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“Make My Day!” The Relevance of Pre-Seizure Conduct in Excessive Force Cases

LEONARD J. FELDMAN¹

I. INTRODUCTION

Excessive force cases involving police officers are governed by a complex, deeply troubling, and conflicting line of court decisions. In many situations in which police are called upon to use lethal force, the victim himself was at fault, creating the need for force by either shooting at officers or refusing to put down a firearm. However, there have been repeated instances in which the police, not the victim, created the need—or more often, merely the apparent need—for force, resulting in the death of, or grave injury to, an entirely blameless law-abiding civilian. In some instances, police create the need for force by committing a constitutional violation that foreseeably led to the apparent need for the use of force. In other instances, police actions foreseeably create the need or apparent need for force through conduct that serves no substantial government interest yet leads to death or injury.

The apparent need for use of force arises most often when police officers fail to identify themselves as law enforcement officers. Usually, that involves plainclothes officers who brandish weapons but do not display their badges or announce their identities. Occasionally, as in *County of Los Angeles, California v. Mendez*² and *White v. Pauly*³,

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2. 137 S. Ct. 1539 (2017).

3. 137 S. Ct. 548 (2017).

the officers are in uniform but know, or reasonably should know, that the people with whom they are dealing with cannot see the uniforms and fail to identify themselves in any other way. In some of these cases, the unidentified officers entered private homes or were just outside those houses. Armed plainclothes officers have also accosted people in their cars or on the street, setting terrified responses in motion which at times result in tragic consequences.

Sadly, these events continue to occur on a weekly, if not daily, basis. The *Washington Post* recently reported a June 2019 incident in which a police officer, responding to a panic alarm that someone in a house triggered shortly before midnight, went to the house, rang the doorbell, and fired his weapon through a window when an armed homeowner inside the house purportedly aimed a gun at him without knowing he was a police officer.⁴ According to the article, the injured homeowner asked the unidentified intruder to “call the cops, please!”⁵ When the officer responded, “I am the cops,” and explained, “you pointed a gun at me, man,” the homeowner replied, “you came to my house 12 o’clock at night, I’m sleeping . . . I’ve got to protect my house . . . I can’t believe you did this to me.”⁶

Police have also created the need for force in more complicated circumstances. In repeated instances, officers have escalated the level of threat posed by mentally ill or suicidal civilians, resulting in the death of the very people whom the police were summoned to protect. In some cases, officers have fired at, fought with, or otherwise threatened a civilian without justification, using even more force when the victim tried to defend themselves. In *City and County of San Francisco, California v. Sheehan*,⁷ for example, police were asked by a social worker to help escort a mentally ill civilian to a facility for temporary evaluation and treatment. Instead, the police forced their way into her apartment, and a shooting ensued.

In recent years, the Department of Justice (DOJ) has commendably attempted to deal with this type of problem. The DOJ has entered into a series of consent decrees that require municipal police depart-

4. Michael Brice-Saddler, *Police Said an Officer Shot a Man who Opened a Door while Aiming a Gun. Then the Body-cam Video Came out*, WASH. POST (July 30, 2019, 10:30 PM), https://www.washingtonpost.com/nation/2019/07/31/police-said-they-shot-man-when-he-opened-his-door-aiming-gun-then-bodycam-video-came-out/?noredirect=on&utm_term=.350aaa460271.

5. *Id.*

6. *Id.*

7. 135 S. Ct. 1765 (2015).

ments to take steps to reduce police-created need for force and deescalate (rather than escalate) when dealing with mentally-ill individuals. In its January 2017 report on the Chicago Police Department, the Justice Department objected to practices which, by needlessly creating a need for force, had resulted in a number of civilian deaths.⁸ Those Department of Justice consent decrees and the Department's related reports would rest on a solid legal foundation if the Supreme Court were to hold, as urged below, that the reasonableness standard in *Graham v. Connor*⁹ applies to police action which foreseeably leads to the need for force. This question was framed, but not resolved, in *Mendez* and is addressed in a disparate array of deeply troubling lower court cases. The Supreme Court should provide additional clarity on whether pre-seizure conduct is relevant in excessive force cases. This article addresses the need for that clarity and offers a proposed framework.

