decision to use certain force was made. Applying this reading to the present case, the *Graham* decision contradicts appellants' argument that, in determining reasonableness, the chain of events ought to be traced backward to the officer's misconduct of failing to comply with the standard police procedures for nighttime prostitution arrests.[122]

Greenidge illustrates the Fourth Circuit's[123] use of the at-the-moment approach, which has also been adopted in the Second,[124] Fifth,[125] Sixth,[126] and Eighth Circuits.[127]

---

[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 790–91.
[117] *Id.* at 791.
[118] *Id.*
[119] *Id.* at 792.
[120] *Id.*
[121] *Id.* at 791–92.
[122] *Id.* at 792.
[123] *See* SCHWARTZ, *supra* note 34, at 689–90; *see also* Heinke, *supra* note 19, at 166–67; Kimber, *supra* note 18, at 667–68.
[124] Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996).
[125] *See, e.g.*, Rockwell v. Brown, 664 F.3d 985 (5th Cir. 2011); *see also* SCHWARTZ, *supra* note 34, at 690; Kimber, *supra* note 18, at 669–70.
[126] *See* SCHWARTZ, *supra* note 34, at 690–91; *see also* Kimber, *supra* note 18, at 668–69.
[127] *See* SCHWARTZ, *supra* note 34, at 692–93; *see also* Kimber, *supra* note 18, at 666–67.

This strand of *Graham* interpretation raises serious concerns. In assessing the reasonableness of police officers' use of force, it seems only fair to inquire into whether police officers themselves needlessly escalated the situation, thus creating the necessity to use force. For instance, in *Greenidge*, if Officer Ruffin's violations of protocol caused the danger that precipitated the use of force, there is no cogent reason why Mr. Greenidge should not be entitled to establish that fact. Certain procedures are adopted precisely to ensure that encounters do not escalate to violence. If police officers instigated a violent confrontation by flouting the rules, it could more likely than not speak to the reasonableness of their conduct.

C. The Case of Ryan Hennessey: Provocation Rule

In the midst of the totality-of-the-circumstances *versus* at-the-moment debate, the Ninth Circuit promulgated its own rule, in 2002, in the case of *Billington v. Smith*.[128] The Ninth Circuit's provocation rule allows consideration of police officers' antecedent, provocative acts, but only if those acts amounted to an independent Fourth Amendment violation.

In *Billington*,[129] David Smith, an off-duty detective, was driving home with his wife and daughter in an unmarked police vehicle. Ryan Hennessey passed him, "tires squealing[,]" and almost hit an approaching car head-on.[130] Detective Smith gave chase, intent on arresting Mr. Hennessey for felony reckless driving.[131] Unbeknownst to Detective Smith, Mr. Hennessey was actually fleeing the scene of an earlier hit-and-run incident.[132]

Detective Smith radioed for backup and subsequently approached Mr. Hennessey's car, which had crashed into a curb.[133] Detective Smith tried to render first aid to Mr. Hennessey, whom he first thought was unconscious but was merely "very drunk[.]"[134] Mr. Hennessey attempted to escape with his car; but when he failed, he hit Detective Smith and tried to grab his gun.[135] They struggled, and in under three minutes, Detective Smith shot and killed Mr. Hennessey.[136] Mr. Hennessey's estate thereafter filed a Section 1983 excessive force claim against Detective Smith.[137]

---

[128] 292 F.3d 1177, 1190–91 (9th Cir. 2002); *see also* Alexander v. City and County of San Francisco, 29 F.3d 1355, 1366–67 (9th Cir. 1994).

[129] The case was captioned "*Billington v. Smith*" after Patricia Billington, the personal representative of the estate of Ryan Hennessey. Mr. Hennessey was killed by Detective David Smith.

[130] *Billington*, 292 F.3d at 1180.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* (noting that Hennessey's blood alcohol level at the time of the incident was 0.285%).

[135] *Id.* at 1181.

[136] *Id.*

[137] *Id.* at 1182.

The district court held that Detective Smith's acts were objectively reasonable.[138] It did not, however, grant Detective Smith's motion for summary judgment based on qualified immunity because there was "a genuine issue of material fact whether alleged tactical errors made by Detective Smith *before* the moment of the shooting made his reasonable use of force at that moment unreasonable."[139] This line of reasoning closely resembles the totality-of-the-circumstances approach, and is reminiscent of how the Tenth Circuit resolved the case of Todd Hastings.[140]

The Ninth Circuit partly affirmed the district court's ruling.[141] The court noted witnesses' consistent accounts that Mr. Hennessey "actively, violently, and successfully resisted arrest and physically attacked Detective Smith and tried to turn Smith's gun against him."[142] Before the shot was fired, Mr. Hennessey was gaining the upper hand in the struggle for possession of Detective Smith's gun.[143] Hence, Detective Smith's use of force was objectively reasonable.

The appeals court, however, overruled the district court's denial of Detective Smith's summary judgment motion, finding that Detective Smith's antecedent acts did not merit further examination, as the district court ruled. The Ninth Circuit pronounced a new rule: "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 *otherwise defensive use* of deadly force."[144] Not *all* antecedent acts, therefore, can be factored into the reasonableness calculus, but only those that independently violate the Fourth Amendment. The Ninth Circuit held that Detective Smith's prior acts were mere tactical errors rather than Fourth Amendment violations, affirming the district court's determination that his use of force was reasonable.[145]

Billington's provocation rule occupies a doctrinal middle ground. It satisfies adherents of the at-the-moment approach by focusing first on the moment when the police officer made the split-second decision to use force. It also accommodates the concerns of advocates of the totality-of-the-circumstances approach by taking into account other relevant police conduct that violates the Fourth Amendment. Police officers may thus be found to have

---

[138] *Id.* at 1183.

[139] *Id.* at 1185. According to the district court, Detective Smith's "'failure to drop off his wife and daughter when the routine traffic stop turned more serious,' failure to await backup, failure to use his baton or spray on Mr. Hennessey, decision to contact Mr. Hennessey 'with both hands encumbered,' and failure to release his magazine to make his gun unusable, 'create questions of fact' as to whether the detective's tactics recklessly created the situation in which force would have to be used." *Id.* at 1183.

[140] *See supra* notes 80–102 and accompanying text.

[141] *Billington*, 292 F.3d at 1185.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 1189 (emphasis added).

[145] *Id.* at 1185.

acted reasonably at the moment force was deployed; but if they provoked the violent confrontation, and such provocation violated the Fourth Amendment, they would still be found to have acted unreasonably as a matter of law.

The provocation rule, however, is not without its critics. Aaron Kimber and William Heinke argue that there is no compelling reason to distinguish between provocative acts that violate the Fourth Amendment and those that fall short of it.[146] Rather than limiting the provocative acts that judges can consider in the reasonableness analysis, judges should be free to consider any form of provocative conduct that bears on the violence that occurred.

III. THE *MENDEZ* CASE

Of the different *Graham* interpretations, the totality-of-the-circumstances approach is most consistent with the *Graham* reasonableness standard. As demonstrated in *Hastings*, a holistic consideration of the circumstances that led to the violent conclusion of the encounter—including antecedent, provocative acts of the police—should fully inform the reasonableness inquiry under the Fourth Amendment.[147] Nevertheless, the totality-of-the-circumstances approach has been adopted only in the First, Third, Seventh, Tenth, and Eleventh Circuits.[148] Elsewhere, antecedent police conduct, including acts that may constitute provocation, are either partly or completely excluded from the reasonableness calculus.[149] This current state of jurisprudence is disadvantageous to injured victims outside the jurisdictions applying totality-of-the-circumstances. So when the Supreme Court decided to hear *Los Angeles v. Mendez*,[150] keen observers sensed its importance.[151] *Mendez* presented an opportunity to correct the jurisprudential discord regarding Fourth Amendment reasonableness standards and to adopt a regime that provides adequate relief for injured victims across the country.

