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Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims

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DISMANTLING THE TRAP: UNTANGLING THE CHAIN OF EVENTS IN EXCESSIVE FORCE CLAIMS

By Cara McClellan[1]

In the wake of repeated police shootings of unarmed Black men and women, police departments across the country are focusing on de-escalation. Yet federal courts reviewing Fourth Amendment excessive force violations are often unwilling to take into account how an officer's pre-seizure conduct may have affected the need to use force during a civilian encounter. I argue that as part of the Graham v. Connor reasonableness analysis, courts reviewing excessive force claims should consider prior police conduct that impacted the need for force when the officer predictably causes the civilian to respond by employing an overly aggressive tactic. I provide examples of how traditional principles of causation in tort law could apply and provide a workable approach. Moreover, I argue that the severity of the crime provides context that is essential to interpreting causation in the entire chain of events that occurs during the police-civilian interaction.

> "We were coming from playing basketball and some of us weren't even wearing our t-shirts. [The police] started patting us down like we're gonna have a gun in our shorts. One of the police officers actually took the food I just bought and threw it down and was like 'You got an issue with what I just did?' I guess they were trying to start an issue where they could arrest me. I wanted to talk back. I actually started talking back, but then I just got quiet. 'Cause I'm basically falling for their trap. If they want me to be locked up

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then they want me to say something back or do something."[2]

I. INTRODUCTION: THE TRAP

How does a conversation about a broken brake light escalate into a fatal shooting? On July 6, 2016, Officer Jeronimo Yanez stopped Philando Castile on a busy street in Falcon Heights, Minnesota. His girlfriend sat in the passenger seat and his daughter in the backseat. The traffic

[2] This quotation comes from interviews completed in New Haven, Connecticut, in 2010 as part of an ethnographic study on how inner-city students view the police. Cara McClellan, *Teacher/Police: How Inner-City Students Perceive the Connection Between the Education System and the Criminal Justice System*, 8 YALE J. SOC. 53, 60 (2012). The young adults interviewed expressed a belief that the police profile youth of color as criminals, not as citizens who deserve protection.

stop was pretextual—Officer Yanez was not in fact motivated to stop Castile because his brake light was broken, but because he believed Castile matched the description of a robbery suspect based on his Afrocentric features, specifically his "wide-set nose."[3] Officer Yanez requested that Mr. Castile provide his license and registration. Before moving, Mr. Castile informed the officer that he possessed a firearm in the car that he was lawfully registered to carry.[4] Officer Yanez then yelled "do not pull it out!" and Castile responded that he would not. Still when Castile began to reach for his ID and wallet as requested, Officer Yanez quickly fired seven shots killing Castile.

The frequent use of excessive force by police against civilians, particularly young, African American men and women, is one of the most significant problems our country faces.[5] In the past several years, this issue has entered the public consciousness as a result of several widely publicized shootings and other uses of excessive force.[6] Like many

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[3] Mitch Smith, *Video of Police Killing of Philando Castile Is Publicly Released*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/us/police-shooting-castile-trial-video.html.

[4] Stephen Rex Brown, *Philando Castile Had a Permit for the Gun He Carried When Minnesota Cop Shot Him to Death*, N.Y. DAILY NEWS (July 9, 2016), http://www.nydailynews.com/news/national/philando-castileminnesotagun-permit-article-1.2705537.

[5] According to the Washington Post, there were 963 civilians killed by police officers in 2016. John Sullivan, et al., *Number of Fatal Shootings By Police Is Nearly Identical To Last Year*, WASH. POST (July 1, 2017), https://www.washingtonpost.com/investigations/number-of-fatal-shootings-by-police-is-nearly-identical-to-last-year/2017/07/01/98726cc6-5b5f-11e7-9fc6-c7ef4bc58d13_story.html?utm_term=.7fda7ac5ef80. African American males represent nearly 1/4 of unarmed people killed by police, but only 6% of the population. *Id.* Police violence against African American women and African American transgender people is also a significant, but difficult to measure problem. *See generally* ANDREA J. RITCHIE, INVISIBLE NO MORE POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017).

[6] *See* Roger A. Fairfax, Jr., *The Grand Jury and Police Violence Against Black Men*, in POLICING THE BLACK MAN 209–234 (Angela J. Davis ed., 2017) (documenting a recent history of African American men killed by police); KIMBERLÉ WILLIAMS CRENSHAW & ANDREA J. RITCHIE, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2015),

others, I have watched footage of these shootings, which repeatedly reveal officers responding aggressively with scant evidence of a threat to the officers' safety. Like many others, I have wondered: how did the situation escalate so quickly?

There are, no doubt, multiple explanations, including implicit bias and stereotypes that lead officers to view African Americans as threatening.[7] My goal in this Article is not to provide a comprehensive account of the problem or potential solutions, but merely to suggest a role that Fourth Amendment excessive force jurisprudence can play in deterring the use of police tactics that contribute to the need for officers to use force.

Interactions between police and young, African American men and women are often highly charged challenges to personal dignity and safety.[8] Many young people experience these encounters as a sort of quandary (or as the quotation describes it, a "trap"), in which they must submit to unfair and aggressive treatment because they risk violence and criminal punishment.[9] As in the quotation at the start, many African Americans describe a feeling that officers behaved in a way that was disproportionate to what was

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https://perma.cc/4DU5-7BQT (documenting a recent history of African American women killed by police).

[7] *See, e.g.*, Kimberly Barsamian Kahn & Paul G. Davies, *Differentially Dangerous? Phenotypic Racial Stereotypicality Increases Implicit Bias Among Ingroup and Outgroup Member*s, 14 GROUP PROCESSES AND INTERGROUP RELATIONS 569 (2011) (finding that Black targets with darker skin, broader noses, and fuller lips elicited stronger implicit bias in split-second "shoot/don't shoot" situations than other targets.

[8] *See generally* Frank Rudy Cooper, *Who's the Man?: Masculinities Studies, Terry Stops, and Police Training*, COLUM. J. OF GENDER AND L. 671 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1257183 (arguing that police use *Terry* stops as an act of domination to validate their sense of esteem and masculinity).

[9] My purpose in describing this experience is not to suggest that police stops which lack suspicion and serve to humiliate young men and women cause a harm that can be equated with police encounters that end in the use of lethal force, but rather that the two are connected when one considers how police encounters escalate to involve force that could have been prevented.

warranted in the situation and designed to provoke a response.