II. LOWER COURT DECISIONS APPLYING THE *GRAHAM* V. *CONNOR* REASONABLENESS TEST

The Supreme Court's opinion in *Graham* is the leading and controlling decision regarding use of force claims against police officers. The Court in *Graham* held that a "reasonableness" test under the Fourth Amendment governs such claims and emphasized that "proper application" of the reasonableness test "requires careful attention to the facts and circumstances of each particular case."¹⁰ Quoting *Tennessee v. Garner*,¹¹ the Court reiterated that the question is "whether the totality of the circumstances justify[es] a particular sort of . . . seizure."¹² The Court thus required lower courts to carefully consider all of the relevant facts and circumstances and did not hold that any facts or circumstances should be ignored in deciding Fourth Amendment claims.

In the wake of *Graham*, lower courts have applied a variety of standards in evaluating the constitutionality of officials' actions that foreseeably create a need for force. Several circuits have sustained excessive force claims based on official action creating a need for

8. U.S. Dep't of Justice Civil Rights Division and U.S. Attorney's Office Northern District of Illinois, *Investigation of the Chicago Police Department*, 5, 28, 37, 151 (2017).

9. 490 U.S. 386 (1989).

10. *Id.* at 396.

11. 471 U.S. 1, 8-9 (1985).

12. *Graham*, 490 U.S. at 396 (emphasis added; brackets and ellipsis in original).

force. The Sixth, Seventh, and Ninth Circuits, for example, apply the *Graham* reasonableness standard to official action creating a need for force, balancing the public interest in that action against the likelihood that it will lead to the use of force. In *Sledd v. Lindsay*,¹³ the Seventh Circuit found liability in part because “the officer had unreasonably created the encounter that led to the use of force.” In *Estate of Starks v. Enyart*,¹⁴ the Seventh Circuit likewise held that “[p]olice officers who unreasonably create a physically threatening situation in the midst of a Fourth Amendment seizure cannot be immunized for the use of deadly force.” In *Yates v. City of Cleveland*,¹⁵ the Sixth Circuit concluded that “[i]t was not ‘objectively reasonable’ for [the officer] to enter the dark hallway at 2:45 a.m. without identifying himself as a police officer, without shining a flashlight, and without wearing his [police] hat.” In *Kirby v. Duva*,¹⁶ the Sixth Circuit confirmed that “[w]here a police officer unreasonably places himself in harm’s way, his use of deadly force may be deemed excessive.” Finally, in *Vos v. City of Newport Beach*,¹⁷ the Ninth Circuit similarly held: “While a Fourth Amendment violation cannot be established based merely on bad tactics that result in a deadly confrontation that could have been avoided, the events leading up to the shooting, including the officers’ tactics, are encompassed in the facts and circumstances for the reasonableness analysis.”

The Tenth Circuit also applies a *Graham* reasonableness standard. However, the Tenth Circuit considers only those actions creating a need for force that are “immediately connected” to the use of force and “actions in the moments leading up to” the use of force.¹⁸ The standard in the Eleventh Circuit is less clear. In *Gilmere v. City of Atlanta, Georgia*,¹⁹ the officers unlawfully beat a suspect who then attempted to escape the officers’ physical abuse. The Eleventh Circuit found liability under *Graham* because “Patillo did little to provoke the police officers to beat him. That unwarranted intrusion, as well as the unwarranted shooting, which directly resulted from his efforts to escape the officers’ further physical abuse, give grounds for relief

13. 102 F.3d 282, 288 (7th Cir. 1996).

14. 5 F.3d 230, 234 (7th Cir. 1993).

15. 941 F.2d 444, 447 (6th Cir. 1991).

16. 530 F.3d 475, 482 (6th Cir. 2008).

17. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th Cir. 2018), *cert. denied sub nom. City of Newport Beach v. Vos*, 139 S. Ct. 2613 (2019).