---

[146] *See* Kimber, *supra* note 18, at 665 ("This requirement [of police provocation amounting to an independent Fourth Amendment violation] severely limits the instances in which a plaintiff will be able to use pre-seizure police conduct. Although it might be good policy to limit such use, this method is arbitrary because it focuses on how one can categorize the pre-seizure encounter, *rather than looking at how that conduct affects the eventual use of force*." (emphasis added)); Heinke, *supra* note 19, at 166 ("[I]n 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." (emphasis added)).

[147] *See supra* Part II.A.

[148] *Id.*

[149] *See supra* Parts II.B & C.

[150] County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017).

[151] *See, e.g.*, James Bryd, *As a Matter of Law and Policy, the Ninth Circuit's Provocation Rule Must Stand*, HARV. C.R.-C.L. L. REV: AMICUS BLOG (Feb. 9, 2017), http://harvardcrcl.org/as-a-matter-of-law-and-policy-the-ninth-circuits-provocation-rule-must-stand-2/, *archived at* https://perma.cc/A2FF-RDLT; Christopher Dunn, *Police-Provoked Shootings by the Police: Excessive Force?*, NYCLU (Feb. 1, 2017), https://www.nyclu.org/en/publications/column-police-provoked-shootings-police-excessive-force-new-york-law-journal, *archived at* https://perma.cc/MCA4-GCX4.

In October 2010, Los Angeles County deputies received information that a parolee who had violated the conditions of his parole was hiding in Paula Hughes's home.[152] Acting on the tip, three deputies bearing an arrest warrant searched Ms. Hughes's home but did not find the subject.[153] During the search, Deputies Conley and Pederson conducted a simultaneous search of a shack at the rear of Ms. Hughes's residence, where Angel Mendez and his then-girlfriend Jennifer Garcia were sleeping.[154]

Without obtaining a search warrant or complying with the knock-and-announce rule,[155] the two deputies entered the shack and saw Mr. Mendez holding a BB gun.[156] According to Mr. Mendez, he thought it was Ms. Hughes at the door.[157] He picked up his BB gun—which was next to him on the futon where he was sleeping[158]—so he could stand up and place it on the floor.[159] Upon seeing Mr. Mendez's BB gun, Deputy Conley yelled "Gun!" and the deputies immediately opened fire, shooting 15 rounds of ammunition directly at Mr. Mendez.[160] Both Mr. Mendez and Ms. Garcia sustained severe injuries; Mr. Mendez's right leg was amputated as a result of the shooting.[161]

Mr. Mendez and Ms. Garcia sued Deputies Conley and Pederson for (1) searching without a warrant, (2) violating the knock-and-announce rule, and (3) employing excessive force.[162] After a bench trial, the district court held the police officers violated the law because they searched without a warrant and did not comply with the knock-and-announce rule.[163] For these grounds, the court awarded nominal damages.[164] As to Mr. Mendez and Ms. Garcia's excessive force claim, the district court held that the deputies justifiably used defensive force when they saw Mr. Mendez holding a gun.[165] Hence, they

---

[152] *Mendez,* 137 S. Ct. at 1544.

[153] *Id.*

[154] *Id.* After the shooting but before trial, Jennifer Garcia married Angel Mendez and adopted his surname.

[155] *See* Wilson v. Arkansas, 514 U.S. 927, 931–34 (1995) (discussing the origin and history of the knock-and-announce rule). The *Wilson* Court noted that the requirement for police officers to first knock and announce their purpose before forcibly opening or breaking the doors of a house finds its roots in English common law. Earlier, the Court in Miller v. United States, 357 U. S. 301, 313 (1958), had acknowledged that principle's role in American jurisprudence. *Wilson* was the first case to hold that categorically, compliance with the knock-and-announce rule is an element of Fourth Amendment "reasonableness." *Wilson*, 514 U.S. at 929.

[156] *Mendez*, 137 S. Ct. at 1544.

[157] *Id.*

[158] Mendez v. County of Los Angeles, No. CV 11-04771-MWF (PJWx), 2013 WL 4202240, at *6 (C.D. Cal. Aug. 13, 2013).

[159] *Mendez*, 137 S. Ct. at 1544–45.

[160] *Id.* at 1545.

[161] *See id*. Notably, the parolee-at-large who was the object of the search was not found in the shack or anywhere in the property. *Id.*

[162] *Id.*

[163] *Id*.

[164] *Id.*

[165] *Id.*

acted reasonably *at the moment* of the shooting.[166] But the deputies were still liable for their *antecedent*, independent Fourth Amendment violations (*i.e.*, the warrantless search and failure to knock-and-announce) that provoked the ensuing violence.[167] To recall, the core of the Ninth Circuit's provocation rule as established in *Billington* is this two-pronged analysis of the police officers' actions at the deployment of the force *and* prior to it.[168]

On appeal, the Ninth Circuit modified the district court's ruling.[169] It held that the deputies were entitled to qualified immunity for their violation of the "knock-and-announce" rule but were liable for making a "startling entry" into the residence of Mr. Mendez and Ms. Garcia.[170] The Ninth Circuit agreed with the district court's finding that the deputies justifiably used defensive force, but the court nonetheless awarded damages based on two alternative theories: (1) *primarily,* consistent with the provocation rule, the deputies' warrantless search was an antecedent, provocative act that independently violated the Fourth Amendment;[171] (2) *alternatively*, the deputies could still be held liable because their startling entry was the proximate cause of Mr. Mendez and Ms. Garcia's injuries.[172] The case ultimately reached the Supreme Court, which addressed three major issues:

First, are Mr. Mendez and Ms. Garcia entitled to recovery under the provocation rule? The Supreme Court declared the Ninth Circuit's provocation rule an improper application of *Graham*, thereby holding that Mr. Men-

---

[166] *Id.*

[167] *Id*. *See also* Mendez v. County of Los Angeles, No. CV 11-04771-MWF (PJWx), 2013 WL 4202240, at *27 (C.D. Cal. Aug. 13, 2013) ("Under *Billington*, Deputies Conley and Pederson's predicate constitutional violations 'provoked' Mr. Mendez's response, which in turn resulted in Deputies Conley and Pederson's subsequent use of force.").

[168] 292 F.3d 1177, 1190–91 (9th Cir. 2002).

[169] Mendez v. County of Los Angeles, 815 F.3d 1178, 1195 (9th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1539; *see also Mendez*, 137 S. Ct. at 1545–46. The dispositive portion of the Ninth Circuit's judgment reads in part: "The district court judgment is AFFIRMED insofar as it awards damages for the shooting and for the unconstitutional entry. The award of $1 nominal damages for the knock-and-announce violation is REVERSED, and we remand for that nominal damages award to be vacated."

[170] *Mendez*, 815 F.3d at 1185. The Supreme Court in *Mendez* notes that this aspect of the Ninth Circuit's decision is somewhat contradictory. *See Mendez*, 137 S. Ct. at 1549 ("The [Ninth Circuit] reasoned that when officers make a 'startling entry' by 'barg[ing] into' a home 'unannounced,' it is reasonably foreseeable that violence may result. 815 F.3d at 1194–95 (internal quotation marks omitted). *But this appears to focus solely on the risks foreseeably associated with the failure to knock and announce*, which could not serve as the basis for liability *since the Court of Appeals concluded that the officers had qualified immunity on that claim*." (emphasis added)).