Department of Justice investigations of police practices in Ferguson and Baltimore, which found systemic overreliance on excessive force against African American civilians,[10] have highlighted the need to focus on deescalating police-civilian encounters in order to minimize the need to use force. The resulting consent decrees require police to undergo de-escalation training and employ new tactics that include slowing down the pace of an incident, waiting out subjects, creating distance between the officer and the threat, and requesting additional resources, such as behavioral healthcare providers, to reduce the need for force.[11] The fundamental insight of de-escalation research and training is that "tactics leading up to the use of force can influence whether the force used was necessary."[12]

In stark contrast with this approach, this Article will describe how the majority of federal courts continue to analyze police encounters without considering how the officer's conduct may have impacted the need for force. Part I outlines controlling law determining whether a police officer used excessive force, applying a totality of the circumstances test. Part II explains how federal courts of appeal apply the totality

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[10] The Department of Justice determined that the Ferguson Police Department used excessive force discriminatorily against African Americans. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[11] *See, e.g.*, Baltimore Consent Decree at 43, *United States v. Baltimore Police Dep't.*, No. CV JKB-17-99, 2017 WL 1301500 (D. Md. Apr. 7, 2017) (ECF No. 2–2), https://www.justice.gov/opa/file/925056/download [hereinafter Baltimore Consent Decree]. Seven police forces across the country are piloting a de-escalation training program known as Integrating Communications, Assessment and Tactics developed by the Police Executive Research Forum and the Department of Justice's Office of Community Oriented Policing Services. *See generally* POLICE EXECUTIVE RESEARCH FORUM, INTEGRATING COMMUNICATIONS, ASSESSMENT AND TACTICS (2016), http://www.policeforum.org/assets/icattrainingguide.pdf.

[12] Consent Decree at 51.

of the circumstances analysis differently, describing three approaches: (1) courts that do not consider any evidence of police conduct prior to the seizure; (2) courts that apply a segmented approach and consider earlier police misconduct separately from the seizure that constitutes the alleged excessive force; and (3) courts that apply tort principles of proximate causation to determine whether police conduct is directly connected to the use of excessive force. Part III describes the recent *County of Los Angeles v. Mendez* decision in which the Supreme Court rejected the Ninth Circuit's provocation doctrine, but left open the question of whether a totality of the circumstances analysis should consider earlier conduct that caused the need to use force.[13] Part IV argues that the severity of the crime provides essential context for determining causation and whether an officer took an overly aggressive tactic that foreseeably created a civilian response. The conclusion offers reflections on why in today's world of pervasive criminal regulation and pretext policing it is essential that courts understand excessive force claims as an entire chain of events. It argues that if current excessive force jurisprudence does not change, the next generation of minority citizens will grow up feeling "trapped" by police conduct, undermining the legitimacy of our criminal justice system and American democracy. [14]

II. OBJECTIVE REASONABLENESS UNDER THE TOTALITY OF THE CIRCUMSTANCES

A seizure occurs when police use force or assert authority in a way that causes a civilian to submit.[15] The Fourth Amendment governs the ways in which officers are permitted to assert authority and use force in conducting an

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

[14] *See* Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 160 (2014) (discussing the different ways in which the criminal justice system educates African American youth and shapes their view of the legitimacy of the democracy).

[15] California v. Hodari D.*,* 499 U.S. 621, 629 (1991).

investigatory stop or seizure under particular circumstances.[16] Victims of excessive police force can sue police officers under 42 U.S.C. § 1983[17] and claim that an officer's action violated the Fourth Amendment's reasonableness standard.[18] Although not the focus of this Article, it is important to note that in order to overcome qualified immunity, the alleged violation must have been clearly established at the time the officer acted.[19]

In *Graham v. Connor*,[20] the Supreme Court established an objective reasonableness test to determine whether an officer's use of force violated the Fourth Amendment, balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."[21] Ultimately, the question is whether a reasonable officer would have believed that the use of force was necessary. The Court in *Graham* outlined three factors to 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."[22]

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[16] Tennessee v. Garner, 471 U.S. 1, 8–9 (1985) (The question to be decided is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.").

[17] In pertinent part, 42 U.S.C. § 1983 provides as follows: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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.

[18] *Id.* at 395.

[19] Anderson v. Creighton, 483 U.S. 635, 639 (1987) ("whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken") (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982)).

[20] Graham v. Connor, 490 U.S. 386 (1989).

[21] *Id.* at 396 (quoting United States v. Place, 462 U.S. 696, 703 (1983).)

[22] *Id.*

The totality of the circumstances analysis, the Court explained, must be conducted from the officer's perspective "at the moment" that the use of force occurred.[23] "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . . violates the Fourth Amendment." [24] Instead, the calculus of reasonableness must allow "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."[25]

Following *Graham v. Connor*, lower courts were left to interpret the relevant timeframe for evaluating an officer's conduct under an excessive force claim.[26] The approaches of the different federal courts of appeal can generally be divided into three groups. First, there are courts that hold that pre-seizure officer conduct is never relevant. Second, some courts apply a segmented approach, considering allegations of police misconduct earlier in the encounter separately from the alleged seizure that constituted excessive force. Third, some courts apply a test that considers how attenuated earlier police conduct is to the force employed in order to determine whether to admit evidence of pre-seizure conduct.

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[23] *Id.*

[24] *Id.* at 396–97 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

[25] *Id.* at 396.

[26] *See* Aaron Kimber, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651, 654 (2004) ("The specific set of factors that fall within [the totality of the circumstances test] is not clear, and the circuits have split on whether pre-seizure police conduct leading up to the use of force is within its scope.") (collecting cases); Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 265 (2003) ("While some circuits have held that officers' actions leading up to a violent incident should be taken into account in assessing the reasonableness of the officers' use of force, others have taken a narrower view, holding that police actions prior to a shooting are not relevant in assessing the reasonableness of the force used.") (collecting cases).

Importantly, all courts consider the civilian's conduct as a factor in the analysis; the disagreement lies only as to whether it is appropriate to consider the officer's pre-seizure conduct.

III. EVALUATING POLICE CONDUCT IN EXCESSIVE FORCE CLAIMS

A. Courts That Exclude All Pre-Seizure Conduct

The Second, Eighth and Eleventh Circuits have generally held that an officer's pre-seizure conduct is not relevant under *Graham*.[27] These courts rely on language in *Graham* stating that the analysis should consider what the officer knew at the moment the use of force occurred, since officers are forced to make "split-second judgments."[28] Courts excluding pre-seizure conduct reason that reasonableness is determined based only on the information possessed by the officer at the moment that force is employed. For example, in *Schulz v. Long*, the Eighth Circuit held that a plaintiff's evidence that an officer's conduct prior to the moment of a seizure led to a need to use force must be excluded. [29] *Schulz* involved a paranoid schizophrenic who barricaded himself in his parents' basement. His parents called the police for help. The *Schulz* court declined to consider whether the

[27] *See*, *e.g.*, Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996) ("[The 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."); Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993) (holding that the police chase of a fleeing tractor trailer was not relevant to the subsequent shooting of the civilian driver because courts should consider "only the seizure itself, and not the events leading up to the seizure, for reasonableness under the Fourth Amendment"); Menuel v. City of Atlanta, 25 F.3d 990, 997 (11th Cir. 1994) (limiting review to the exact moment when the officer's shooting began because "[r]econsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred" (quoting Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994))).

