North Carolina Central Law Review

Volume 40 | Number 2 Article 2

2018

Getting Away With Murder: The Legal Fiction of Objective Reasonableness

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GETTING AWAY WITH MURDER? THE LEGAL FICTION OF OBJECTIVE REASONABLENESS

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INTRODUCTION

There are at least two critical decisions that every police officer must make, sometimes daily. The first is the decision to approach a citizen with an investigative or adversarial purpose in mind. This decision may be predicated upon the officer's reasonable suspicion that the civilian is up to some mischief. Perhaps the situation is more cut-and-dry; the officer has found probable cause to believe that the suspect has committed a crime. In the most extreme case, the officer has come upon a crime in progress, and is confronted with an offender who is attempting to escape. As detailed below, each of these scenarios has a set of conditions that the officer must meet to satisfy strictures laid out in the Bill of Rights, particularly the Fourth Amendment.

The second and less common decision for the officer is whether the behavior of a suspect calls for the application of any force, and if so, how much. The suspect, in turn, must choose to cooperate or resist. Patently, intentions and motivations propel most contact between police and suspects.

The predicament is not that intentions and motivations exist or play a role in the outcome of the exchange—the problem is the subjectivity of intentions/motivations and the difficulty of knowing what is in someone else's mind. A hindsight analysis of events usually raises a wealth of speculation about motives, intentions, and "what if" questions. Such questions were at the heart of the substantive due process review in suits against police officers who were judged to be "malicious and sadistic."[1] In *Graham v. Connor* the Rehnquist Court solved the subjectivity problem by jettisoning the substantive due process standard when either the Fourth or Eighth Amendment might

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1.*See Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir.1973).

instead apply.[2] The Court described their revised standard of review as an inquiry guided by "objective reasonableness."[3]

A final and critical step in the analysis of use of force is to decide if the officer acted properly under color of his or her legal authority, or whether the officer's actions violate established statutory or constitutional rights. Assuming arguendo that the officer acted within certain bounds, he or she will enjoy protection from lawsuit under the aegis of "qualified immunity."[4]

This article aims to trace the legal issues that arise across the arc of police-civilian interactions. Specifically excepted from this discussion are encounters that occur post-arrest, including events that may occur in interrogation rooms and corrections facilities. The focus here is the process by which an officer engages a civilian, before or during an arrest, and the consequences of an officer's use-of-force. To adumbrate a conclusion of this review, legal precedent and the doctrine of *stare decisis* have steered police accountability to an effective dead end.[5] Even in the most extreme cases of unwarranted force, the deck is unreasonably stacked in favor of law enforcement.

Sometimes hindsight is the only lens that gives a complete account of rapidly evolving events, and the "reasonable police officer" guideline is itself subject to the biases and priorities of the judge and/or jury.[6] It may be appropriate now—28 years after Graham met Connor—to revisit the question of reasonable use of force by government agents and the standard of review in these cases. Specifically, it is proposed that the standard of "objective reasonableness" is neither: it has become too narrowly construed to be truly objective, unreasonably constraining the context of what is to be judged, and leading to outcomes that do not protect the rights of citizens. Fourth Amendment restrictions on unreasonable search and seizure should invoke a presumption that a government actor who attacks a person or takes a life without substantial justification has violated that citizen's constitutional protections.

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2. *See Graham v.* Connor, 490 U.S. 386, 394 (U.S. 1989).

3. *Id.* at 397.

4. *See Mullenix v. Luna,* 136 S. Ct. 305, 308 (2015) (per curiam). *See also* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 67-68 (2016) (discussing the impact of *Mullenix* on the line of cases invoking "qualified immunity").

5. *See, e.g.,* Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform* 12 DUKE J. CONST. L. & PUB. POL'Y 53 (2016) (Discussing a series of "notorious" police killing of Black civilians, the impact of police training, and describing current efforts at police reform).

6. *See, e.g.*, Vida B. Johnson *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245 (2017) (describing juror biases regarding police testimony).

I. BACKGROUND – THE ROAD TO OBJECTIVE REASONABLENESS

A. REASONABLE SUSPICION AND TEMPORARY DETENTION

To accord with the Fourth Amendment and the standard set in *Terry v. Ohio*, a police officer must have, at minimum, a "reasonable suspicion" of criminal activity to stop a suspect for questioning.[7] To temporarily hold a person for further investigation, the officer must be able to articulate a reason for suspecting pending criminal conduct based on the circumstances and context of immediate events.[8] It cannot be a mere hunch or speculation.[9] In other words, at the very first moment of contact between a civilian and a law enforcement officer, the question of "reasonableness" is based on what the officer may infer from events.[10] That is, considering his or her experience and training, did the officer reasonably perceive that there might be some crime afoot?

Sometimes there is a second step in the reasonable suspicion inquiry–-does there exist sufficient cause to search a person so detained? Once again, the guidelines of *Terry* require the officer to have a "reasonable suspicion" that the suspect is armed.[11] The search must be a limited search for weapons, that is, a frisk or pat down of the outer clothing.[12]

The key word here is "reasonable." Was the search or seizure reasonable? This short instruction—that searches and seizures must be reasonable—is the basis for many of the rules of procedure faced by police, prosecutors and courts in criminal cases.[13] This Fourth Amendment requirement has probably generated more legal ink than any other constitutional issue before the criminal court.