[171] *Mendez*, 137 S. Ct. at 1545–46 ("The Court of Appeals did not disagree with the conclusion that the shooting was reasonable under *Graham*; instead, like the District Court, the Court of Appeals applied the provocation rule and held the deputies liable for the use of force on the theory that they had intentionally and recklessly brought about the shooting by entering the shack without a warrant in violation of clearly established law."); *see also Mendez*, 815 F.3d at 1193, *vacated and remanded*, 137 S. Ct. 1539.

[172] *Mendez*, 137 S. Ct. at 1546 ("[The Court of Appeals] held that 'basic notions of proximate cause' would support liability even without the provocation rule because it was 'reasonably foreseeable' that the officers would meet an armed homeowner when they 'barged into the shack unannounced.'"); *see also Mendez*, 815 F.3d at 1194–95.

dez and Ms. Garcia could not claim damages under that theory of liability.[173] According to the Court, once there is a judicial determination that police officers acted reasonably, such officers cannot be held liable under an additional, subsequent test.[174] In other words, the flaw in the provocation rule is its prescription of a two-pronged analysis.

In *Mendez*, both lower courts held that the deputies acted reasonably in using defensive force at the time of the shooting; however, pursuant to the provocation rule, the courts concluded that the deputies' provocative acts prior to the shooting violated the Fourth Amendment.[175] The Court rejected this approach. It held that once courts decide a shooting is reasonable, they cannot modify that decision based on independent Fourth Amendment violations committed *before* the shooting.[176] At most, these antecedent, independent Fourth Amendment violations could be litigated separately and, if warranted, allow a distinct award for damages.[177]

Second, can Mr. Mendez and Ms. Garcia claim damages under any other theory of liability? Despite rejecting Mr. Mendez and Ms. Garcia's claim under the provocation rule, the Supreme Court did not preclude them from obtaining relief.[178] The Court directed the Ninth Circuit on remand to apply a proximate cause[179] approach in assessing the deputies' liability for their allegedly provocative acts.[180] The *Mendez* Court, citing *Paroline v.*

---

[173] *Mendez*, 137 S. Ct. at 1546. The Court, citing *Billington*, stated the gist of the Ninth Circuit's provocation rule as follows: "The rule comes into play after a forceful seizure has been judged to be reasonable under *Graham*. Once a court has made that determination, the rule instructs the court to ask whether the law enforcement officer violated the Fourth Amendment in some other way in the course of events leading up to the seizure. If so, that separate Fourth Amendment violation may 'render the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law.'" *Id.*

[174] *Id.* at 1547 ("When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim. The basic problem with the provocation rule is that it fails to stop there. . . . Specifically, it instructs courts to look back in time to see if there was a *different* Fourth Amendment violation that is somehow tied to the eventual use of force. That distinct violation, rather than the forceful seizure itself, may then serve as the foundation of the plaintiff's excessive force claim.").

[175] *Id.*

[176] *Id.*

[177] *Id.* ("The framework for analyzing excessive force claims is set out in *Graham*. If there is no excessive force claim under *Graham*, there is no excessive force claim at all. To the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately.").

[178] *Id.* at 1548 ("The provocation rule may be motivated by the notion that it is important to hold law enforcement officers liable for the foreseeable consequences of all of their constitutional torts. . . . However, there is no need to distort the excessive force inquiry in order to accomplish this objective. To the contrary, both parties accept the principle that plaintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation.").

[179] *See* Howard v. Bennett, 894 N.W.2d 391, 395 (S.D. 2017) ("Proximate cause is defined as 'a cause that produces a result in a natural and probable sequence and without which the result would not have occurred. Such cause need not be the only cause of a result. It may act in combination with other causes to produce a result.'") (internal citations omitted).

[180] *Mendez*, 137 S. Ct. at 1549.

United States,[181] explained that proximate cause analysis "required consideration of the 'foreseeability or the scope of the risk created by the predicate conduct,' and required the court to conclude that there was 'some direct relation between the injury asserted and the injurious conduct alleged.' "[182]

Thus, based on the Court's ruling, while the deputies' antecedent, independent Fourth Amendment violations (*i.e.*, the warrantless search and the violation of the knock-and-announce rule) could not affect the finding that their use of force was reasonable under *Graham*, those violations *themselves* could be a direct source of liability if they proximately caused the resulting injury.[183]

The Supreme Court agreed with the Ninth Circuit that Mr. Mendez and Ms. Garcia could rely on a proximate cause theory if they were able to draw a causal link between their injury and the police's provocative acts.[184] This is different from the approach of the provocation rule to first find the police officers' use of force reasonable, and then modify such characterization by looking into their antecedent acts. The *Mendez* Court, however, disagreed with the results of the Ninth Circuit's proximate cause analysis.[185] Whereas the Ninth Circuit found that the deputies' "startling entry" proximately caused the injury, the Supreme Court instead directed the Ninth Circuit to examine whether *conducting a warrantless search*, by proximate cause standards, could support a damages award.[186]

In *Mendez*, Justice Alito appeared to signal to future litigants, stating "there is no need to dress up every Fourth Amendment claim as an excessive force claim."[187] This is a reminder that police provocation alone, using proximate cause principles, provides a sufficient basis for Fourth Amendment liability. The *Mendez* Court seems to suggest that the proximate cause approach should be employed more frequently, perhaps alongside, or even in the place of, a *Graham*-based excessive force claim.

Third, did Deputies Conley and Pederson use excessive force under Graham? The Supreme Court declined to address the excessive force claim

---

[181] 134 S. Ct. 1710, 1719 (2014).

[182] *Mendez*, 137 S. Ct. at 1548–49.

[183] *Id.* at 1548. Although the Supreme Court was discussing generally how an injured party can recover based on *any* Fourth Amendment violation that proximately caused the injury, it signaled Mr. Mendez, Ms. Garcia, and the Ninth Circuit to look to *one* specific violation in this case: "For example, if the plaintiffs in this case cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused *by the warrantless entry*." *Id.*

[184] *Id.* at 1548.

[185] *Id.* at 1549.

[186] *Id.* at 1548–49. The Supreme Court noted that the failure to "knock-and-announce" could not support a damage claim because the circuit court had itself previously ruled that the deputies were covered by qualified immunity on that particular violation. "By contrast," according to *Mendez*, "the Court of Appeals did not identify the foreseeable risks associated with the *relevant* constitutional violation (the warrantless entry); nor did it explain how, on these facts, respondents' injuries were proximately caused by the warrantless entry."

[187] *See id.* at 1548.

against the deputies and did not grant certiorari on this issue.[188] To recall, consistent with the Ninth Circuit's then-existing provocation rule, the courts below found that: (1) the deputies' resort to force was reasonable at the moment it was deployed; but (2) liability nonetheless arose from their antecedent provocative acts, which violated the Fourth Amendment, rendering their otherwise reasonable use of force unreasonable as a matter of law.[189] The *Mendez* Court focused on the constitutionality of the second prong of this test. It held that "[t]o the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately,"[190] rather than rendering unreasonable the use of force pronounced reasonable at the first prong.

The *Mendez* Court defined and framed the issues in a manner that allowed it to avoid "slosh[ing] . . . through the factbound morass of reasonableness"[191] that characterizes *Graham* jurisprudence. Instead of assessing the reasonableness of the deputies' actions against the factual backdrop of the encounter—potentially spurring contentious debate—the Court confined its analysis to the constitutionality of the provocation rule.[192] However, by passing over the excessive force issue, the Court missed the opportunity to settle the doctrinal discord discussed in Part II[193] regarding the proper interpretation of *Graham*. Mr. Mendez and Ms. Garcia squarely presented this question, but the Court only addressed it in a lone footnote:

> [Mendez] argue[s] that the judgment below should be affirmed under *Graham* itself. *Graham* commands that an officer's use of force be assessed for reasonableness under the "totality of the cir-

---

[188] *Id.* at 1547 n.*.