[28] *Graham*, 490 U.S. at 397.

[29] Schulz v. Long, 44 F.3d 643, 647–48 (8th Cir. 1995).

police mishandled the events leading up to the moment the officer shot Schulz.[30] The Eighth Circuit reasoned that the *Graham* Court's use of the phrase "at the moment" in describing the reasonableness inquiry indicated that the reasonableness review extends only to those facts "known to the officer at the precise moment the officers effectuate the seizure." [31] These facts included that the plaintiff was armed with a double-bladed axe. According to the *Schulz* court, because the seizure was reasonable at the moment that it occurred, the facts leading up to the seizure were irrelevant. To hold otherwise would limit an officer's ability to defend himself during a rapidly evolving and increasingly dangerous encounter.

B. Courts That Apply The Segmented Approach

The Fourth, Fifth, Sixth and Seventh Circuits have generally reached the conclusion that "pre-seizure conduct is not subject to Fourth Amendment scrutiny."[32] In some cases, when faced with multiple claims of unreasonable police action, these courts attempt to divide prior events from those immediately preceding the use of force by splitting interactions into temporal segments and then analyzing the moments immediately before each violation separately. [33] This approach allows courts flexibility. As the Sixth Circuit described in *Greathouse v. Couch*:[34]

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[30] *Id.*

[31] *Id.* at 648.

[32] Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992) (citations omitted). *See also* Elliott v. Leavitt, 99 F.3d 640, 643 (4th Cir. 1996) (holding that the reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis); Young v. City of Killeen, 775 F.2d 1349 (5th Cir. 1985) (finding that an officer may use lethal force when threatened even if he negligently failed to follow procedure and created the circumstances leading to the need for force).

[33] Livermore v. Lubelan, 476 F.3d 397, 406–07 (6th Cir. 2007) ("The proper approach . . . is to view excessive force claims in segments" and "disregard" events in earlier segments in analyzing subsequent claims of excessive force.)

[34] Greathouse v. Couch, 433 F. App'x 370 (6th Cir. 2011).

> We apply a "segmented approach" to excessive-force claims, in which we "carve up" the events surrounding the challenged police action and evaluate the reasonableness of the force by looking only at the moments immediately preceding the officer's use of force . . . Our segmented approach applies even to encounters lasting very short periods of time.[35]

In *Plakas v. Drinski*, the Seventh Circuit elaborated on the justification for the segmented approach, explaining that "[t]he time-frame is a crucial aspect of excessive force cases" because "[o]ther than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. . . . In this sense, the police officer always causes the trouble."[36]

In *Boyd v. Baeppler*, officers received a radio call that an African American male had fired a shot, pointed a gun at three people outside of a Wendy's, and fled.[37] Shortly after, the officers claimed they saw Boyd, who met the description of the suspect, running with a gun in his hand.[38] According to the officers, when they could not persuade Boyd to stop, they shot and killed him.[39] Analyzing the officers' use of force in segments, the majority of the panel found that only the facts surrounding the officers' confrontation with Boyd were relevant, including Boyd's failure to respond to demands that he stop running and officer testimony that Boyd pointed a gun at the officers in the seconds before he was shot.[40] The majority excluded as irrelevant evidence of the circumstances leading up to the encounter, including evidence as to whether Boyd was running from the officers in an attempt to escape, whether Boyd had in fact fired the reported shot, and whether

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[35] *Id.* at 372–73 (internal citations omitted).
[36] Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994).
[37] Boyd v. Baeppler, 215 F.3d 594, 597 (6th Cir. 2000).
[38] *Id.*
[39] *Id.*
[40] *Id.* at 601.

Boyd had committed any crime prior to being confronted by the police.[41]

The segmented approach does not lead to consistent rules, particularly because it is difficult to determine how to divide an encounter into temporal segments. The Sixth Circuit admitted in *Claybrook v. Birchwe* that the events in that case were not so easily divided.[42] The case involved undercover police officers shooting a civilian, Claybrook, after approaching him in an unmarked car and, without identifying themselves, demanding that he drop his weapon.[43] Claybrook's estate alleged that the officers fired the first shot, causing Claybrook to return fire.[44] Later, during a second exchange of fire, Claybrook positioned himself behind concrete steps and pointed a gun at the officers.[45] It was during this second exchange that Claybrook was ultimately killed.

The officers argued that events should be divided into two segments: the first beginning with the officers' decision to confront Claybrook through the initial firefight between the officers and Claybrook, and the second beginning when Claybrook hid behind the concrete steps and ending with the shots that killed him. From this perspective, evidence that the officers approached Claybrook out of uniform, in an unmarked car, and opened fire on Claybrook, would be excluded from the analysis of whether the use of lethal force was reasonable because only the second round of firing resulted in the officers' lethal shooting of Claybrook.[46] The court rejected this approach, opting instead to divide the events into three segments: "first, the officers' approach and

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[41] *Id.* at 599–600.

[42] Claybrook v. Birchwell, 274 F.3d 1098, 1103–05 (6th Cir. 2001) (segmenting a 1-2 minute encounter and finding the earlier shots that did not hit the suspect should be used in analyzing whether the deadly force was reasonable, even though it excluded evidence of the officers' actions leading up to the beginning of the shooting).

[43] *Id.* at 1104–05.

[44] *Id.*

[45] *Id.* at 1102 (quoting Claybrook v. Birchwell, 199 F.3d 350, 355 (6th Cir. 2000)).

[46] *Id.* at 1104.

confrontation of Claybrook; second, the initial firefight . . . ; and third, the shots fired after Claybrook's move to a position behind the concrete steps."[47] Under these circumstances, the *Claybrook* court concluded that the officers could not justify their use of lethal force as self-defense. The court explained that it reached this result because "plaintiffs brought suit to contest *all* use of deadly force . . . not only the shot that took his life."[48] Thus, the court was willing to segment earlier police misconduct prior to shots being fired, but not after.

In *Williams v. Indiana State Police Dep't*, the Seventh Circuit admitted that its own application of case law was "far from clear as to the relevance of pre-seizure conduct, or even as to a determination as to what conduct falls within the designation 'pre-seizure.'"[49] The court explained that although the majority of its cases held that pre-seizure conduct may not form the basis for a Fourth Amendment claim, that did not "mean that [] pre-seizure conduct is irrelevant to the Fourth Amendment claim. The sequence of events leading up to the seizure is relevant because the reasonableness of the seizure is evaluated in light of the totality of the circumstances."[50]

The Fourth Circuit initially rejected segmenting, but later changed course. In *Rowland v. Perry*, the civilian,

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[47] *Id.* at 1105.