In the instance where no reasonable suspicion exists to engage in a search of a person or property, the determined officer need not necessarily be deterred. Voluntary consent of a person in authority to search of the premises

7. *Terry v, Ohio*, 392 U.S. 1, 21 (1968).
8. *Id.*
9. *Id.*
10. *Id.* ("And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").
11. *Id.* at 26.
12. *Id.* (The author has heard officers testify that they patted down the suspect "for officer safety." Officer safety is the *reason* for the guideline, but it is not the *standard*. The standard is an articulable suspicion, based on the facts and circumstances at the scene, in the light of the knowledge and training of a reasonable police officer, that the suspect has a weapon.).
13. *See generally* W.R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th Ed., 2012) (providing a discussion of search and seizure law in two volumes).

is acceptable under the Fourth Amendment.[14] There is no requirement that the officer advise the party of his or her right to refuse to consent, and the only condition is that the predicate detention of the suspect is lawful.[15]

Thus, the very first line of inquiry in the exploration of an excessive force claim is often an inquiry into what was going on in the police officer's mind in the moment of contact with a suspect.[16] What did he or she imagine, and why? Note that even if the officer's suspicion was not founded, it is sufficient that the suspicion was reasonable.[17]

B. PROBABLE CAUSE AND ARREST

Many adversarial contacts are based on the officer having some reason to believe (beyond a reasonable suspicion) that a crime has been committed. That is, the officer has probable cause to believe that a crime has occurred, and that the suspect is the likely offender.[18] Like "reasonableness," "probable cause" is a specific requirement of the Fourth Amendment – "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* . . . ."[19]

A notable difference between probable cause and reasonable suspicion is that probable cause does not limit the assessment to that of a "reasonable police officer." Probable cause expands the requirement. For probable cause to exist, there must be sufficient facts and evidence to warrant any *person of reasonable caution* to believe that a crime is happening.[20] A badge alone is not enough. Nevertheless, an observant officer will often find probable cause in the most minor of infractions–-a broken tail light, perhaps, or overly tinted windows on the suspect's vehicle.

As circumstances move up the continuum from reasonable suspicion to probable cause, a law enforcement officer's authority expands, while the suspect's options shrink. An officer may briefly detain a suspect based on reasonable suspicion, but it takes probable cause to justify an arrest (regardless

14. *Katz v. United States*, 389 U.S. 347, 358 n. 22 ("A search to which an individual consents meets Fourth Amendment requirements.").

15. *Schneckloth v. Bustamonte*, 412 US 218, 227 (1973).

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

17. *See Illinois v. Wardlow*, 528 US 119, 126 (2000).

18. *See Carroll v. United States*, 267 U.S. 132, 162 (1925) ("Probable cause exists where 'the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.").

19. U.S. CONST., amend. IV (italics added).

20. *Carroll*, 267 U.S. at 162.

of how minor the infraction).[21] Arrest, in turn, usually justifies a complete search of the person and his or her immediate surroundings.[22]

C. SUBSTANTIVE DUE PROCESS

The origins of due process may be traced to language referencing the "law of the land" in the Magna Carta.[23] The concept of "substantive" due process was originally applied to property law, on the question of where a person could be deprived of property by legislation, or if the matter required judicial action.[24] More recently, substantive due process is credited with being the basis for *Connecticut v. Griswold*[25] and various cases that followed, identifying a "right to privacy" where no such right is described in the Constitution.[26]

As a result, due process review has been criticized as a means of legislating from the bench. In 1930, Justice Oliver Wendell Holmes wrote, "As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable."[27] Other critics of the idea include Justices Byron White, Anton Scalia and Clarence Thomas.[28] Noted legal scholar John Hart Ely described substantive due process (perhaps incorrectly) as an oxymoron: "[W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms - sort of like 'green pastel redness.'"[29] Some hold that substantive due process is redundant; that due process is due process, regardless of how the term is modified.[30] McCormack argues to the contrary that procedural and substantive due process were distinguished from one another as a result of New Deal policies.[31] Professor Erwin Chemerinsky says that procedural due process is a question of whether the government has followed

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21. *Atwater v. Lago Vista*, 532 U.S. 318, 322-23 (2001) ("The question is whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. We hold that it does not.").

22. *See generally* Chimel v. California, 395 U.S. 752, 768 (1969) (discussing the permissible scope of search pursuant to an arrest).

23. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320 (1999).

24. *Id.* at 328-29.

25. *Griswold v.* Connecticut, 381 U.S. 479 (1965).

26. Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L. REV. 215, 219 (1987).

27. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930).

28. *See, e.g.,* Moore v. East Cleveland, 432 U.S. 494, 543 (1977), (White, J., dissenting); U.S. v. Carlton, 512 U.S. 26, 41-42 (1994), (Scalia, J., joined by Thomas, C., concurring).

29. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980).

30. Jamal Greene, *The Meming of Substantive Due Process* 31 CONST. COMMENT. 253, 253 (2016) ("Substantive due process is not a contradiction in terms. Indeed, it is redundant." (footnote omitted)).

31. Wayne McCormack, *Economic Substantive Due Process and the Right to Livelihood,* 82 KY. L.J. 397, 404 (1993-1994) ("No recognized distinction between procedural and substantive due process existed until after the New Deal eliminated the substantive protections.").

proper procedures, while substantive due process is an inquiry into whether there is "sufficient substantive justification" for some governmental action.[32]

One frequently cited criminal case to employ a substantive due process analysis was a 1952 case, *Rochin v. California*.[33] In *Rochin,* California officers illegally pumped a suspect's stomach, searching for drugs.[34] In the pre-Warren 1950s, the law in California and many other states allowed the admission of physical evidence even when it had been illegally obtained by the police.[35] Ergo, in *Rochin* the Fourth Amendment was not in play, and the Supreme Court resorted to substantive due process to interfere in a question of police conduct that otherwise would have been acceptable to the state:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.[36]

In 1973, Judge Friendly of the Second Circuit Court of Appeals ruled on *Johnson v. Glick.*[37] He concluded that the assault of a pre-trial detainee by a corrections officer fell under neither the Fourth Amendment (because it was not a search or seizure) nor the Eighth Amendment (because it was an unprovoked assault, and given that the victim was being held pre-trial, not intended as a "punishment").[38] Accordingly, Friendly decided that the case most closely fit the situation where "application of undue force by law enforcement officers deprives a suspect of liberty without due process of law."[39] Friendly cited the "shocks the conscience" test from *Rochin* in support of his analysis.[40] Judge Friendly devised a 4-factor test (including malicious and sadistic motivation) as the measure for excessive force.[41] This became the

32. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).
33. *Rochin v.* California,342 U.S. 165 (1952).
34. *Id.* at 166.
35. *People v. Rochin*, 101 Cal.2d 140, 142; 225 P.2d 1, 2 (1950), *rev'd sub nom. Rochin v. California*, 342 U.S. 165 (1952) ("[T]he accepted rule in this state, as in many others, permits the introduction of improperly obtained evidence on the ground that the illegality of the search and seizure does not affect the admissibility of the evidence." (quoting People v. Gonzales, 20 Cal.2d 165, 169, 124 P.2d 44 (1942))).
36. 342 U.S. at 172.
37. 481 F.2d 1028 (1973).
38. *Id.* at 1032.
39. *Id.*
40. *Id.* at 1033 (quoting *Rochin*, 342 U.S. at 172).
41. *Id.*

prevailing standard for actions under 42 U.S.C. § 1983 (Civil Action for Deprivation of Rights).[42] It was this substantive due process standard for reviewing excessive force claims that was curtailed by the Supreme Court in *Tennessee v. Garner*[43] and rejected outright in *Graham v. Conner*.[44]

D. THE FLEEING FELON RULE

Sometimes the first contact between an officer and a citizen is when the crime is in progress (or complete) and the officer perceives that the perpetrator is attempting to flee the scene, or, alternatively, an arrestee is trying to escape. In the past, the common law governed police use of force in such situations: the "fleeing felon rule" permitted the use of force, including deadly force, against an individual who was suspected of a felony and was in clear flight.[45] Over time, this rule from English Common Law filtered its way into the Tennessee and other state criminal statutes.[46]

In *Tennessee v. Garner*, the father of a young man shot by a Memphis police officer filed suit under 42 U.S.C. § 1983.[47] Edward Garner was a 15-year-old eighth-grade student[48] when he broke into an unoccupied home and stole a ring and $10.[49] He was confronted in the back yard by Officer Elton Hymon:

> With the aid of a flashlight, Hymon was able to see Garner's face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that Garner was unarmed. He thought Garner was 17 or 18 years old and about 5' 5" or 5' 7" tall. While Garner was crouched at the base of the fence, Hymon called out "police, halt" and took a few steps toward him. Garner then began to climb over the fence. Convinced that, if Garner made it over the fence, he would elude capture, Hymon shot him.[50]

Hymon's shot struck Garner in the back of the head; he died shortly later in a hospital operating room.[51] The U.S. District Court found no constitutional violation in either the statute or Hymon's actions.[52] The Sixth Circuit

42. 490 U.S. 386, 393 (1989).
43. *See* 471 U.S. 1 (1985), *see also* Heath v. Henning, 854 F.2d 6 (1988), (holding that the District Court improperly instructed a jury as to the legal standard in a use-of-deadly-force case.).
44. 490 U.S. 386-87.
45. 471 U.S. at 12-15.
46. *Id.* at 12.
47. *Id.* at 5.
48. *Id.* at 4 n.2.
49. *Id.* at 4.
50. *Id.* at 3-4 (citations omitted).
51. *Id.* at 4.
52. *Id.* at 6.

Court of Appeals disagreed and reversed.[53] The State then appealed the matter to the Supreme Court.[54]

The Supreme Court sided with the Court of Appeals, saying that deadly force was justified only when the fleeing suspect had already inflicted or was likely to cause serious bodily harm to the officers or others.[55] In *Tennessee v. Garner* the Supreme Court began its shift from a Fourteenth Amendment substantive due process approach to one based on a Fourth Amendment standard of review.[56] The resulting analysis offers a "totality of the circumstances" perspective:

> To determine the constitutionality of a seizure "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." We have described "the balancing of competing interests" as "the key principle of the Fourth Amendment." Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out.[57]

Although the Garner decision clarified the issue of when police may employ deadly force, based on a "totality of the circumstances" test, it did not address the use of less-than-deadly force. That question was the problem the Court confronted in *Graham v. Connor*.[58]

E. OBJECTIVE REASONABLENESS

Dethorne Graham was a diabetic.[59] On November 12, 1989, Graham realized that he was having an insulin reaction, and that he required sugar to prevent hypoglycemia (low blood sugar).[60]

Graham asked his friend William Berry to drive him to a convenience store so he could buy some orange juice to counteract the reaction.[61] Upon arriving at the store, Graham quickly entered and found several people waiting in line. Concerned about the likely delay, Graham hurried from the store and asked Berry to take him to a friend's house.[62] Officer M. S. Connor of the Charlotte, North Carolina police department was parked in the store parking lot. He observed Graham running into and from the store and proceeded to follow Graham and Berry as

53. *Id.*
54. *Id.* at 7.
55. *Id.* at 11.
56. *Id.* at 7 ("[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.").
57. *Id.* at 8 (citations omitted).
58. *See* 490 U.S. 386.
59. 490 U.S. at 388.
60. *Id.*
61. *Id.*
62. *Id.* at 388-389.

they drove away.[63] A short distance from the store, Connor stopped Graham and Berry.

Berry explained to Officer Connor that Graham was having a "sugar reaction" and Connor told the two that they would have to wait until Connor found out what had happened at the store.[64] According to Graham's trial testimony, this was the last thing he remembered until he woke up on the ground surrounded by police officers.[65]

Connor went to his car to call for backup. While he was doing so, Graham got out of Berry's car, ran around it twice, then sat on the curb and briefly passed out.[66] Several Charlotte officers responded to Connor's call.[67] They handcuffed Graham tightly, ignored Berry's pleas to get him some sugar and lifted Graham to the hood of Berry's car. Officers seemed to believe Graham was intoxicated.[68] When Graham asked the officers to look in his wallet for a decal identifying him as a diabetic, they told him to "shut up" and forced his face down against the hood of car.[69] They then threw Graham headfirst into a police car and refused to let him drink the orange juice that a friend brought to the scene.[70] After Connor was assured that nothing had happened at the convenience store, the police drove Graham home and released him.[71]

Graham suffered a broken foot, cuts on his wrists, an injured shoulder, a bruised forehead, and he reported ongoing trouble with ringing in his right ear.[72] Graham sued under 42 U.S.C. § 1983.[73] The case made its way to the Supreme Court, which sided with Graham and ruled that the lower courts had applied the wrong standard of review.[74]

The Supreme Court determined that the standard of review in this case and cases like it–-including many police-involved shootings of civilians–-should be limited to review for reasonableness under the Fourth Amendment.[75] They

63. *Id.* at 389 ("The officer became suspicious that something was amiss and followed Berry's car.").