[189] *Id*. at 1545–46 ("The Court of Appeals did not disagree with the conclusion that the shooting was reasonable under *Graham*; instead, like the District Court, the Court of Appeals applied the provocation rule and held the deputies liable for the use of force on the theory that they had intentionally and recklessly brought about the shooting by entering the shack without a warrant in violation of clearly established law."); *see also* Mendez v. County of Los Angeles, No. CV 11–04771–MWF (PJWx), 2013 WL 4202240, *31 (C.D. Cal. Aug. 13, 2013), *aff'd in part, rev'd in part*, 815 F.3d 1178 (9th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1539 ("Accordingly, Deputies Conley and Pederson violated Mr. and Mrs. Mendez's right to be free from excessive force under a theory of *Billington* provocation. The predicate (unreasonable search) constitutional violations render their "otherwise reasonable defensive use of force unreasonable as a matter of law.").

[190] *Mendez*, 137 S. Ct. at 1547.

[191] Scott v. Harris, 550 U.S. 372, 383 (2007).

[192] The *Mendez* Court may have been sharply divided on the excessive force issue; the deliberate avoidance of this issue, as expressed in the opinion's lone footnote, may have been the determining factor for achieving unanimity among the Justices. *See* Rory Little, *Opinion Analysis: Finding Fourth Amendment Unanimity While Allowing Fourth Amendment Justice*, SCOTUSBLOG (May 31, 2017, 11:55 PM), http://www.scotusblog.com/2017/05/opinion-analysis-finding-fourth-amendment-unanimity-allowing-fourth-amendment-justice/, *archived at* https://perma.cc/3BJX-WTBD (speculating that "the [lone, unnumbered] footnote was first suggested by someone other than the opinion's author—a justice who threatened otherwise to dissent. Even more likely, four justices may have asked for this footnote as a condition for joining, thereby threatening a 4–4 affirmance of the judgment below and continuation of the provocation rule.").

[193] *See supra* Part II.

> cumstances." On [Mendez's] view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here . . . . *All we hold today is that once a use of force is deemed reasonable under Graham, it may not be found unreasonable by reference to some separate constitutional violation.* Any argument regarding the District Court's application of *Graham* in this case should be addressed to the Ninth Circuit on remand.[194]

Because the Court declined to address the correctness of the totality-of-the-circumstances approach, it will be tested by future litigation. The present challenge, then, is to use the lessons from *Mendez* to push the law in the direction of this more fair and just approach.

IV. The Post-*Mendez* Agenda: A Proposal

Reactions to the *Mendez* ruling were understandably critical.[195] The Court's ruling, after all, reversed the lower court's finding that Deputies Conley and Pederson acted unreasonably as a matter of law, thereby vacating Mr. Mendez and Ms. Garcia's damages award of $4 million.

Still, there is hope. *Mendez* changed Ninth Circuit law, but "did not change [S]ection 1983 doctrine elsewhere."[196] *Mendez* redefined the jurisprudential debate problematized in Part II by closing one door—the provocation rule—while leaving open two others: (1) the proximate cause approach, and (2) the totality-of-the-circumstances approach. Indeed, *Mendez* might even be a blessing in disguise, moving the Ninth Circuit towards a regime even more accommodating of plaintiff's claims and more conducive to police accountability. The following sections provide a short-term agenda for the Ninth Circuit and long-term agendas for litigants and for the Supreme Court in the post-*Mendez* era.

---

[194] *Mendez*, 137 S. Ct. at 1547 n.* (emphasis added; internal citations omitted).

[195] *See, e.g.*, Radley Balko, *SCOTUS Eliminates the 'Provocation Rule,'* Wash. Post: The Watch (May 30, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/05/30/scotus-eliminates-the-provocation-rule/?utm_term=.91ec79118a19, *archived at* https://perma.cc/F83Q-DL9X ("The cops . . . engaged in some incredibly sloppy policing that nearly got someone killed. They violated the Mendezes' Fourth Amendment rights not once, but twice. Then they filled the couple with bullets after they mistook Angel Mendez's reach for his pellet gun as a threat. Angel Mendez was shot five times, and lost his right leg below the knee. Jennifer Mendez was shot in the back. That was 6½ years ago. They still haven't seen a dime.").

[196] Sheldon Nahmod, *County of Los Angeles v. Mendez: Supreme Court Rejects "Provocation Rule," Remands On Proximate Cause*, Nahmod Law (June 16, 2017), https://nahmodlaw.com/2017/06/16/county-of-los-angeles-v-mendez-supreme-court-rejects-provocation-rule-remands-on-proximate-cause/, *archived at* https://perma.cc/R92U-EERK.

A. Agenda for the Ninth Circuit: Moving Forward in the Post-Provocation Rule Era

Given the vacuum created by the Supreme Court's declaration that the provocation rule is unconstitutional, the Ninth Circuit must adopt a new approach. Other federal circuits have adopted either the totality-of-the-circumstances approach or the at-the-moment approach. The Ninth Circuit should adopt the former, as it hews more closely to the spirit of the provocation rule and would least disrupt Ninth Circuit jurisprudence.[197] Prior to *Mendez*, the Ninth Circuit mandated a reasonableness analysis of "the events *leading up to the shooting* as well as the shooting."[198] Thus, the rationale underpinning the provocation rule arguably more closely resembles the totality-of-the-circumstances approach.

To comply with *Mendez,* the Ninth Circuit need merely eliminate the second prong of the now-defunct provocation rule. Instead of performing a two-stage analysis, the Ninth Circuit should simply apply a single totality test, which incorporates questions about provocative police acts leading up to the deployment of force in the reasonableness analysis. Adopting this approach would allow the Ninth Circuit to preserve its doctrine that police provocation is relevant to Section 1983 claims, without running afoul of the Supreme Court's admonition that "*once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation."[199]

*B. Agenda for Litigants: Pleading Police Provocation Post-*Mendez

Future litigants claiming police provocation should proceed based on *Mendez*'s main holdings: first, that all excessive force claims should be measured against the *Graham* reasonableness standard; and second, that following a proximate cause approach, Fourth Amendment liability can be based on provocative police acts.[200] Different theories of liability are available to litigants post-*Mendez*, depending on the forum.

Plaintiffs in the First, Third, Seventh, Tenth and Eleventh Circuits, which follow the totality of the circumstances approach,[201] can plead police provocation in two ways. First, they can cite provocative acts of the police as part of the totality of the circumstances rendering the use of force unreasonable by *Graham* standards.[202] Second, as the *Mendez* Court emphasized,

---

[197] The assumption, of course, is that the Ninth Circuit would want to "save" or "resurrect" at least the kernel of the "provocation rule," as this rule had long been part of its jurisprudential history and is a doctrinal device unique among the federal circuits.

[198] *Billington*, 292 F.3d at 1190 (emphasis added).

[199] *Mendez*, 137 S. Ct. at 1547 n*; *see also id.* at 1546 (advising against "manufactur[ing] an excessive force claim where one would not otherwise exist").

[200] *See id.* at 1544–45, 1549.

[201] *See supra* notes 67–71 and accompanying text.