[48] *Id.*

[49] Williams v. Ind. State Police Dep't, 797 F.3d 468, 482–83 (7th Cir. 2015), *cert. denied sub nom.*; Blanchard v. Brown, 136 S. Ct. 1712 (2016). *Compare* Marion v. City of Corydon, Indiana, 559 F.3d 700, 705 (7th Cir. 2009) ("Pre-seizure police conduct cannot serve as a basis for liability under the Fourth Amendment; we limit our analysis to, force used when a seizure occurs."), *and* McCoy v. Harrison, 341 F.3d 600, 605 (7th Cir. 2003) ("Even unreasonable, unjustified, or outrageous conduct by an officer is not prohibited by the Fourth Amendment if it does not involve a seizure." (alteration omitted) (internal quotation marks omitted)) *with* Sledd v. Lindsay, 102 F.3d 282, 288 (7th Cir. 1996) (observing that under Seventh Circuit law, if an officer conceals his identity as an officer, doctrine controlling the use of lethal force is modified because an officer "unreasonably create[s an] encounter that [leads] to a use of force" by "entering a private residence late at night with no indication of identity").

[50] *Williams*, 797 F.3d at 483.

Rowland, was a thirty-seven-year-old man who was mildly retarded.[51] Although the accounts of the officer, Officer Perry, and Rowland differed, what was clear was that the officer believed that Rowland had picked up a five dollar bill after he saw a woman drop it, the officer told Rowland to return it, and, for whatever reason, Rowland did not do so. The officer confronted Rowland and a struggle began. At some point, Officer Perry twisted Rowland's leg, tearing his anterior cruciate ligament such that Rowland later required surgery and was left partially disabled.[52] Officer Perry argued that the excessive force claim should be analyzed in stages, or, in other words, through a segmented approach.[53] The court rejected Perry's proposed approach as "miss[ing] the forest for the trees."[54] "Artificial divisions in the sequence of events do not aid a court's evaluation of objective reasonableness."[55] The court then applied the *Graham* factors and concluded "it is impossible to escape the conclusion that a man suffered a serious leg injury over a lost five dollar bill."[56]

In *Waterman v. Batton*,[57] a divided panel of the Fourth Circuit adopted a different approach. The case involved an encounter in which police officers fired an initial round of gunfire at a motorist and then seconds later another round. The officers argued that the shots should not be analyzed in segments. The panel interpreted the controlling cases as failing to clearly establish whether events should not be reviewed outside the "context of the conduct that precipitated the seizure,"[58] and whether a segmented analysis should be applied.[59] The *Waterman* court then looked at the officer's use of lethal force, applying the segmented approach, and determined that while the early rounds of gunfire were

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[51] Rowland v. Perry, 41 F.3d 167, 171 (4th Cir. 1994).
[52] *Id.* at 171–72.
[53] *Id.* at 173.
[54] *Id.*
[55] *Id.*
[56] *Id.* at 174.
[57] Waterman v. Batton, 393 F.3d 471, 481 (4th Cir. 2004)
[58] *Id.* at 480.
[59] *Id.*

justified, the later rounds were not, because the immediate threat to officer safety had been alleviated.[60] As *Waterman* reveals, courts that try divide an incident into segments are often concerned that the reasonableness analysis changes during prolonged encounters as circumstances change.[61] This is true both in cases where officers are faced with a growing threat that justifies increasing use of force, and where the threat is alleviated and the justification decreases with time.

Yet while the strength of the segmented approach is the flexibility to adjust the analysis as circumstances change, the weakness of the segmented approach is that it can be easily manipulated to reach an intended result. Indeed, courts seem to be segmenting events when necessary to avoid reaching a disturbing result, such as in *Claybrook* where manipulating the divisions between segments could have resulted in the exclusion of evidence that undercover officers ambushed and began shooting at a civilian without warning.[62] Moreover, as the *Claybrook* court recognized, segmenting can lead to inconsistent results. In short, a segmented approach does not provide a principle for courts to determine how pre-seizure circumstances are relevant to the eventual use of force.

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[60] *Id.* at 482 (holding that the later round of gunfire was unconstitutional, but that the law at the time was not clearly established in order to defeat qualified immunity).

[61] *See* Dickerson v. McClellan, 101 F.3d 1151, 1162 n.9 (6th Cir. 1996) (observing that a different analysis may apply if it is determined that the officers' initial decision to shoot was reasonable, but there was no justification for continuing to shoot); Ellis v. Wynalda, 999 F.2d 243, 247 (7th Cir. 1993) ("When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity."); Hopkins v. Andaya, 958 F.2d 881, 887 (9th Cir. 1992) (dividing an encounter into two segments and holding that even if the use of deadly force was justified initially, "the exigency of the situation lessened dramatically" and the later use of lethal force was unreasonable).

[62] *Claybrook*, 274 F.3d at 1104.

As Judge Higginbotham excoriated in *Mason v. Lafayette City-Parish Consolidated Government*,[63] appellate judges have yet to explain "from where [they] derive[] the authority to slice a single event and choose from the resulting parts of the appeal which to decide."[64] In *Mason*, a Fifth Circuit panel was asked to consider an encounter in which a police officer fired multiple shots with decreasing justification. In his partial dissent, Judge Higginbotham wrote: "I am at sea as to why the majority slices a single event into distinct segments—seven shots into five and two—then performs the proper analysis with respect to one segment—the final two shots . . ."[65]

Indeed, a segmenting approach could result in courts excluding evidence that the officer himself created the justification for his later use of force. This is because a test that focuses on dividing pre-seizure evidence based on temporal limitations is not suited to analyze a dynamic interaction between an officer and a civilian. As will be discussed in the next section, a causation analysis better provides the flexibility required to determine whether an officer's pre-seizure conduct is sufficiently connected to the use of force to be relevant to the reasonableness determination.

C. Courts That Consider Pre-Seizure Conduct Relevant When Connected To The Need To Use Force Under Traditional Principles Of Causation

The First, Third, and Tenth Circuits have all held that a police officer's actions prior to the use of force are relevant

[63] Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268, 288 (5th Cir. 2015) (Higginbotham, J., dissenting in part) ("At some point, an officer crosses the line between setting up a risky situation and actually himself directly causing the 'threat.'").

[64] *Id.* at 285–86.

[65] *Id.* at 285.

in the reasonableness analysis.[66] These courts interpret *Graham*'s "moment of" the seizure language as preventing the judge from applying a hindsight perspective, and not prohibiting the judge from considering an officer's earlier conduct in the reasonableness analysis.[67] This interpretation of *Graham* makes sense when one considers that the opinion later explains: "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . . violates the Fourth Amendment."[68] Read in context, *Graham*'s "at the moment" language prohibits judges from imposing their own perspective, and not from considering any pre-seizure police conduct.