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

19. *Gilmere v. City of Atlanta, Ga.*, 774 F.2d 1495, 1495 (11th Cir. 1985) (en banc).

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under the fourth amendment.”²⁰ In affirming the district court’s finding that the officer was liable on substantive due process grounds, the court explained that “a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of official power.”²¹

Conversely, some other circuits hold that “[t]he proper approach . . . is to view excessive force claims in segments” and “disregard” events in earlier segments when determining whether an officer used excessive force in a later segment.²² Notably, the Sixth Circuit reached that holding in *Livermore* despite its contrary decisions in *Kirby* and *Yates*.²³ In *Salim v. Proulx*,²⁴ the Second Circuit also applied a segmenting approach to excessive force claims, holding that “a defendant’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.” And in *Waterman v. Batton*,²⁵ the Fourth Circuit likewise held that “the reasonableness of the officer’s actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis.” These and other decisions generally reason that pre-seizure conduct is not relevant in analyzing the reasonableness of force used by a police officer because, under their interpretation of *Graham*, such force must be examined “at the moment”²⁶ it occurs. As discussed below, this reasoning is deeply flawed and leads to absurd results.

III. TOTALITY MEANS TOTALITY

A segmenting approach cannot properly be justified by the “at the moment” language in *Graham*. Although *Graham* refers to the reasonableness of an officer’s actions “at the moment,” the rest of the passage in question makes clear that the “at the moment” phrase was not intended to preclude consideration of what preceded the use of force, but only to focus the analysis on “the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hind-

20. *Id.* at 1502.

21. *Id.* at 1501.

22. *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007).

23. *See Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991); *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008).

24. *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996).

25. *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005).

26. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

sight.”²⁷ The Court explained that “[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.”²⁸ The “at the moment” requirement is properly read to preclude courts from second-guessing the actions of police officers after the fact; it does not require courts to pretend that critically important events leading to the use of force did not occur.

A segmenting approach is also contrary to any reasonable interpretation of the phrase “totality of the circumstances.”²⁹ As the Third Circuit noted in *Abraham v. Raso*,³⁰ it is not possible to 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. ‘Totality’ is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer’s use of force.”³¹ Moreover, if the seizure is a bullet striking a suspect, then the circumstances before that moment—which the segmenting approach disregards—would include “what [the officer] saw when she squeezed the trigger.”³² As the court in *Abraham* noted, courts that disregard pre-seizure circumstances “are left without 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.”³³

In *Mendez*, the United States, writing as *amicus curiae*, appears to have recognized the problem that the court identified in *Abraham*. Addressing the relevance of prior events, the government stated in its amicus brief:

This is not to say that courts and officers should be blind to the events that lead to a use of force. The objective reasonableness test accounts for “the facts and circumstances of each particular case,” *Graham*, 490 U.S. at 396, including “what the officer knew at the time” he decided to use force, *Kingsley [v. Hendrickson]*, 135 S. Ct. 2466, 2473 (2015); see *Plumhoff [v. Rickard]*, 134 S. Ct. 2012, 2023

27. *Id.* (emphasis added).

28. *Id.* (citation omitted).

29. *Id.*

30. *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999).

31. *Id.*

32. *Id.*

33. *Id.* at 291-92.

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(2014)] (The “crucial question” is “whether the official acted reasonably in the particular circumstances that he or she faced.”).³⁴

But the government never explained what it meant by, and the legal significance of “what the officer knew at the time.” For example, would it include a police officer’s knowledge—or presumed knowledge—that his unreasonable or unlawful pre-seizure conduct is what created the apparent need for force? If so, would that knowledge be enough to impose liability even if the use of force was otherwise justified?

Indeed, in many cases, the pre-seizure conduct by the officer and victim is as a practical matter the only action to which *Graham* could meaningfully be applied. The Court in *Graham* stressed that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”³⁵ But in many cases involving the use of deadly force, the person who “forced” the police officer to make that decision was the police officer himself, by entering a residence without first alerting the occupants or otherwise creating a dangerous situation. Although there may be a need for a split-second decision once an officer is in an apparently life-threatening situation, the decision that got the officer into that situation is often far less hurried.