[202] *See, e.g.*, Part II.A *supra* (discussion of *Hastings*).

plaintiffs can claim the provocative acts of the police proximately caused the resulting death or injury, thereby entitling them to an independent damages award.[203]

Plaintiffs in the Second, Fourth, Fifth, Sixth and Eighth Circuits have limited options because the restrictive *Graham* interpretation in these jurisdictions precludes consideration of any antecedent police acts.[204] But *Mendez* reminded plaintiffs the proximate cause theory of liability is available for police provocation claims, even in jurisdictions following the at the moment approach. Plaintiffs could assert that the police officers' antecedent acts provoked the violence which proximately caused the resulting death or injury. This strategy would allow plaintiffs to avoid persuading at-the-moment courts to go against the tide of their precedents by considering police provocation allegations in the *Graham* calculus. Instead, plaintiffs could simply offer an independent, alternative theory of liability based on proximate cause. For instance, recall that in *Greenidge*,[205] the plaintiff was not able to recover because his claims of antecedent police provocation were deemed irrelevant under the Fourth Circuit's at-the-moment *Graham* approach. Had the plaintiff in that case argued an alternative proximate cause theory of liability, his chances of recovery would have improved.

C. Further Agenda for Litigants: Testing the Proximate Cause Approach

As the *Mendez* Court encouraged Section 1983 claimants to make full use of the proximate cause approach in pleading police provocation, this approach merits careful examination. To recall, *Mendez* explained that proximate cause analysis "required consideration of the 'foreseeability or the scope of the risk created by the predicate conduct,' and required the court to conclude that there was 'some direct relation between the injury asserted and the injurious conduct alleged.'"[206] Is it more advantageous for litigants to establish a proximate causal link between a police officer's provocative acts and the injury, as compared to pleading police provocation as a factor in the *Graham* analysis? The following sections explore the advantages and disadvantages of the proximate cause approach.

1. Potential Benefits

When Section 1983 claimants allege a police officer's provocation proximately caused their injuries, arguments turn on whose acts—the claimant's or the police officer's—naturally or probably gave rise to the injuries. For instance, if Mr. Mendez and Ms. Garcia had used this proximate cause approach, they could have argued that the police officers' warrantless entry

---

[203] *See Mendez*, 137 S. Ct. at 1548.
[204] *See supra* notes 73–77 and accompanying text.
[205] *See supra* Part II.B.
[206] *Mendez*, 137 S. Ct. at 1548–49 (citations omitted).

into their home, rather than Mendez's act of reaching for his BB gun, was the proximate cause of the resulting injury.[207]

Invoking cognitive psychology could help Section 1983 plaintiffs strengthen arguments that police provocation proximately caused their injuries. While proximate cause is determined by assessments of causality, literature suggests that judgments of blameworthiness affect those assessments.[208] As noted by Jennifer K. Robbennolt and Valerie P. Hans, culpability is often conflated with causality; that is, "people are more likely to attribute causality to acts that are otherwise morally blameworthy."[209] Hence, it would help plaintiffs' proximate cause arguments if police officers' provocative acts (*e.g.*, barging into a house without a warrant) were significantly more blameworthy than the citizens' acts in response (*e.g.*, employing reasonable measures to defend one's home).[210]

Cognitive psychology also teaches that, when presented with alternative causes, people tend to pick one as the *sole* cause of the injury if hypothetically changing or modifying some aspect of that cause would change the outcome in question.[211] Understanding this cognitive process, called "counterfactual thinking,"[212] could inform how Section 1983 claimants frame their police provocation allegations.[213] Claimants should emphasize how, given the police's provocative acts, the injury would still have occurred even if the citizens' acts were hypothetically modified. For example, it is

---

[207] *See supra* notes 155–160 and accompanying text. The police officers barging in triggered the natural sequence of events that followed; Mendez would not have reached for his gun if not for the police officers' antecedent acts.

[208] *See* JENNIFER K. ROBBENNOLT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW 70 (2016) (citing Mark Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368 (1992)) (explaining that a morally blameworthy act is likely to be identified as the cause of the injury "even when the moral indiscretion is not related to the question of causation"); *see also* MARK D. ALICKE, ET AL., *Causation, Norm Violation and Culpable Control*, 108 J. PHIL. 670, 670 (2011) ("[W]hen people are asked to identify, for example, the primary cause of an event, they accord privileged status to actions that arouse positive or negative evaluations. In this way, causal attributions reflect a desire to praise or denigrate those whose actions we applaud or deride.").

[209] *Id.* at 368.

[210] Additionally, "people are inclined to provide explanations for outcomes using accounts that emphasize intent." *See* ROBBENNOLT & HANS, *supra* note 208, at 29. Hence, the police *intentionally* barging into a house would more likely be identified as the cause of the eventual injury as compared to the *instinctual* defensive act of the homeowner.

[211] *See id.* at 67. Robbennolt and Hans illustrate this through the example of an accident involving Driver B, whose car swerved into the path of Driver A. In this scenario, hypothetically changing the manner or speed of Driver A's driving would not affect the outcome; the collision will still occur the moment Driver B swerves into Driver A's path. Hypothetically modifying Driver B's actions, however, would likely modify the outcome. Hence, in this hypothetical, Driver B would be adjudged the cause of the accident. *Id.*

[212] For an overview of the science of counterfactual thinking, see Neal J. Roese & Mike Morrison, *The Psychology of Counterfactual Thinking*, 34 HIST. SOC. RES. 16 (2009); Daniel Kahneman & Dale Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYCHOL. REV. 136 (1986).

[213] *See* ROBBENNOLT & HANS, *supra* note 208, at 71, 80 (discussing how the framing of counterfactuals by litigants can influence decisions regarding causality or attribution of blame).

plausible that Mr. Mendez and Ms. Garcia would still have been injured during the warrantless, unannounced search, even if Mr. Mendez had not reached for his BB gun.[214]

2. Potential Challenges

A proximate cause approach to pleading police provocation is potentially advantageous because of its natural parallel to instinctive moral judgments. However, the potential dangers in shifting from excessive force litigation to tort law proximate causation have been underexplored.[215] The following sections discuss potential challenges facing Section 1983 claimants who plead that police officers' antecedent, provocative acts proximately caused an injury.

a. Complexity of Proximate Cause Analyses

The principles of proximate causation generate confusion and disagreement.[216] This challenge is compounded when proximate cause is applied to Section 1983, which offers both constitutional and tort remedies. The Supreme Court has ruled that Section 1983 "should be read against the background of tort liability."[217] However, it is unclear when (and to what extent) the common law rules of tort should be applied to constitutional questions.[218]

---

[214] *See supra* notes 155–160 and accompanying text.

[215] For example, Professor Katherine A. Macfarlane offered a generally positive view of the *Mendez* Court's prescription to use the alternative legal theory of proximate causation in pleading police provocation, but the potential challenges were under-discussed. *See* Katherine A. Macfarlane, Los Angeles v. Mendez*: Proximate Cause Promise for Police Shooting Victims*, 118 COLUM. L. REV. ONLINE 48 (2017); *see also id.* at 51–52 (describing *Mendez* as "an exciting development for civil rights plaintiffs injured by law enforcement shootings"); *id*. at 62 (suggesting that if future claimants are able to successfully use the proximate cause model, "there might be a way of finally fulfilling [Section] 1983's deterrent purpose").

[216] *See* Exxon Co. v. Sofec, Inc., 517 U.S. 830, 838 (1996) (". . . commentators have often lamented the degree of disagreement regarding the principles of proximate causation and confusion in the doctrine's application."); W. PAGE KEETON & W.L. PROSSER, PROSSER AND KEETON ON THE LAW OF TORTS 263 (5th ed. 1984) ("There is perhaps nothing in the entire field of law which has called forth more disagreement [than proximate cause], or upon which the opinions are in such a welter of confusion."); Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness,* 69 WASH. U. L. Q. 49, 49–50 (1991) ("Modern tort theorists have lavished seemingly boundless attention on the problem of explaining proximate cause, but the consensus of law students and others is that proximate cause remains a hopeless riddle. Proximate cause is not an easy concept to understand.").