Graham explicitly identifies the severity of the crime as one of the factors that courts must consider, and therefore requires courts to contextualize an interaction beyond the temporal period when the seizure happened. Similarly, the pre-seizure conduct of a police officer is a non-contemporaneous factor that can provide context for interpreting the reasonableness of the seizure itself.[69] This is

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[66] *See, e.g.*, St. Hilaire v. City of Laconia, 71 F.3d 20, 26 (1st Cir. 1995) ("court[s] should examine the actions of the government officials leading up to the seizure.").

[67] *See, e.g.*, Young v. City of Providence ex rel. Napolitano, 404 F.3d 4, 22 (1st Cir. 2005) (explaining its approach "is most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances'" (quoting Tennessee v. Garner, 471 U.S. 1, at 8–9 (1985)); Abraham v. Raso, 183 F.3d 279, 291 (3d Cir. 1999) ("we do not see how [an alternative approach] can reconcile the Supreme Court's rule requiring examination of the "totality of the circumstances" with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished"); Medina v. Cram, 252 F.3d 1124, 1132 (10th Cir. 2001) ("This approach is simply a specific application of the 'totality of the circumstances' approach inherent in the Fourth Amendment's reasonableness standard." (quoting *Garner*, 471 U.S. at 8–9)).

[68] *Graham*, 490 U.S. at 396–97 (citations and internal quotation marks omitted). *See* Bella v. Chamberlin, 24 F.3d 1251, 1256 n.7 (10th Cir. 1994) ("Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable.").

[69] *See* Deering v. Reich, 183 F.3d 645, 650 (7th Cir. 1999) (emphasizing that it is relevant that the arrest warrant the officers attempted to serve was for a misdemeanor charge). The *Deering* court went on to explain that: "Reasonableness depends on the information the officer

consistent with how courts generally review reasonableness under the Fourth Amendment by considering the prior conduct of the police officer. [70] Courts excluding pre-seizure conduct treat the reasonable officer as if he or she has no memory that informs his or her perspective. [71]

In *Abraham v. Raso*, after collecting cases from different circuits, the Third Circuit concluded that courts lack "any principled way of explaining when 'pre-seizure' events start and, consequently, will not have any defensible justification for why conduct prior to that chosen moment should be excluded."[72] The *Raso* court explained that under the facts of the case before it, excluding evidence of the officer's pre-seizure conduct would effectively mean that it would be asked to consider whether Officer Raso used excessive force in shooting a suspect, Abraham, without considering the "circumstances before the moment Abraham was actually struck by Raso's bullet."[73] The *Raso* court provided several reasons for rejecting the doctrine that pre-seizure police conduct is irrelevant. First, such a "problematic justification" might be "understood as only excluding evidence that helps the plaintiff show the force was excessive" or "undermines the estate's case." [74] Second, "there are considerable practical problems with trying to wrest from a complex series of events all and only the evidence that hurts the plaintiff."[75] Finally,

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possesses prior to and at the immediate time of the shooting . . . . What [the deputy] knew about [the suspect] and the basis for the warrant would seem to fall within these parameters." *Id.* at 650.

[70] *See*, *e.g.*, Kentucky v. King, 563 U.S. 452, 462 (2011) (holding that police can invoke exigent circumstances in order to conduct a warrantless search only "when the conduct of the police preceding the exigency is reasonable" and "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment").

[71] *See*, *e.g.*, Williams v. Ind. State Police Dep't, 797 F.3d 468, 483 (7th Cir. 2015) (explaining that "the circumstances known by [the officer], or even created by him, inform the determination as to whether the lethal response was an objectively reasonable one").

[72] *Raso*, 183 F.3d at 291–92.

[73] *Id.* at 291.

[74] *Id.*

[75] *Id.*

the court reasoned that the term "totality" as used in *Graham* "implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force."[76]

Instead, the *Raso* court concluded that whether an officer's pre-seizure conduct should be considered as part of the totality of the circumstances analysis should be determined by applying traditional principles of causation: "what makes these prior events of . . . consequence [or not] are ordinary ideas of causation, not doctrine about when the seizure occurred."[77] Similarly, the Tenth Circuit has held that "[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own 'reckless or deliberate conduct during the seizure unreasonably created the need to use such force.'"[78] The Tenth Circuit thus "consider[s] an officer's conduct prior to the suspect's threat of force if the conduct is 'immediately connected' to the suspect's threat of force."[79]

This is consistent with how courts have historically understood other kinds of § 1983 claims outside of the excessive force context.[80] Section 1983 imposes liability on a government official who "subjects, or *causes to be subjected*, any citizen . . . to the deprivation of any rights."[81] "Mere negligent actions precipitating a confrontation would not, of course, be actionable under § 1983,"[82] which does not cover officers' 'non-tortious conduct,' such as the use of reasonable

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[76] *Id.*

[77] *Id.* at 292.

[78] Jiron v. City of Lakewood, 392 F.3d 410, 415 (10th Cir. 2004) (quoting Sevier v. City of Lawrence, Kan., 60 F.3d 695, 699 (10th Cir. 1995)).

[79] Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir. 1997) (quoting Romero v. Bd. of Cty. Comm'rs of Cty. of Lake, 60 F.3d 702, 705 n.5 (10th Cir. 1995).

[80] *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) ("[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights . . . .").

[81] 42 U.S.C. § 1983 (emphasis added).

[82] *Sevier*, 60 F.3d at 699 n.7.

force."[83] But the "requisite causal connection is satisfied if the defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of his constitutional rights.'"[84]

That is not to say that determining how attenuated the connection is between an officer's conduct and an officer's use of force will always be straightforward, but there are well established principles to guide this analysis. First, a plaintiff asserting a constitutional tort under § 1983 must establish proximate causation.[85] Proximate causation requires a direct relationship between the challenged conduct and the injury such that the injury was foreseeable,[86] which is" intended to say that the scope of the defendant's liability is determined by the scope of the risk he [tortiously] created."[87] Second, a cause is not a proximate cause if an intervening force occurred that foreseeably led to the harm at issue.[88] "[D]etermining whether a particular intervening force is or is not a superseding cause of the harm is in reality a problem of determining whether the intervention of the force was within the scope of the reasons imposing the duty upon the actor to refrain from [the prohibited] conduct."[89] Applying these principles to excessive force claims, officers are not liable for harm produced by a superseding cause. [90] For example, as the Third Circuit

[83] Bodine v. Warwick, 72 F.3d 393, 400 (3d Cir. 1995).

[84] Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990) (quoting Conner v. Reinhard, 847 F.2d 384, 397 (7th Cir.1988))..

[85] *See, e.g.*, Murray v. Earle, 405 F.3d 278, 290 (5th Cir. 2005) ("Section 1983 . . . require[s] a showing of proximate causation, which is evaluated under the common law standard.").