64. *Id.*

65. Graham v. City of Charlotte, 827 F.2d 945, 947 (4th Cir. 1987), *rev'd sub nom.* Graham v. Connor, 490 U.S. 386 (1989).

66. 490 U.S. at 389.

67. *Id.*

68. *Id.* ("Another officer said: 'I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M. F. but drunk. Lock the S. B. up.'").

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 390.

73. *Id.*

74. *See Graham v. City of Charlotte*, 827 F.2d at 945, 950 (holding that substantive due process is the appropriate standard of review).

75. 490 U.S. at 395 ("Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force — deadly or not — in the course

did not stop at merely requiring all seizures, particularly, the forcible seizure of people to be reasonable. The Court also was concerned about the judgment calls made by officers in making use-of-force decisions. They said:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . 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. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[76]

The Court went on to describe the inquiry as one of "objective reasonableness."[77] Specifically, the officers' actions should be objectively reasonable in light of the facts and circumstances confronting them, and "without regard to the officers' *underlying intent or motivation*."[78] The Court disagreed with the Court of Appeals requirement that police be subjectively motivated to act in a "malicious and sadistic" manner.[79] That is, the question of whether there was some malicious intent on the part of the officer is irrelevant to the Fourth Amendment analysis.[80] The question is, did the officer *reasonably* respond, based on objective facts and circumstances at the time, with the appropriate level of force?[81] In view of his instructions to Graham and Graham's seemingly erratic and irrational actions, did Connor and his fellow officers react appropriately?

We know now that Graham was sick, not drunk. We know now that Graham likely did not intentionally ignore Connor's instructions or resist the police. We know now that the force used against Graham was unnecessary–*if the officers knew then what we know now*. That hindsight knowledge is the trap that the objective reasonableness standard seeks to avoid.[82]

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of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard . . . .").

76. *Id. at* 396-97 (citation omitted).

77. *Id.* at 397.

78. *Id.* (italics added).

79. *Id.*

80. *Id.* at 393-94 ("We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard. . . In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.").

81. *Id.* at 394.

82. *Id.* at 396.

In his concurrence in the Graham case, Justice Blackmun (joined by Justices Brennan and Marshall) agreed that in general, a Fourth Amendment analysis of the sort described above was the appropriate course in most police use-of-force cases.[83] Blackmun expressed concern that the Court had taken the additional step of foreclosing any other analysis.[84] Particularly, Blackmun saw "no reason for the Court to find it necessary further to reach out to decide that prearrest excessive force claims are to be analyzed under the Fourth Amendment *rather than* under a substantive due process standard."[85] Blackmun said that use of force "not demonstrably unreasonable under the Fourth Amendment only rarely will raise substantive due process concerns."[86] In other words, Blackmun was suggesting that police use of force *may* give rise to a substantive due process claim even when no constitutional violation exists, and that he would prefer to rule on a case in which that question was "squarely raised."[87]

F. WHEN ALL ELSE FAILS: QUALIFIED IMMUNITY

Regardless of an officer's erroneous judgment—that is, when a constitutional violation is found to exist—in most situations law enforcement officers may lay claim to "qualified immunity." According to Justice Scalia, "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law."[88] The limitations are outlined in *Mullenix*:

> The doctrine of qualified immunity shields officials from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." A clearly established right is one that is "sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right." "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question *beyond debate*." "Put simply, qualified immunity protects all but the *plainly incompetent* or those who *knowingly violate* the law."[89]

Saucier v. Katz raised the matter of whether qualified immunity and constitutional violation issues merge into a single question, because they both

83. *Id.* at 399 (Blackmun, H., concurring).

84. *Id.* (The Court did acknowledge that the officer's ill will toward a suspect might play a role in assessing the officer's credibility, and that an officer's "good faith" in the reasonableness of his or her actions might be relevant to the question of qualified immunity.).

85. *Id.* at 399-400.

86. *Id.* at 400.

87. *Id.*

88. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (citation omitted).

89. *Mullenix v. Luna*, 136 S. Ct. at 305, 308 (citations omitted).

require evaluating the objective reasonableness of the officer's conduct.[90] In determining that the two are separate questions, the Court pointed to the possibility that the officer might not know how a legal doctrine would apply to the present factual situation.[91] In other words, even when a clearly established law is violated, a reasonable officer who could have believed that his or her conduct was lawful is still entitled to qualified immunity.

In sum, justifying the forcible and sometimes fatal seizure of a person minimally requires 1) an objectively reasonable use of force by the officer (often based upon a very time-limited analysis of events, and in consideration of the officer's training and experience), and/or 2) that the officer is not plainly incompetent or criminal, and reasonably believed that his or her conduct was lawful.

II. OBJECTIVE REASONABLENESS RECONSIDERED

Objective reasonableness is a kind of "*mens rea*-free zone," in that it does not matter what the officer has in mind so long as his/her behavior is "reasonable."[92] That may sound fine, except that almost any behavior can be made to seem reasonable when the review narrows to judgements made hastily, under stress, in the exigency of the moment. We are not far from where matters stood 70 years ago:

> It is a principle very generally accepted that an officer, having the right to arrest an offender, may use such force as is necessary to effect his purpose, and *to a great extent he* is *made the judge of the degree of force* that may be properly exerted. Called on to deal with violators of the law, and not infrequently to act in the presence of conditions importing serious menace, his conduct in such circumstances is not to be harshly judged **...**[H]e may use the force necessary to overcome resistance and to the extent of taking life . . . [93]

Law enforcement officers are trained to anticipate danger in every situation, and drilled to respond almost mechanically to any apparently lethal threat.[94] Nearly any movement by a suspect may be construed as potentially

90. *Saucier v. Katz et al.*,533 U.S. 194, 199-200 (2001).

91. *Id.* at 205 ("The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.").

92. *See supra* text accompanying notes 74-80.

93. *State v. Fain*, 229 N.C. 644, 646, 50 S.E. 2d 904, 905 (1948) (italics added).