[217] Monroe v. Pape, 365 U.S. 167, 187 (1961).

[218] *See, e.g.*, Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability,* 50 IND. L.J. 5, 23–25 (1974) (discussing how "the tort concept of proximate cause . . . obscures the difficult 1983 policy question of the extent of liability where there has been a clear infringement of constitutional rights,"); *id*. at 33 (arguing that tort law should be modified wherever appropriate, as when doing so is necessary to serve federal policy); *see also* Michael Wells, *Constitutional Remedies, Section 1983, and the Common Law,* 68 MISS. L.J. 157, 212 (1998) (". . . in deciding where to draw the lines that define the scope of a defendant's liability, courts in constitutional tort ought not to mechanically adopt the common law rules. They should, instead, take account of the broad difference in the interests to be balanced in constitu-

With this context, Professor Macfarlane's statement that "[i]n some ways, *Mendez* simply allows plaintiffs to use provocation facts to support proximate cause conclusions"[219] needs qualification, lest readers overestimate how easily facts that trigger the application of the defunct provocation rule can be translated into proximate cause allegations. The provocation rule is straightforward because it seeks to answer a binary question: whether or not there was an antecedent Fourth Amendment violation. In contrast, proximate causation requires contending with labyrinthine legal rules evolved through centuries of common law tort litigation. Section 1983 claimants should therefore be forewarned that navigating this field of law is by no means simple.

b. The Question of "Superseding Cause"

Section 1983 claimants should also prepare to answer whether the citizen's acts in response to the police provocation constitute a "superseding cause." An original negligent act (*e.g.*, an officer's provocation) cannot be the basis of a damages claim if it was followed by an intervening act (*e.g.*, a citizen's resistive or retaliatory response to the police provocation) which effectively broke the causal chain and thus *superseded* the prior negligent act.[220] In determining whether a citizen's reaction was a superseding cause of the final outcome, courts consider whether such a reaction was an unforeseeable consequence of the original provocation,[221] which then triggered the unfolding of a wholly different sequence of events.

Johnson v. Philadelphia[222] illustrates how courts apply this doctrine. In *Johnson*, Officer Thomas Dempsey responded to a call that Kenyado Newsuan, who was high on PCP, was standing on the street naked, yelling and flailing his arms.[223] Officer Dempsey ordered Mr. Newsuan to approach, but

---

tional tort, giving more weight to the plaintiff's interest in recovery than they do in common law tort. They should also bear in mind the special role of deterrence in constitutional tort.").

[219] Macfarlane, *supra* note 215, at 51.

[220] *See* Deskovic v. City of Peekskill, 673 F.Supp.2d. 154, 161 (S.D.N.Y. 2009) (quoting Higazy v. Templeton, 505 F.3d 161, 181 (2d Cir. 2007)) ("Even if a Section 1983 defendant's initial act is the but for cause of some ultimate harm (*i.e.*, the harm would not have happened but for the initial act), he is not legally liable for the harm if an intervening act is a superseding cause that breaks the legal chain of proximate cause.") (internal quotations and alterations omitted); *see also* Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514, 520 (Ind. 1994) ("[A] superseding cause . . . results in the original negligence being considered a remote cause and not a proximate cause.").

[221] *See* Azure v. United States, 758 F. Supp. 1382, 1385 (D. Mont. 1991) (citing Bissett v. DMI, Inc., 717 P.2d 545 (Mont. 1986)) ("An intervening cause does not relieve an actor from liability for his negligent acts where the intervening cause is one which the defendant might reasonably anticipate under the circumstances. The issue of whether an individual is to be relieved of responsibility for his negligence, and his liability superseded, by a subsequent event is also determined by the test of foreseeability.") (citations omitted).

[222] 837 F.3d 343 (3d Cir. 2016).

[223] *Id.* at 345. Officer Dempsey did not wait for backup before confronting Mr. Newsuan. *Id.*

the latter allegedly assaulted the officer and tried to seize his firearm.[224] Officer Dempsey then shot and killed Mr. Newsuan.[225] The estate of Mr. Newsuan brought a Section 1983 claim,[226] alleging that Officer Dempsey's provocative acts, which contravened Philadelphia Police Department policies,[227] proximately caused Mr. Newsuan's death. The Court of Appeals for the Third Circuit ruled that Mr. Newsuan's attack was an unforeseeable consequence of whatever departmental policy violation Officer Dempsey may have committed; hence, Mr. Newsuan's own actions directly caused his death.[228] Petitioners in *Mendez* also employed this line of argument, asserting that "Mr. Mendez's act of pointing a gun at the Deputies was a superseding cause of Plaintiffs' ensuing injuries."[229] Professor Macfarlane proposed a persuasive rejoinder to this defense, arguing that Mr. Mendez's act could not be deemed a superseding cause because his reaction was a foreseeable consequence of the deputies' own actions.[230]

Section 1983 claimants who allege police provocation through the proximate cause approach should be prepared to ward off these superseding cause defenses. A theory of liability based on proximate cause could easily trigger a debate as to whether the citizen's reaction can be considered a reasonably "unforeseeable" consequence of a provocative act by the police. Such an inquiry is an additional layer of complexity in proximate cause analyses.

c. The Enduring Barrier of Qualified Immunity

The final potential pitfall to future Section 1983 claims that this Note raises is the thorny "qualified immunity" question. This legal device is frequently used in police violence cases, as it shields from liability public of-

---

[224] *Id.* at 346.

[225] *Id.*

[226] *Id.* at 348.

[227] *See id*. at 350 ("Plaintiff cites a Philadelphia Police Department directive that instructs officers who encounter severely mentally disabled persons (including persons experiencing drug-induced psychosis) to wait for back-up, to attempt to de-escalate the situation through conversation, and to retreat rather than resort to force.").

[228] *Id*. at 352 ("Whatever harms we may expect to ordinarily flow from an officer's failure to await backup when confronted with a mentally disturbed individual, they do not include the inevitability that the officer will be rushed, choked, slammed into vehicles, and forcibly dispossessed of his service weapon. We therefore have little trouble concluding that Newsuan's life-threatening assault, coupled with his attempt to gain control of Dempsey's gun, was the direct cause of his death.").

[229] Brief for Petitioners at 51, County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369).

[230] *See* Macfarlane, *supra* note 215, at 61 ("As plaintiffs intimated, Mendez did not intentionally aim his BB gun at the deputies. Rather, he thought that someone who knew that he might be holding a BB gun and would not be threatened by it had entered his home. As a result, his actions, which occurred after he was awoken from a midday nap, are not the kind of 'free, deliberate, and informed' acts that break the chain of causation between a wrongdoer's conduct and a foreseeable consequence.").

ficers who demonstrate they did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[231]

The current law on qualified immunity has spurred criticisms from various scholars,[232] and even, in the recent case of *Kisela v. Hughes*,[233] from a Supreme Court Justice.[234] In *Kisela*, Officer Andrew Kisela shot and injured Amy Hughes, who was reportedly "engaging in erratic behavior with a knife,"[235] because he believed Ms. Hughes was threatening to assault another woman a few feet away.[236] The majority of the Court did not even consider the issue of whether Officer Kisela used excessive force,[237] because, according to them, the record sufficiently established that he was entitled to qualified immunity.[238] Hence, the decision of the Ninth Circuit—that Officer Kisela could stand for trial—was summarily reversed.[239]

Justice Sotomayor, in a strongly-worded dissent,[240] countered the

---

[231] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.' "). Chavis and Degnan explain how the successful invocation of the qualified immunity doctrine depends on the crystallization of "clearly established" law. *See* CHAVIS & DEGNAN, *supra* note 37, at 29 (". . . in order to recover damages in a § 1983 action, a plaintiff must prove to the court or jury that the officer violated 'clearly established' law at the time of the incident. This standard is highly deferential to the state actor, leading courts to dismiss many, if not most, cases prior to trial. The result is that too often courts have no opportunity to assess the accusations of excessive force and reviewing courts, including the Supreme Court, never have the opportunity to evaluate those lower courts' assessments. As a result, the unconstitutionality of seemingly egregious behavior never has the chance to become 'clearly established' law, stymying efforts to increase accountability or secure institutional reform.").