[86] A harm is not "foreseeable" simply because it is conceivable; rather, it must be "the natural and probable consequence." Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U.S. 469, 475–76 (1876).

[87] D. Dobbs et al., THE LAW OF TORTS § 205 (2d ed. 2016).

[88] *See* Staub v. Proctor Hosp., 562 U.S. 411, 420 (2011) ("A cause can be thought 'superseding' only if it is a 'cause of independent origin that was not foreseeable.'") (internal quotation marks and citation omitted).

[89] RESTATEMENT (SECOND) OF TORTS § 281 cmt. h (AM. LAW INST. 2017).

[90] *Bodine*, 72 F.3d at 400 (citing George v. City of Long Beach, 973 F.2d 706 (9th Cir. 1992)).

observed in *Bodine*, if officers improperly entered without knocking and announcing their presence, but once inside, identify themselves, and are attacked by the suspect, an officer would not still be liable for any harm caused to the suspect based on the theory that the illegal entry rendered any subsequent use of force unlawful.[91] In short, the question is whether the conduct is "immediately connected" to the suspect's threat of force.[92]

On the other hand, a civilian may resist tortious police conduct without creating a superseding cause to the excessive force precipitated by the officer's actions, unless this resistance goes beyond mere self-defense and creates a threat to the officer that was not a foreseeable response.[93] In *Pauly v. White*, the Tenth Circuit was asked to determine whether the actions of several officers were the but-for cause of Samuel Pauly's death, where the officers approached Pauly's residence at night in the rain when he and his brother were in their home and, without knocking or announcing themselves as police, made threatening comments about intruding into the home to attack the brothers. [94] On appeal, a panel of the Tenth Circuit considered whether Pauly's act of pointing a gun at the officers was an intervening act or within the scope of the original risk the officers assumed by entering Pauly's home at night in a threatening manner.[95] The court concluded that because the officers could have predicted that the two civilians inside the residence would open fire in response,

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[93] Brief for the Petitioner at 55, Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) 2017 WL 696103 (arguing that tortious or criminal reaction to police constitutes a superseding cause).

[94] Pauly v. White, 814 F.3d 1060, 1066, 1070 (10th Cir. 2016), *cert. granted, judgment vacated on other grounds*, 137 S. Ct. 548 (2017). *See* 137 S. Ct. at 552 (explaining that the panel majority applied the "clearly established" standard at too high a level of abstraction when it conducted the qualified immunity analysis).

[95] *Id.* at 1073.

Pauly's actions did not constitute a superseding cause to the officers' use of force.[96]

In summary, the relevance of an officer's pre-seizure conduct should be determined based on how closely the conduct relates to the force at issue, and whether there was a superseding cause under traditional jurisprudential principles of proximate cause.[97] Most courts have recognized the limited principle that an officer cannot rely on a civilian's attempt to comply with an order or a civilian's immediate reaction to police force as justification for the use of additional force.[98] The logical extension of this reasoning is that officers should be liable for excessive force when their conduct causes the justification for the force.[99] While courts that apply the segmented approach struggle to analyze the relationship

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[96] *Id.* at 1090.

[97] Brief for Petitioner at 42–56, *Cty. of Los Angeles v. Mendez*, 2017 WL 696103.

[98] *See, e.g.*, Kirby v. Duva, 530 F.3d 475, 482 (6th Cir. 2008) (observing in a case where a police officer moved towards a moving vehicle that "[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive"); Sample v. Bailey, 409 F.3d 689, 697 (6th Cir. 2005) (holding that an officer could not order a suspect to get out of his hiding place and then rely on the suspect's movement to justify the use of lethal force); Ribbey v. Cox, 222 F.3d 1040, 1042 (8th Cir. 2000) (holding that an officer could not unreasonably break a car window and then rely upon the suspect's "reflex[ive] [movement] to protect himself from the breaking glass" to justify the use of lethal force); Estate of Starks v. Enyart, 5 F.3d 230, 234 (7th Cir. 1993) (holding that a police officer cannot jump in front of a suspect's car and then rely upon the danger of the oncoming car as justification for the use of deadly force); Kopf v. Wing, 942 F.2d 265, 268 (4th Cir. 1991) (finding that an officer could not deploy an attack dog and then rely upon the suspect's inability to put his hands up as the dog attacked him to justify a subsequent use of force); Gilmere v. City of Atlanta, Ga., 774 F.2d 1495, 1502 (11th Cir. 1985) (holding that a shooting directly resulting from decedent's efforts to escape officers' unwarranted physical abuse "g[a]ve grounds for relief under the fourth amendment").

[99] Chiraag Bains, *Can Cops Use Force with Impunity When They've Created an Unsafe Situation?* SLATE (June 15, 2017, 7:00 AM), www.slate.com/articles/news_and_politics/jurisprudence/2017/06/the_supreme_court_suggests_cops_use_of_force_is_always_justified.html ("Police officers should not be allowed to create dangerous situations that leave them with no choice but to use deadly force. Instead, our system should discourage such reckless conduct by making officers liable when they do.").

between a series of events, principles of proximate causation provide workable rules for interpreting how to impose liability when a series of events interact to produce a result. As the next section describes, the causation approach is not only the most workable, but the most promising under recent Supreme Court case law.

IV. THE SUPREME COURT SUGGESTS THAT COURTS SHOULD APPLY TORT PRINCIPLES OF CAUSATION WHEN CONSIDERING PRE-SEIZURE CONDUCT

In *County of Los Angeles v. Mendez*, the Supreme Court was asked to review the question of how courts may consider pre-seizure conduct in a case challenging the Ninth Circuit's provocation rule.[100] The Ninth Circuit's approach permitted more limited evidence of pre-seizure officer conduct than the First, Third and Tenth Circuits. Under what it termed the "provocation doctrine", 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."[101] Thus, if a plaintiff can establish unconstitutional conduct, the officer is liable for proximately caused harm, regardless of whether the force might have otherwise been reasonable.[102]

Mendez involved two deputies, Christopher Conley and Jennifer Pederson, who entered a shack that belonged to the Mendezes without a warrant and without first knocking and announcing their presence.[103] The deputies were in search of an armed and dangerous parolee who was not there when they arrived.[104] Upon entering, the deputies thought they saw Mr. Mendez pointing a rifle at them, although it turned out what

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

[101] Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002), *abrogated by Mendez*, 137 S. Ct. 1539.

[102] *Smith* at 1189–90 (emphasis added).