94. *See generally* Thomas Petrowski, *Use-of-Force Policies and Training – A Reasoned Approach (Part Two)*, 71 FBI L. ENFORCEMENT BULL. 11, 24-32 (2002) (discussing threat assessment, the preemptive use of reasonable force, reducing incidents of unreasonable force, and use of force policy).

hazardous. For example, officers are instructed in careful detail that there is a perception-reaction lag, wherein valuable time is lost recognizing and understanding the situation—sometimes to the extent of being in danger from a person armed with a knife as much as 21 feet away.[95] This perceptual lag is also used to explain why suspects are sometimes shot in the side or back.[96] Where police officers hesitate, it seems that criminals do not. It is a convention that:

> [O]fficers can only accurately hit their moving assailants 14% of the time in life-or-death situations from distances of only two to 10 feet. On the other hand, assailants were able to successfully engage and hit officers 68% of the time within those same distances.[97]

In other words, a motivated offender is more dangerous than an experienced police officer. As a result, "officers must be trained to respond to the threat of violence and not to the actual violence itself, guarding against the inherent presence of hesitation."[98] Even a fleeing suspect, pulling at his waistband and construed to be reaching for an unseen weapon, may face deadly force.[99] Moreover, police officers under the stress of the moment routinely experience perceptual distortions that likely impact on their judgment of real or perceived danger.[100]

It is not surprising that police officers still repeat the mantra this author learned in a state police academy 40 years ago: "Better to be tried by twelve than carried by six."[101] *Graham's* apparent restrictions regarding hindsight and "reasonableness in the moment," [102] coupled with a training regime that

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95. Marcus, *supra* note 5, at 85-88.

96. Ron Martinelli, *Revisiting the 21-foot-rule*, POLICE MAGAZINE, (Sept. 18, 2014), http://www.policemag.com/channel/weapons/articles/2014/09/revisiting-the-21-foot-rule.aspx ("The reason why some suspects are found to have entry wounds in their sides and backs when the officers who shot them say the suspects were facing them when they fired is often the perception action-reaction lag time and the manner in which information was processed by the officers' brains. This is pretty sophisticated information for a criminal or civil jury to understand and consider.").

97. *Id.*

98. Petrowski, *supra* note 94, at 28.

99. *See, e.g., Krueger v. Fuhr*, 991 F.2d 435, 440 (8th Cir. 1993).

100. *See* David A. Klinger & Rod K. Brunson, *Police officers' perceptual distortions during lethal force situations: Informing the reasonableness standard*, 8 CRIMINOLOGY & PUBLIC POLICY 117 (2009) (discussing the likelihood of officers experiencing substantial levels of perceptual distortion during deadly force encounters, suggesting that after-the-fact assessments must consider perceptual and sensory distortions likely to occur when a reasonable officer becomes aware of a potential threat of death or serious injury).

101. Christopher S. Wren, *Official Ban Ignored: Police Carry Extra Guns Despite Department Ban*, N. Y. TIMES, Jan. 31, 1973, at 85 ("We have been told that if we get caught in the car with anything other than a .38, we'll have charges brought against us," said one young patrolman from the 83d Precinct, which covers the Bushwick section of Brooklyn. "But it's better to be judged by 12 men than carried by six. That's the motto around here.") *available at* https://www.barrypopik.com/index.php/new_york_city/entry/its_better_to_be_judged_by_twelve_than_to_be_carried_by_six_police_saying.

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

predicts danger in the suspect's every gesture, creates the perfect crucible for police officers to respond violently now in expectation that their actions will be deemed "reasonable" later.[103]

A. REASONABLENESS IN THE MOMENT

There are important implications in how the courts have construed "reasonableness in the moment."[104] Even before *Graham*, there was no requirement for the police to use less intrusive measures, providing they acted reasonably under to the Fourth Amendment.[105] Courts have since held that objective reasonableness is focused on the very moment in which the use of force is deemed necessary, regardless of otherwise "ill-advised" conduct on the part of the police.[106] This seems to be the case even when the police manufacture the basis for the use of force.[107] In sum, there is a set of cases that focus sharply on the "reasonableness in the moment" reference in *Graham*, with less attention to the "totality of the circumstances" perspective enshrined in *Garner*, *Connor* and most Fourth Amendment analysis generally.[108]

In apparent response to this practice, the Ninth Circuit created a provocation rule, which makes an officer's otherwise reasonable use of force unreasonable if (1) the, "officer intentionally or recklessly provokes a violent confrontation' and (2) "the provocation is an independent Fourth Amendment violation."[109]

This rule came into play when two deputies from the Los Angeles, California, Sheriff's Department were sent to search for a "potentially armed and dangerous parolee-at-large" in the back of the property where the suspect had

103. *See generally* J. Michael McGuinness, *Law Enforcement Use of Force: The Objective Reasonableness Standards under North Carolina and Federal Law*, 24 CAMPBELL L. REV. 201 (2002) (discussing various cases and circumstances under which objective reasonableness applies, including "mistaken belief" cases).

104. Graham, 490 U.S. at 396.

105. *Illinois v. LaFayette*, 462 U.S. 640, 647 (1983) (reasonableness of governmental activity does not turn on existence of alternative "less intrusive" means).

106. *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995) (citing Cole, 993 F.2d at 1333) ("[T]he Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general. Consequently, we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment." (citations omitted)).

107. *Fraire v. Arlington*, 957 F.2d 1268, 1275-76 (5th Cir. 1992) (rejecting as irrelevant evidence that police officer manufactured the circumstances which gave rise to the force).

108. *See* Kit Kinports, *Probable Cause and Reasonable Suspicion: Totality Tests or Rigid Rules?* 163 U. PA. L. REV. 75, 75 (2014) citing Illinois v. Gates, 462 U.S. 213 (1983) ("Since its decision more than thirty years ago in Illinois v. Gates, the Supreme Court has emphasized that the Fourth Amendment's suspicion requirements — the probable cause required to arrest and search, the reasonable suspicion needed to stop and frisk — are totality-of-the-circumstances tests.").