[232] *See* Diana Hassel, *Excessive Reasonableness,* 43 IND. L. REV. 117, 118–19 nn.7–8 (2009) (listing scholarly works that have criticized the doctrine of qualified immunity and the present legal regime of police accountability in general.); *see also* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity,* 100 MINN. L. REV. HEADNOTES 62, 64 (2016); HUMAN RIGHTS WATCH, *supra* note 40, at 120 (explaining that the doctrine of qualified immunity induces jurors to "find in favor of the officer if the conduct is *objectively unreasonable but understandable*").

[233] 138 S. Ct. 1148 (2018).

[234] *See id.* at 1155 (Sotomayor, J., dissenting).

[235] *Id*. at 1150.

[236] *Id*. at 1151.

[237] *Id*. at 1152. But on this score, the Supreme Court obliquely opined that the occurrence of a Fourth Amendment violation in this case is "a proposition that is not at all evident." *Id.*

[238] *Id*.

[239] *Id*. at 1154–55.

[240] *See* Cortney O'Brien, *SCOTUS Rules on Police Shooting. . .and Sotomayor's Scathing Dissent*, TOWNHALL.COM (Apr. 3, 2018), https://townhall.com/tipsheet/cortneyobrien/2018/04/03/scotus-ruling-on-police-shooting-n2467046, *archived at* https://perma.cc/8ERH-P8ZK; Alan Pyke, *Sotomayor Rips Supreme Court for Playing to Right-Wing Gutter Politics on Police Violence*, THINKPROGRESS.ORG (Apr. 2, 2018), https://thinkprogress.org/justice-sotomayor-criticizes-supreme-court-kisela-hughes-police-violence-668446e7011d/, *archived at* https://perma.cc/N9HH-NPGB; Mark Joseph Stern, *The Conservatives vs. Sonia Sotomayor*, SLATE (Apr. 2, 2018), https://slate.com/news-and-politics/2018/04/sonia-sotomayor-has-become-a-lonely-voice-fighting-against-the-supreme-courts-rightward-turn.html, *archived at* https://perma.cc/TUU4-3M6W ("The liberal justice has become a lonely voice fighting against the Supreme Court's rightward turn.").

majority's findings.[241] Citing, among others, *Graham* and *Garner*, she maintained that jurisprudence was replete with "clearly established principles" regarding the proper use of force, the violation of which disqualified Officer Kisela from invoking qualified immunity.[242] Echoing criticisms of the qualified immunity doctrine,[243] Justice Sotomayor urged the Court not to "intervene prematurely" by directing a summary reversal of the circuit court's decision based on this doctrine.[244] She noted the "disturbing trend regarding the use of this Court's resources in qualified-immunity cases,"[245] as she previously discussed in dissent in *Salazar-Limon v. Houston*.[246] She ended her *Kisela* dissent thus:

> The majority today exacerbates that troubling asymmetry [in qualified immunity cases]. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.[247]

Evidently, the doctrine of qualified immunity has become a virtual "trump card" in police violence cases. Section 1983 claimants should thus be forewarned that it could defeat even a finely-crafted proximate cause theory of police provocation right at the outset. Addressing this barrier, therefore, must be the first priority for claimants.

---

[241] *Kisela*, 138 S. Ct. at 1155 (Sotomayor, J., dissenting).

[242] *Id.* at 1158 ("This Court's precedents make clear that a police officer may only deploy deadly force against an individual if the officer 'has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others.' . . . Ninth Circuit precedent predating these events further confirms that Kisela's conduct was clearly unreasonable. . . . Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.") (internal citations omitted).

[243] *Id.* at 1162 (asserting that the Supreme Court's "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment").

[244] *Id.* (". . . [T]he qualified-immunity question here is, at the very best, a close call. Rather than letting this case go to a jury, the Court decides to intervene prematurely, purporting to correct an error that is not at all clear.").

[245] *Id.*

[246] Salazar-Limon v. Houston, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting from denial of certiorari) (observing that the Supreme Court tends to "summarily reverse courts for wrongly denying officers the protection of qualified immunity" but "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases").

[247] *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

D. Agenda for the Supreme Court: The Graham *Debate, Moving Forward*

The post-*Mendez* agenda for the Supreme Court, therefore, is to resolve the question left hanging in its lone footnote:[248] whether antecedent police provocation can be incorporated into the *Graham* reasonableness calculus. As pointed out in Part IV, owing to *Mendez*'s procedural posture, this question was not presented to the Supreme Court on certiorari. Hence, the impasse between the federal circuits, as discussed in Part II, still stands, except that the provocation rule is no longer an option.

It is imperative to settle once and for all whether Fourth Amendment reasonableness hinges on a single moment or an entire encounter. The police continue to regularly cause civilian deaths.[249] Many of these cases raise questions as to whether the citizen, or the police, acted reasonably, considering all circumstances. The Supreme Court has the opportunity to resolve the split between the two camps of federal circuits and, in doing so, redefine the dynamics of citizen-police interaction across the country. How should the Supreme Court stand on the matter?

Weighty considerations underpin the positions on both sides of the debate, as evidenced by the policy-oriented concerns brought to the fore in the dueling *amici* briefs filed in *Mendez*.[250] Undoubtedly, these considerations will bear heavily on the Supreme Court's decision, if and when it finally solves the *Graham* puzzle.

The at-the-moment camp was represented in *Mendez* by influential law enforcement organizations and the United States, as *amici* siding with the *Mendez* petitioners. For instance, the California State Sheriffs' Association advocated viewing police officers' actions not with the 20/20 vision of hindsight but "through the lens of their viewpoint in the heat of the moment."[251] The National Association of Counties raised concerns about police officers being forced to choose between defending themselves or paying damages.[252] The Los Angeles County Police Chiefs' Association lamented that police officers' training (in responding to dangerous situations) will be undermined if they would be required to "think back on every tactical decision leading up to the moment."[253] And, in broad terms, the Solicitor General, as *amicus*

---

[248] *Mendez*, 137 S. Ct. at 1547 n.*.

[249] *See* Washington Post, *supra* note 2.

[250] *Compare* Brief for the California State Sheriffs' Ass'n, et al. as Amici Curiae Supporting Petitioners, County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369) *with* Brief for the American Civil Liberties Union and the ACLU of Southern California as Amici Curiae Supporting Respondents, County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369).

[251] *See* Brief for the California State Sheriffs' Ass'n, et al., *supra* note 250, at 8.

[252] *See* Brief for the National Ass'n of Counties, et al. as Amici Curiae Supporting Petitioners at 18, County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369).