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

[104] *Id.*

Mr. Mendez actually possessed was a BB gun used to kill rodents in the home.[105] The deputies shot and seriously injured both Mendezes—Mrs. Mendez was shot in the back, and Mr. Mendez required amputation of his right leg below the knee.[106]

The Mendezes sued the deputies and the County of Los Angeles under § 1983, asserting three distinct Fourth Amendment claims: warrantless entry, failure to knock-and-announce, and excessive force. Writing for the Court, Justice Alito framed the issue as:

> If law enforcement officers make a "seizure" of a person using force that is judged to be reasonable based on a consideration of the circumstances relevant to that determination, may the officers nevertheless be held liable for injuries caused by the seizure on the ground that they committed a separate Fourth Amendment violation that contributed to their need to use force?[107]

According to the Court, the Ninth Circuit's provocation rule conflated distinct Fourth Amendment claims that should be analyzed independently by asking 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."[108] The Court held that the Fourth Amendment provides no basis for the Ninth Circuit's approach.[109] Rather, it found that *Graham's* totality of the circumstances analysis is the only controlling test.[110]

In a footnote, the Court further explained that it had not granted certiorari on, and thus declined to address, the question of whether a totality of the circumstances analysis under *Graham* "means taking into account unreasonable

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[105] *Id.* at 1545.
[106] *Id.*
[107] *Id.* at 1543.
[108] *Id.* at 1547.
[109] Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1544 (2017).
[110] *Id.* at 1547.

police conduct prior to the use of force that foreseeably created the need to use it."[111] The Court indicated that the correct question to focus on was whether the excessive force at issue was a *direct result* of the deputies' earlier Fourth Amendment violations "under basic notions of proximate cause,"[112] or whether Mr. Mendez pointing a gun was a superseding cause that made the deputy's decision to shoot reasonable.

After *Mendez*, we know that an officer's otherwise reasonable use of force is not as a matter of law unreasonable, simply because "(1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation."[113] In other words, "a different Fourth Amendment violation cannot transform reasonable use of force into an unreasonable seizure."[114] But the question remains whether a totality of the circumstances analysis can take into account police conduct prior to the use of force that caused the need to use the excessive force at issue. The Court indicated that on remand the Ninth Circuit should consider whether there was direct causation between the prior act and the need to use force,[115] suggesting that the Court would be likely to accept an approach that considers causation like that of the First, Third or Tenth Circuit.

V. THE SEVERITY OF THE CRIME PROVIDES ADDITIONAL CONTEXT FOR EVALUATING CAUSATION

The Supreme Court decided *Graham* before the dramatic expansion of *Terry*'s progeny, particularly in case law governing pretextual and consent searches. Under present case law, an officer may ask for "consent" to search a civilian's belongings without informing the civilian that he or

[111] *Id.* at 1547 n.*.
[112] *Id.* at 1548.
[113] *Id.* at 1546.
[114] *Id.* at 1544.
[115] Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1549 (2017) (citing Brief of Petitioner at 31–32, Cty. of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369), 2017 WL 696103).

she can decline.[116] Moreover, police have greater authority to stop civilians for minor, nonthreatening legal violations,[117] or even a pretextual justification.[118] As Michelle Alexander has argued, there was a sharp turn in the Supreme Court's Fourth Amendment jurisprudence during the War on Drugs so that "it is no longer necessary for the police to have any reason to believe that people are engaged in criminal activity or actually dangerous to stop and search them."[119] And as Justice Sotomayor described in *Utah v. Strieff*, the reality is that today a police stop may be "*suspicionless*" or "one in which the officer initiated [a] chain of events without justification."[120]

As Professor Devon Carbado explains, "an ordinary traffic stop can be a gateway to extraordinary police violence" and "Fourth Amendment law help[s] to stage" the "ordinary police interaction whose life-and-death boundaries Fourth Amendment law helps to produce."[121] *Terry* is the basis for an officer to initiate the chain of events that for some may end in lethal force. With increased authority to stop and seize comes new opportunities for police officers to both assert power and use force.

One might question how the increased authority of officers to initiate encounters impacts courts' analysis of the events that follow. Civilians are generally expected to

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[116] *See* Florida v. Bostick, 501 U.S. 429, 438 (1991).

[117] Devenpeck v. Alford, 543 U.S. 146, 154–55 (2004); Heien v. North Carolina, 135 S. Ct. 530 (2014).

[118] *See* Whren v. United States, 517 U.S. 806 (1996) (holding that when police officers have probable cause to stop vehicles for traffic infractions, a pretextual reason for conducting the stop is irrelevant).

[119] MICHELLE ALEXANDER, THE NEW JIM CROW 64 (2010). *See* JAMES FORMAN JR., LOCKING UP OUR OWN 194–201 (2017) (describing the increased use of pre-text stops in Washington, DC's Black neighborhoods under Eric H. Holder); United States v. Hill, 852 F.3d 377, 385 (4th Cir. 2017) (Davis, J., dissenting) ("[T]the ill-fated 'War on Drugs' has a sometimes overlooked and unmentioned casualty: the Fourth Amendment.").

[120] Utah v. Strieff, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting).

[121] *See* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 150, 164 (2017).

acquiesce when the police assert authority or exert physical force in order to enforce a lawful action. The right to make an investigatory stop, arrest, or other seizure encompasses the right to use some degree of physical force or other demonstration of power to effect it.[122] But when the basis of this authority is a minor traffic violation, the latitude courts typically extend to law enforcement officers to use force in order to neutralize potentially dangerous suspects is undermined because there is no reason to assume that the suspect is dangerous. The fact that Castille's deadly encounter with Officer Yanez began over a broken brake light outraged many because it seemed to violate Fourth Amendment values, which balance the nature and quality of the intrusion with the countervailing governmental interests at stake; while a violent fleeing felon has forfeited the right to a less intrusive seizure, a driver with a broken brake light has not.

The conduct that precipitated the seizure matters, not just as context for understanding the seizure as an isolated segment, but as context for understanding the entire chain of events. The case *Estate of Starks v. Enyart*[123] also illustrates this point. The Seventh Circuit panel reviewing the use of lethal force found it relevant to the analysis that the officers knew "that the underlying crime was not accomplished violently."[124] The court observed: "If a fleeing felon is converted to a 'threatening' fleeing felon *solely* based on the actions of a police officer," basic Fourth Amendment tenets would become meaningless.[125]

The severity of the crime at issue must inform the causation analysis. First, the severity of the crime is critical in the evaluation of aggression. While a more aggressive tactic may be warranted initially when the police are chasing a murder suspect, there is no justification for undertaking an

[122] *See* Terry v. Ohio, 392 U.S. 1, 22–27 (1968).
[123] Estate of Starks v. Enyart, 5 F.3d 230 (1993).
[124] *Id.* at 233.
[125] *Id.* at 234.

aggressive approach initially when an individual is merely suspected of a minor traffic violation. The crime at issue also matters in understanding the civilian's response to the officer's conduct because of the civilian's interest in remaining free from state-sponsored violence. Courts must evaluate how civilians will predictably respond to aggressive police tactics considering that the civilian was not suspected of dangerous or threatening conduct. Aggressive displays of power under these circumstances are almost always experienced as disproportionate and threatening. Thus, understanding whether an officer predictably created legitimate resistance by employing an overly aggressive tactic requires consideration of the crime at issue from the officer's perspective.