109. *See* L.A. Cnty. v. Mendez, 137 S. Ct. 1539, 1546 (2017) (citing Billington v. Smith, 292 F. 3d 1177, 1189 (C.A.9 2002).

allegedly been sighted.[110] They located a shack which was home to Mendez and Garcia, who were inside asleep. Without knocking or identifying themselves, the deputies opened the door.[111] Mendez was holding a BB gun that he kept nearby to kill pests.[112] Deputy Conley yelled "Gun!" and both officers opened fire.[113] Both Mendez and Garcia were hit; Mendez lost a leg.[114] Both survived. No parolee was found in the shack or on the property.[115]

This case presented an opportunity for the Supreme Court to settle the question of how narrowly in time courts should look to determine questions of excessive force--in the moment that force is used, or at the "totality of the circumstances?"[116] In the opinion authored by Judge Alito, the phrase "in the moment" was never mentioned. Instead—and perhaps in the interest of unanimity—the Court passed on that specific question.[117] They rejected the provocation rule as an "unwarranted and illogical extension of *Graham*," and accepted "the principle that plaintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation."[118]

A "totality of the circumstances" analysis necessarily begins when the officer and the suspect first interact. On what basis did the two come together? It is in these few early seconds that many use-of-force episodes begin. Objective reasonableness crosses paths with subjective intentions and motivations in the instant that the contact occurs. There are many circumstances under which an officer may initiate contact, including:

1. The officer has no adversarial expectation or intent (e.g., a "courtesy contact" to inform the person of some problem or hazard.)

2. The officer has a reasonable suspicion or probable cause to believe crime is afoot.

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110. *Mendez*, 137 S. Ct. at 1542.

111. *Id.*

112. *Id.* .

113. *Id.*

114. *Id.* at 1545

115. *Id.* at 1542

116. *See generally* Brief of *Amici Curiae*, National Association for the Advancement of Colored People et al., L.A. Cnty. v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369) (discussing the "totality of the circumstances" analysis, the disproportionate killing of people of color by police, and split-second judgments regarding use of deadly force).

117. *Mendez*, 137 S. Ct. at 1547 n. ("Respondents do not attempt to defend the provocation rule. Instead, they argue 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 circumstances.' On respondents' 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." (citations omitted)).

118. *Id.* ("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.").

3. The officer approaches a person with a suspicion that does not rise to the level of "reasonable," or is mistaken.

4. The officer has issued a command (lawful or not) to which the person is slow to respond, or fails to respond.

5. The officer intrudes (lawfully or not) into the privacy of a person's place or house.

6. The officer's confrontation of the person is based on some extra-legal variable (age, race, gender, etc.)

A Fourth Amendment violation at this moment of contact—an unreasonable suspicion, an unlawful act or command, an unwarranted search or seizure—those mistakes alone are not necessarily enough to pierce the protections granted to police officers in performance of their duties.[119] In *Mendez*, the Court of Appeals determined that the L.A. deputies were protected by qualified immunity for failure to knock-and-announce at the Mendez's door, despite their lack of a warrant.[120] But what if the approaching officer is provocative, the tone is hostile, the demeanor is threatening or violent? Surely these are facts and circumstances to be considered in evaluating an excessive force outcome. As psychologist James Fyfe observed:

> Discussions of police violence are often blurred by the failure to distinguish between violence that is clearly extralegal and abusive and violence that is simply the necessary result of police incompetence. This distinction is important because the causes of these two types of violence, and the motivations of the officers involved, vary greatly. Extralegal violence involves the willful and wrongful use of force by officers who knowing exceed the bounds of their office. Unnecessary violence occurs when well-meaning officers prove incapable of dealing with the situations they encounter without needless or too hasty resort to force.[121]

B. WRONG, ROGUE, OR MERELY MISTAKEN?

No protection under "objective reasonableness" seems to exist for civilians faced with officers who turn violent or behave dangerously under the color of law. Perhaps no better example of this is the case of Jeronimo Yanez, a Ramsey, Minnesota police officer who shot and killed Philando Castile on camera, in front Castile's girlfriend and her daughter.[122] The shooting occurred after Castile volunteered that he had a gun in his possession, for which

119. *See Mullenix v. Luna*, 136 S. Ct. 305 (2015).

120. Mendez v. Cnty. of L.A., 815 F.3d 1178, 1191-1193 (9th Cir. 2016), *see also* L.A. Cnty. v. Mendez, 137 S. Ct. at 1549.

121. James Fyfe, *The Split-Second Syndrome and Other Determinants of Police Violence, in* CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 517, 517 (Roger G. Dunham & Geoffrey P. Alpert eds., 7th ed. 2015).

122. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html.

he had a lawful concealed-carry permit.[123] According to a report prepared for the prosecutor by use-of-force expert Jeffrey Noble, "The totality of the facts and circumstances indicate that Officer Yanez's use of deadly force was unnecessary, objectively unreasonable, and inconsistent with generally accepted police practices."[124] In a rare turn of events, Yanez was charged with criminal manslaughter and two counts of endangering the other occupants in the car.[125] He was acquitted of these crimes at trial.[126]

Perhaps the critical fact in the Yanez case is that although he claimed that he stopped Castile based on Castile's similarity with a suspect in a bank robbery, "no reasonable police officer would have believed that Mr. Castile matched the description of an armed robbery suspect."[127] Officer Yanez did not treat the stop as an officer might when confronting an armed criminal, and instead "conducted a routine car stop due to a faulty brake light and approached the driver's door of Mr. Castile's vehicle with his handgun holstered."[128] While the Castile case will not have its day in civil court,[129] it is not difficult to imagine that Yanez himself might have enjoyed qualified immunity, because (1) Yanez was not plainly incompetent or criminal (witness his acquittal in criminal court); and (2) Castile was armed.[130]

Mistakes of fact and law figure importantly in use of force cases. A particularly disturbing trend has officers confusing their own handguns for tasers.[131] The predictable response is that it was an "honest" mistake. The fact that a law enforcement officer has an honest belief that he or she is acting in accord with the Constitution and state law can mean that the target is now fair game.[132] Although some states (such as North Carolina and New Mexico) specifically disavow a "good faith" exception to their statutory exclusionary

123. *Id.*

124. Jeffrey J. Noble, *Expert Report of Jeffrey J. Noble* 5, Ramsey County Attorney's Office, Yanez Case Trial Documents, https://www.ramseycounty.us/sites/default/files/County%20Attorney/Noble%20Use%20of%20Force%20Final%20Report.pdf (last visited Nov. 14, 2017).