A strict application of a segmenting approach also bars redress in a troubling range of situations. In *Sudden Impact*, Harry Callahan—played by Clint Eastwood—points his .44 Magnum revolver at a man’s face and dares him to shoot, saying with classic Clint Eastwood style, “Go ahead, make my day!” If a plainclothes police officer, without identifying himself, was to imitate Clint Eastwood’s famous conduct and the civilian were to reach for a weapon or point an already-drawn weapon at the officer, the officer’s subsequent fatal shooting of the civilian would constitute a reasonable use of force in any circuit that has adopted a segmenting approach because, in those circuits, pre-seizure conduct is legally irrelevant. The dispositive inquiry is whether a reasonable officer on the scene, *at the moment of the shooting*, would believe that the civilian was threatening his safety.

The segmenting approach also bars redress in other equally troubling yet more realistic situations where courts have found liability or otherwise condemned the officer’s conduct. If a plainclothes

34. Brief for the U.S. at Amicus Curiae Supporting Petitioners at 25, *Cty of L.A., Cal. v. Mendez*, 137 S. Ct. 1359 (2017) (No. 16-369).

35. *Graham*, 490 U.S. at 397.

police officer who had a warrant and was within one of the “knock and announce” exceptions climbed through a bedroom window in the middle of the night without identifying himself and then killed a resident who pointed a weapon in fear, the officer’s fatal shooting of the resident would constitute a reasonable use of force under a segmenting approach. That is essentially what the officer did in *McDonald v. United States*.³⁶ In his concurring opinion, Justice Jackson soundly condemned such conduct:

I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many home-owners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.³⁷

Similarly, if a police officer jumped in front of a moving car and then shot the driver to stop the car, the killing of the motorist would constitute a reasonable use of force. The Seventh Circuit appropriately rejected such a result in *Starks*.³⁸ And if a police officer were called to the house of a deranged man who was home alone shouting incoherently and swinging a golf club, the officer was warned that if he entered the house, the man would attack him with the club. The officer nonetheless entered the house and was attacked as predicted, the officer’s killing of the mentally ill man would constitute a reasonable use of force. The district court logically rejected that result in *Estate of Crawley v. McRae*.³⁹

36. 335 U.S. 451 (1948).

37. *Id.* at 460-61 (Jackson, J., concurring).

38. *Enyart*, 5 F.3d at 234.

39. *Estate of Crawley v. McRae*, No. 1:13-CV-02042-LJO-SAB, 2015 WL 5432787, at *28-33 (E.D. Cal. Sept. 15, 2015).

IV. A PROPOSED FRAMEWORK

Unfortunately, the Supreme Court has not squarely decided whether pre-seizure conduct can properly be considered in deciding an excessive force claim under *Graham*. The issue was briefed and argued in *Mendez*; however, the Court held: “We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here.”⁴⁰ Following *Mendez*, several courts have continued to hold that pre-seizure conduct is relevant and must be considered as part of the “totality of the circumstances.”⁴¹ Nevertheless, the issue remains unresolved in the Supreme Court.

In the absence of controlling Supreme Court authority, this article suggests the following framework:

- In resolving excessive force claims, courts may entertain a claim that police action foreseeably created the need for the use of force against a claimant and should apply to the police action the general standard of reasonableness established by *Graham* and *Scott*.
- Under *Graham*, whether that prior police action was reasonable “requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.”⁴²
- Consideration would also be given to the “relative culpability” of involved individuals,⁴³ and all such issues would be assessed from the perspective of “a reasonable officer on the scene.”⁴⁴

Since the test draws from both *Graham* and *Scott*, it can appropriately be characterized as “*Graham/Scott* balancing.”

Applying such a balancing test is simple and straightforward. Action involving a high likelihood of creating a need for force would be justified in the circumstances involving culpable conduct, such as po-

40. 137 S. Ct. at 1547 n.* (internal citations omitted).