The reality that traffic or other minor violations can provide legal sanction for police to initiate severe intrusions feeds the feeling that any slight violation could provide the basis for a police officer to enact discrimination based upon race under the guise of legitimate punishment.[126] As described in the quote at the outset, some African Americans may comply with police authority not because they view it as legitimate, but because they feel unfairly "trapped" by officers who rely on increased authority to initiate encounters, and then seek to provoke a reaction that may provide a basis for punishment. This feeling of being trapped is not merely imagined; as this Article has described, some courts continue to conduct a totality of the circumstances analysis in excessive force cases without even considering how conduct of officers may have contributed to the justification for the officer's need to use force, much less holding officers accountable.

Of course, there is a risk that causation will be more clearly understood with the benefit of hindsight and courts ought not impose rules that "undercut the necessary element

[126] For an account of how overreliance on aggressive assertions of authority "inevitably engenders individual-level and community-wide pushback and resistance that can escalate into violence," *see* Devon W. Carbado, *Blue-On-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016).

of judgment inherent in a constable's attempts to control a volatile chain of events."[127] But a causation analysis simply imposes a duty on officers to anticipate the reasonable results of their actions, and need not hamper their ability to do their jobs. The Fourth Circuit case, *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*[128] provides a good example of this.[129] The civilian in that case, Armstrong, suffered from bipolar disorder and schizophrenia. Police were called to enforce an involuntary commitment order compelling him to be hospitalized after his doctor identified him as a danger to himself.[130] When police ordered Armstrong to return to the hospital, Armstrong wrapped his body around a stop sign and refused to comply.[131] In response, the police officers tased him five times.[132] When he continued to resist, they removed him by force, cuffed, and shackled him.[133] During the course of the struggle, Armstrong died.[134] In finding that the use of force was unreasonable, a panel of the Fourth Circuit wrote: "Tasing Armstrong did not force him to succumb to [the] seizure—he actually increased his resistance in response . . . Had Appellees limited themselves to permissible uses of force when seizing Armstrong, they would have had every tool needed to control and resolve the situation at their disposal."[135] Thus, under the court's analysis, the officers' decision to tase Armstrong was not only unjustified—his noncompliance did not warrant this level of force given that he did not present a threat to officer safety—but also ineffective, as their use of force actually increased his resistance and escalated the situation.[136]

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[127] Brown v. Gilmore, 278 F.3d 362, 369 (4th Cir. 2002).

[128] Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst, 810 F.3d 892, 896 (4th Cir.), *cert. denied sub nom.* Vill. of Pinehurst, N.C. v. Estate of Armstrong, 137 S. Ct. 61 (2016).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 897.

[133] *Id.*

[134] *Id.* at 898.

[135] *Id.* at 906.

[136] *Id.*

Viewing excessive force claims as a chain of events is essential to untangling "the trap" by creating accountability for police conduct that escalates an interaction. By incorporating principles of causation, excessive force claims have the potential to provide an important deterrent to police officers' abuse of the increased power and discretion that *Terry*'s progeny provide. While Fourth Amendment law generally may be moving in the direction of permitting increased intrusions for minor crimes,[137] excessive force case law can provide an increasingly important check on this trend by limiting how aggressive police conduct can justify police force later in the encounter. Considering excessive force claims in terms of the chain of events is essential to ensuring that the totality of the circumstances analysis reaches a result that is in line with long-established and fundamental Fourth Amendment principles.

VI. CONCLUSION

In the wake of repeated police shootings of young, unarmed, Black men and women, police departments across the country are focusing on de-escalation.[138] In contrast with

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[137] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 339–40, 345, 354 (2001) (explaining why custodial arrests even for very minor criminal offenses do not violate the Fourth Amendment).

[138] INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, NATIONAL CONSENSUS POLICY ON USE OF FORCE 3 (Jan. 2017), http://www.theiacp.Org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf (recommending training on de-escalation and proscribing that officers "shall use de-escalation techniques and other alternatives to higher levels of force . . . whenever possible and appropriate before resorting to force and to reduce the need for force"). *See also* Tom Jackman, *De-Escalation Training to Reduce Police Shootings Facing Mixed Reviews at Launch,* WASH. POST (Oct. 15, 2016), https://www.washingtonpost.com/local/public-safety/de-escalation-training-to-reduce-police-shootings-facing-mixed-reviews-at-launch/2016/10/14/d6d96c74-9159-11e6-9c85ac42097b8cc0_story.html?utm_term=.1922bc753fe2. ("[I]n about 40 percent of [lethal police shooting] cases, the subject does not have a gun, and many police officials think that reducing the intensity of such encounters, establishing more distance between officer and subject, and simply talking to the person can result in no shots being fired and less trauma on all

this approach, federal courts often continue to analyze Fourth Amendment excessive force cases from the moment force is employed without considering how police conduct earlier in an encounter may have contributed to the need for subsequent force. Moreover, judges often assume that force serves the interest of officer safety and civilian compliance, rather than exacerbating a situation under some circumstances and increasing risks. The assumptions that guide judicial analysis are therefore fundamentally out of touch with standard policies and best practices in policing, which should instead inform the analysis that courts apply.[139]

This Article has argued that an officer should not be permitted to use force when the officer predictably created the need for force by employing an overly aggressive tactic. Existing legal principles for understanding causation can be applied in excessive force cases to determine whether the officer created the circumstances justifying the need to use force and whether the actions of the civilian constituted a superseding cause. The severity of the crime provides key context for this causation analysis.

While a civilian's failure to comply generally authorizes an officer to use additional force, an exception should occur when it can be said that the officer's approach predictably caused the civilian to resist. This limitation would prevent officers from manufacturing authority to use force by employing overly aggressive tactics or other misconduct that is likely to provoke civilian resistance. As the justification for asserting authority weakens, so does the line between legal police force and illegal state-sponsored violence. Thus, the

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sides."); Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-escalate,* N.Y. TIMES (June 27, 2015), https://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html.

[139] *See*, *e.g.*, Ludwig v. Anderson, 54 F.3d 465, 472 (8th Cir. 1995) (finding that the police department's policy was relevant to the reasonableness analysis). *See also* Wilson v. Meeks, 52 F.3d 1547, 1554 (10th Cir. 1995) (violations of police regulation do not alone give rise to a Section 1983 claim).

implications of making tort-based causation distinctions are important for ensuring that the next generation of citizens views the criminal justice system as legitimate, instead of a trap.

Police departments are beginning to recognize the importance of how an officer's behavior influences the need to use force later on, and while this is an important step in the right direction, the change required is not just a question of policing. Courts must play an essential interpretative role in addressing this justice concern as well.