125. Smith, *supra* note 122.

126. *Id.*

127. Noble, *supra* note 124, at 45-46.

128. *Id.* at 4.

129. Mark Berman, *Minnesota Officer Who Killed Philando Castile Formally Leaves Police Department, Given $48,500 Buyout*, WASH. POST (July 11, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/11/minnesota-officer-who-killed-philando-castile-formally-leaves-police-department/?utm_term=.a7ed047d6d12 ("The agreement with Yanez comes not long after Castile's family reached a $3 million settlement with St. Anthony, which avoids a federal civil rights lawsuit his relatives had pledged to file.").

130. Smith, *supra* note 122.

131. *E.g.*, People v. Mehserle, 206 Cal.App.4th 1125, 142 Cal.Rptr.3d 423 (2012); Henry v. Purnell, 652 F.3d 524 (2011); Torres v. City of Madera, 648 F. 3d 1119 (2011).

132. *See* Heien v. North Carolina, No. 13-604, 574 U.S. ___, 1 (2014) (citing *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949)) (internal citations omitted) (The 8-1 majority held that a police officer's reasonable mistake of law can provide individualized suspicion to justify a traffic stop).

rules, the Supreme Court disagrees: "The Fourth Amendment requires government officials to act reasonably, not perfectly, and gives those officials 'fair leeway for enforcing the law.' Searches and seizures based on mistakes of fact may be reasonable. The limiting factor is that 'the mistakes must be those of reasonable men.'"[133]

Although it is not a use-of-force case, *Heien v. North Carolina* raises this issue of "mistake" and its consequences.[134] In *Heien*, an officer's honest but apparently incorrect understanding of the traffic statutes (mistake of law) provided him with the excuse he needed to (1) seize the occupants of the vehicle, (2) extract inconsistent and suspicious statements from the parties, and (3) engage in a consent search of the vehicle, finding contraband.[135] The Supreme Court adjudged that the North Carolina officer had acted reasonably.[136]

Acts based on honest but mistaken beliefs are particularly egregious when an officer finds evidence to support a lawful arrest, or to justify the use of force. The tendency is to apply a kind of post hoc rationale: the belief must have been correct, because evidence/contraband/weaponry was found.[137] The fact is, as was the case in *Heien*, officers routinely target persons they deem suspicious but not rising to the level of "reasonable suspicion" and monitor or follow the suspect until some reasonable suspicion/probable cause emerges—as it almost inevitably will.[138]

C. SUBSTANTIVE DUE PROCESS: NOT DEAD YET

Even though police use of force may be "objectively reasonable" at some point, it is often the mere decision to make contact, and the method of that contact, that sets the stage for eventual struggle. This raises the substantive due process question: what is the "sufficient substantive justification" for some governmental action, as contemplated by Professor Chemerinsky?[139] What is it about the situation that caused the police to act in the first instance, before the fight broke out?

There is no question that reckless, dangerous conduct on the part of the civilian can justify deadly force from the police. In *Scott v. Harris* the police

133. *Id.*
134. *Id.*
135. *Id.* at 2.
136. *Id.* at 12-13.
137. *Id.* at 12 (". . . Heien is not appealing a brake-light ticket; he is appealing a cocaine-trafficking conviction as to which there is no asserted mistake of fact or law.").
138. *Id.* at 2 ("Shortly before 8 a.m., a Ford Escort passed by. Darisse thought the driver looked 'very stiff and nervous,' so he pulled onto the interstate and began following the Escort. A few miles down the road, the Escort braked as it approached a slower vehicle, but only the left brake light came on. Noting the faulty right brake light, Darisse activated his vehicle's lights and pulled the Escort over.").
139. Chemerinsky, *supra* note 32.

caused severe, permanent disability to a driver who was attempting to elude the officers at high speed.[140] The Supreme Court ruled 8-1 that this was an appropriate application of deadly force, justified by the danger Harris presented to officers and others.[141]

In *Sacramento v. Lewis*, a factually similar case to *Harris*, the officers pursuing a fleeing motorcycle on which Lewis was a passenger were unable to stop in time when the bike fell over and Lewis was killed when struck by their police car.[142] The Court held that Lewis was not seized pursuant to the Fourth Amendment when the accident occurred, and that a substantive due process review was appropriate.[143] According to the opinion of Justice Souter, "[A] purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."[144] In other words, evidence of "a purpose to cause harm" prior to a seizure may give rise to a substantive due process violation.

Substantive due process and its "conduct that shocks the conscience" standard may not protect a suspect—usually a young man—from confrontation with an eager officer or two as they provide the impetus for a resisting arrest charge. But what if a purpose to cause harm arises *because* the suspect has resisted? The American Law Institute proposes "proportionality" in the use of force:

> [P]roportionality means that even when force is the minimum necessary force to achieve a law-enforcement end, its use may be impermissible if the harm it would cause is disproportionate to the end that officers seek to achieve. The proportionality principle demands that law-enforcement interests go unserved if achieving them would impose undue harm.[145]

What of the instance where at least six (eventually more) officers are present while one of them chokes a man to death as he repeatedly complains that he can't breathe, in public and on film?[146] Is overwhelming force the objectively reasonable response to resistance by an unarmed civilian? Advertent or not, surely deadly force is an extreme reaction to the crime of selling loose, untaxed cigarettes.[147]

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140. *Scott v. Harris*, 550 U.S. 372 (2007).
141. *Id.*
142. *City of Sacrament v.* Lewis, 523 U.S. 833, 837 (1998).
143. *Id.* at 833.
144. *Id.* at 836.
145. Barry Friedman et al., *Proportional Use of Force*, THE ALI ADVISOR, (March 23, 2017), http://www.thealiadviser.org/policing/proportional-use-force/.
146. Al Baker, J. David Goodman, & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES, (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0.
147. *Id.*

A discussion of the pros and cons of "broken window policing" is beyond the scope of this review. What is squarely within its purview is the question of when resistance to an arrest for some petty violation will justify fatal use of force. "The necessity inquiry is a factual one: 'Did a reasonable non-deadly alternative exist for apprehending the suspect?'"[148]

In terms of potential for resistance, there is no reliable difference between arresting someone for a broken taillight and for suspicion of murder.[149] Accordingly, there are times when a police officer's best course of action may be to issue a warning, or write a citation, or simply walk away and if appropriate, apply for a warrant. To force the moment to its crisis in the zeal to make an arrest may be not be reasonably justified and, practically speaking, simply unnecessary—sometimes shockingly so.