41. See, e.g., *K.J.P. v. City of San Diego*, No. 3:15-CV-2692-H-MDD, 2017 WL 3537740, at *3 (S.D. Cal. Aug. 17, 2017) (“The Supreme Court recently reversed the Ninth Circuit’s provocation rule. In doing so, however, the Court did not say that provocation was irrelevant, only that it should be considered as part of the ‘totality of the circumstances.’”) (citing *Mendez*, 137 S. Ct. at 1546-47); *Maddox v. City of Sandpoint*, No. 2:16-CV-00162-BLW, 2017 WL 4343031, at *3 (D. Idaho Sept. 29, 2017) (reading *Mendez* as allowing courts to continue to consider “whether the officers engaged in ‘unreasonable conduct prior to the use of force that foreseeably created the need to use it’”) (quoting *Mendez*, 137 S. Ct. at 1547 n.*); *Felts v. Valencia County*, No. 13-CV-1094 MCA/SCY, 2017 WL 4480118, at *2 (D.N.M. Oct. 6, 2017) (reading *Mendez* to allow courts to continue to consider “whether Defendants’ own reckless or deliberate conduct during the seizure unreasonably created the need to use such force”).

42. *Graham*, 490 U.S. at 396 (internal quotation marks and citation omitted).

43. *Scott*, 550 U.S. at 384.

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

lice entering a room in which armed robbers are holding a hostage. Conversely, a relatively modest likelihood of creating a need for force would *not* be justified if the action in question served no apparent governmental interest, such as the failure of plainclothes officers to identify themselves as police when they accost civilians.⁴⁵ Under the *Graham/Scott* balancing test, it would be irrelevant whether the officer intended that his or her action would create a need for force. The reasonableness inquiry under the Fourth Amendment is and would remain an objective one; it does not depend on the officer's "underlying intent and motivation."⁴⁶ The crucial question is whether the official acted reasonably given the "totality of the circumstances"⁴⁷ that he or she faced.

Some may claim that adopting a framework that considers events that precede the use of force would undermine officer safety. The opposite is true: a rule that imposes liability for objectively unreasonable conduct protects both police and the public. If an officer engages in unreasonable conduct that creates the need for force, both the officer and the suspect are at risk of harm. Conversely, when officers use crisis intervention and de-escalation techniques, the likelihood of a violent confrontation is reduced. When these techniques were employed by the Seattle Police Department as required by a Court-ordered agreement with the Department of Justice, the compliance monitor found that "[f]orce has gone down without officer injuries going up."⁴⁸ Clearly, the best approach for both officer and civilian safety is to promote safe practices *before* a violent confrontation becomes necessary. The above framework accomplishes that goal.

V. CONCLUSION

A police officer who dares a suspect to "make (his or her) day" should be liable if his or her unreasonable conduct leads to a violent confrontation. Unfortunately, the Supreme Court in *Mendez* missed a

45. See United States Department of Justice, Investigation of Chicago Police Department at 31 (Jan. 13, 2017) (criticizing "jump out" tactic, in which a group of gun wielding officers suddenly accost a group of pedestrians to see who will flee, noting that it "can be particularly problematic when deployed by [the Chicago Police Department] using unmarked vehicle[s] and plainclothes officers").

46. *Graham*, 490 U.S. at 397.

47. *Id.* at 396.

48. Press Release, U.S. Dep't of Justice, Federal Monitor finds Seattle Police Department in Initial Compliance with Use of Force Requirements of Consent Decree (Apr. 6, 2017), <https://www.justice.gov/usao-wdwa/pr/federal-monitor-finds-seattle-police-department-initial-compliance-use-force>.

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crucial opportunity to provide needed guidance regarding whether pre-seizure conduct is relevant in excessive force cases involving police officers. As urged herein, the Court should adopt a test that appropriately considers pre-seizure conduct as part of the “totality of the circumstances.” Considering such conduct will promote safe practices *before* a violent confrontation becomes necessary, thereby protecting both police officers and the public.