[253] *See* Brief for the Los Angeles Cty. Police Chiefs' Ass'n as Amicus Curiae Supporting Petitioners at 7–8, County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369).

representing the United States, asked that police officers' conduct be measured against a "reasonableness at the moment" standard as it makes more sense compared to the provocation rule.[254]

The issues raised by *amici* for petitioners cannot and should not be lightly dismissed. These are legitimate concerns about the safety of police officers and the difficult judgment calls they routinely make that could provide reasonable justification for the at-the-moment *Graham* approach. While acknowledging these concerns, this Note argues the totality-of-the-circumstances approach is more in accord with the underlying philosophy of *Graham*, more protective of Fourth Amendment rights, and more supportive of police integrity and accountability.

The merits of the totality-of-the-circumstances approach were deftly argued by the American Civil Liberties Union (ACLU) and the ACLU of Southern California as *amici* in support of the *Mendez* respondents.[255] First, they asserted that adherents of the at-the-moment approach "[took] a single phrase from *Graham* completely out of context" and subverted the *Graham* Court's "foundational 'totality of the circumstances' approach."[256] The *Graham* decision is indeed replete with references to factors and circumstances that should inform the reasonableness analysis.[257] *Graham*'s citation to *Garner* and the reference to *Garner*'s specific articulation of a totality-of-the-circumstances standard[258] only buttress the theory that *Graham* does stand for a holistic, rather than a segmented, approach to reasonableness.

Second, the ACLU *amici* argued that focusing solely on the exact moment of the deployment of force would lead to situations where police officers can be rendered immune from liability despite taking clearly unreasonable antecedent actions.[259] On this point, the National Police Accountability Project, *amicus* for respondents in *Mendez*, illustrated, through

---

[254] *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 18–19, County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369) ("*Graham* set out a 'reasonableness at the moment standard' . . . . That standard makes sense, because the judgment to use force is often made in a 'split-second,' under 'tense, uncertain, and rapidly evolving' circumstances." (internal citations omitted)).

[255] *See* Brief for the American Civil Liberties Union, *supra* note 250.

[256] *See id.* at 2.

[257] *See generally* Graham v. Connor, 490 U.S. 386 (1989). Specific factors that may be considered in the reasonableness inquiry include "the nature and quality of the intrusion on the individual's Fourth Amendment interests;" and "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." *Id.* at 396.

[258] *Id.* at 396 (citing Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

[259] *See* Brief for the American Civil Liberties Union, *supra* note 250, at 3 ("On this view, if a plainclothes officer broke into a home in the middle of the night unannounced bearing a weapon and confronted a homeowner who sought to defend himself, he would be constitutionally permitted to shoot the homeowner if, at the moment the owner sought to act in self-defense, the officer feared for his life. So, too, an officer who leapt into the path of an oncoming car could shoot to kill the driver, so long as, at the 'moment' the officer shot, he feared for his own life. Such actions would plainly be 'unreasonable,' precisely because of the officer's antecedent conduct. Yet under Petitioner's blindered approach, they would be immune from any liability.").

actual cases handled by its members, the injustice that can result from applying a test that segments an encounter into discrete moments.[260]

Third—and perhaps most importantly—the ACLU *amici* point out that the totality-of-the-circumstances approach aligns with law enforcement's emerging consciousness of the need to focus on de-escalation rather than immediate resort to force.[261] Police departments are currently adopting de-escalation policies,[262] with the express support of major law enforcement organizations.[263] The structure of the law should acknowledge and encourage police officers' growing awareness of the need to de-escalate potentially violent situations. Establishing a legal framework where the totality of police conduct during an encounter is scrutinized for Fourth Amendment compliance would help this goal.

This Note argues that the Supreme Court should settle the *Graham* debate in favor of federal circuits adhering to the totality-of-the-circumstances approach. This approach encourages police officers to develop the instincts expected of law enforcers: an abiding respect for citizens' rights, an intuitive desire to engage with citizens in a peaceable manner, and a conscientious and judicious tendency to resort to force only when absolutely necessary.

Conclusion

This Note began by problematizing the doctrinal discord regarding the role of police provocation in the reasonableness calculus. The cases of Todd Hastings, Leonard Greenidge, Ryan Hennessey, Angel Mendez, Jennifer Garcia, and many others, make clear that current Fourth Amendment jurisprudence stands in the way of many plaintiffs' ability to seek redress for injuries arising from police-provoked violence. This Note argues that this

---

[260] *See* Brief for the National Police Accountability Project as Amicus Curiae Supporting Respondents at 16–18, County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369).

[261] *See* Brief for the American Civil Liberties Union, *supra* note 250, at 5 ("Officer-involved shootings in recent years have sparked widespread protest and police departments have sought to respond to the ongoing problem by training their officers in how to de-escalate confrontations before they rise to the level of lethal force. Police chiefs and experts agree that best practices on use of force must emphasize not merely the decision to shoot, but how the officer handles the situation and avoids force by slowing down, creating space, and using de-escalation tactics.").

[262] *See* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. Ill. L. Rev. 629, 669 (2018).

[263] *See generally* Association of State Criminal Investigative Agencies, et al., National Consensus Policy and Discussion Paper on Use of Force 3 (Oct. 2017), https://www.theiacp.org/sites/default/files/all/n-o/National_Consensus_Policy_On_Use_Of_Force.pdf, *archived at* https://perma.cc/WU8M-KEVS ("An officer shall use de-escalation techniques and other alternatives to higher levels of force consistent with his or her training whenever possible and appropriate before resorting to force and to reduce the need for force."); *id.* at 9 ("Agencies should strive to encourage officers to consider how time, distance, positioning, and especially communication skills may be used to their advantage as de-escalation techniques and as potential alternatives to force and to provide training on identifying when these techniques will be most useful to mitigate the need for force.").

obstacle to justice needs redress; basic notions of justice and fairness dictate that when police officers intentionally or recklessly provoke a violent encounter, they should be held liable for the resulting injuries.[264]

In the wake of *Mendez*, a definitive rule along this line has begun to take shape. But it will take several more doctrinal moves[265] for the courts to finally settle the *Graham* debate described here. The post-*Mendez* agenda outlined in this Note seeks to push the law toward recognizing police provocation as a ground for claiming damages.

Incorporating police provocation into the reasonableness calculus is the right way forward. Taking police provocation out of the equation engenders in police officers an intuitive tendency to deploy coercive force as a first impulse, rather than a last resort; or in Justice Sotomayor's words in *Kisela*, to "shoot first and think later."[266] On the other hand, holding police officers liable for escalating an otherwise non-violent encounter forces them to abide by the strictures of the Fourth Amendment. It forces them to be *reasonable* when engaging citizens.

---

[264] This proposition came up during the *Mendez* oral argument, during Justice Sotomayor's interpellation of the Petitioner's counsel. *See* Transcript of Oral Argument at 3–4, County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369) ("[Counsel for Petitioner] MR. ROSENKRANZ: Your Honor, when a police officer reasonably thinks to himself, as Deputy Conley did here, this is where I'm going to die, he has to be free to make the split-second decision to defend himself and those around him. Any legal rule that says that is unreasonable is untenable. JUSTICE SOTOMAYOR: . . . it is a very moving statement, and one that I totally agree with, but we're not asking the police officers to make that choice. When they feel in danger, they are going to take the step that's important to them, and I think that's absolutely right. The issue is who's going to suffer that loss? Who's going to take the financial penalty of that loss . . . . The question is when does the police officer pay the victim who is suffering for that loss if the victim had nothing to do with causing the loss?").

[265] *See supra* Parts IV.A & C. A post-provocation rule Ninth Circuit would have to determine how it would approach future police provocation cases within the confines of the *Mendez* ruling. The Supreme Court would also have to wait for an appropriate case to settle the doctrinal discord among the circuits.

[266] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).