CONCLUSION

The United States is a dangerous place, and being a police officer here is a dangerous job.[150] It is unsurprising that for people who rightly or wrongly draw police attention, being approached by an officer likewise portends danger.[151] The time for the police to hesitate is not when they are in the middle of an encounter. The time for them to hesitate is before the encounter occurs. Consideration of the purpose and aims of the interaction and the desired outcome weighed against the likelihood of confrontation should figure in their thinking. To their credit, some police agencies now offer training in implicit bias, de-escalation techniques, and other policies aimed at making police "guardians" instead of "warriors."[152]

The "totality of the circumstances test" as discussed in *Garner* and referenced in *Graham* draws specific attention to the severity of the crime and the likely threat the suspect presents.[153] A narrow focus on the moment of force

148. Forrett v. Richardson, 112 F. 3d 416, 420 (citing Brower v. County of Inyo, 884 F.2d 1316, 1318 (9th Cir.1989)).

149. *But cf.* John Kavanagh, *The Occurrence of Resisting Arrest in Arrest Encounters: A Study of Police-Citizen Violence*, 22 CRIM. JUST. REV. 1, 16 (May 1, 1997) (discussing the role of citizen and police attitudes in a review of resisting-arrest events).

150. *See* Lisa Desjardins, *The History of U.S. Police Deaths in the Line of Duty* (PBS Newshour television broadcast July 8, 2016) https://www.pbs.org/newshour/nation/the-history-of-u-s-police-deaths-in-the-line-of-duty.

151. *See* Jamila's Lartey, *By the Numbers: U.S. Police Kill More in Days Than Other Countries Do in Years*, THE GUARDIAN (June 9, 2015) https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries.

152. *See* "THE MARSHALL PROJECT" , *De-escalation Training: A Curated Collection of Links,* https://www.themarshallproject.org/records/1220-de-escalation-training.

153. *Graham*, 490 U.S. at 396 ("Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether

is a misreading of *Graham* and a failure of the "totality of the circumstances" review. Where is the "balancing of competing interests" between the individual's rights and government aims?[154] What happened to the requirement that reasonableness depends on both *when* and *how* a seizure is made?[155] There must be a determination that the force employed was justified by a legitimate state interest in protecting the rights of all its citizens—including the person against whom force was used.[156]

Justice Blackmun noted that reasonable use of force under a Fourth Amendment analysis rarely will raise substantive due process concerns.[157] The corollary is equally true-–Fourth Amendment violations are often bound together with substantive due process abuses. Because they so often go hand in hand, the first question in a use-of-force inquiry should be the substantive justification for the encounter.

Objective evidence of an officer's vindictive, hostile, or positive *conduct* (as distinguished from "intentions and motivations") prior to, during or after any use of force should be identified as a legitimate part of a "totality of the circumstances" Fourth Amendment analysis.[158] Things an officer said and did to preserve the peace and to protect all involved reflect his or her behavior, not "intentions and motivations." Those who object by reference to *Graham's* prohibition against hindsight misread the text.[159] All reviews of past events require hindsight. It seems obvious that the Rehnquist Court was referencing hindsight that considers facts not available to the police in the moment when force was judged necessary-–such as the fact that Graham was sick and not intoxicated. This is easily distinguished from police who violated departmental policy by employing a dangerous and discredited choke hold on a person suspected of a tax law offense.[160]

It is axiomatic that the Bill of Rights is meant to be a restraint on governmental interference with individual freedoms. Clearly, a narrow reading of "objective reasonableness" has twisted the Fourth Amendment definition of

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he is actively resisting arrest or attempting to evade arrest by flight."(citing Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

154. *Garner*, 471 U.S. at 8-9 ("[T]he question was whether the totality of the circumstances justified a particular sort of search or seizure").

155. *Id.*at 8.

156. 490 U.S. at 394 ("Where . . . the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable. . . seizures' of the person.").

157. *Id.*at 399-400 (Blackmun, H., concurring).

158. *Id.* at 399 ("Of course, in assessing the credibility of an officer's account of the circumstances that prompted the use of force, a factfinder may consider, along with other factors, evidence that the officer may have harbored ill-will toward the citizen.").

159. *Id.* at 396.

160. *See* Baker et al., *supra* note 146.

"reasonable" into something that severely limits the ability of citizens to seek redress for official misconduct. The time has come to return to a more encompassing understanding of "totality of the circumstances." The investigation should review the sufficiency of the government's justification to act, and include precipitating behavior by government agents as–-at least-–one variable in the analysis.

Did the suspect pose a threat that necessitated his or her seizure? Was the force employed proportional to the presumed offense and surrounding circumstances? Did the officer(s) act in accordance with their own departmental regulations? Qualified immunity requires that officers facing excessive force allegations know when they are violating "clearly established statutory or constitutional rights."[161] Objective reasonableness should require law enforcement officers to know when they are violating clearly established department policy.

It is not in the cause of justice or public interest to hamstring the police or to make their job unreasonably difficult. The rule of law requires enforcement. Police in the U.S. have drifted for some time in the direction of greater latitude in their use-of-force decisions, presumably encouraged by the apparently meager number of successful excessive force claimants[162] and by a public that believes strongly in "law and order." While law-and-order may be the go-to phrase for a politician seeking applause, it is the duty of the courts to protect the minority view. The minority view, in this instance, is that law-and-order does not trump the right to be free from state-sponsored harassment, unwarranted police violence and plainly indefensible use of deadly force.

161. *Mullenix*, 136 S. Ct. at 308.

162. *See* Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST, (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.597ef5c6f285. *See also* PUB. L. 103–322, TITLE XXI, §210402, SEPT. 13, 1994, 108 STAT. 2071, (declaring that the U.S. Attorney General "shall, through appropriate means, acquire data about the use of excessive force by law enforcement officers." No such data exists.).