Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force

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Abstract

When a police officer's use of deadly force kills or seriously injures a civilian, that officer may face civil liability or criminal prosecution. In both civil and criminal cases, a critical question that the jury must decide is whether the officer's use of force was reasonable or excessive. As a general matter, the jury will be advised that it should consider all the relevant facts and circumstances—the totality of the circumstances—to answer this question.

An officer's decisions and conduct prior to that officer's use of deadly force can create jeopardy for the civilian and the officer, increasing the risk of an officer-civilian encounter turning into a deadly confrontation. Such conduct is part of the totality of the circumstances. Yet in cases involving officer-created jeopardy, many trial courts restrict the jury to considering only the facts and circumstances known to the officer at the moment the officer chose to use deadly force, precluding consideration of the officer's antecedent conduct that may have increased the risk of a deadly confrontation. The lower courts are split over whether a narrow or a broad time frame is required, and the U.S. Supreme Court has not explicitly taken a position on this issue. This Article argues that courts overseeing criminal prosecutions of police officers should broaden the time frame and allow juries assessing the reasonableness of the officer's use of deadly force to consider pre-shooting conduct of the officer that created or increased the risk of a deadly confrontation. Broadening the time frame is an important way to encourage law enforcement officers to take the steps needed to prevent police-civilian encounters from ending in death or serious bodily injury.

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INTRODUCTION

Hypothetical 1. A police officer in uniform and on patrol sees a White[1] man in a silver SUV driving at a high speed northbound in his direction. He hears over the radio dispatch that an armed White man driving a silver SUV is northbound on Jefferson Street, a narrow one-lane, one-way only road, is fleeing the scene of a bank robbery. The

1 The author purposely capitalizes the words "Black" and "White" except where the words are lower case in quotations. *See* Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/ [https://perma.cc/ER4S-JVUD] (explaining why it is important to capitalize the words "Black" and "White" when referring to Black and White people); Lori L. Tharps, *The Case for Black With a Capital B*, N.Y. TIMES (Nov. 18, 2014), https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html?smid=TW-share&_r=1 [https://perma.cc/YGG2-3XWS] ("When speaking of a culture, ethnicity or group of people, the name should be capitalized."); Brooke Seipel, *Why the AP and Others Are Now Capitalizing the 'B' in Black*, HILL (June 19, 2020, 5:25 PM), https://thehill.com/homenews/media/503642-why-the-ap-and-others-are-now-capitalizing-the-b-in-black [https://perma.cc/WE6C-KQPU].

officer tells dispatch that he thinks he has spotted the suspect and will try to stop him. The officer gets out of his patrol car and runs in front of the SUV with his gun drawn, shouting "Stop! Show me your hands!" The motorist does not stop but instead slows down. When the SUV moves closer to the officer, the officer shoots the driver through the front windshield, killing him. The officer claims that at that moment, he honestly and reasonably believed it was necessary to use deadly force to protect himself from being killed or seriously injured by the motorist.[2]

Hypothetical 2. Shortly after midnight, plainclothes police officers, with merely a hunch that large quantities of drugs are within a home, bust through the front door with a battering ram and enter without knocking and identifying themselves as police. The homeowner, a licensed gun owner, is sleeping in his bed when he hears a loud commotion that sounds like someone is breaking into his house. He grabs his gun, loads it, and rushes downstairs where he sees two men in the front foyer of his home with guns drawn. Thinking the men are criminals about to rob him, the homeowner fires off a shot at the men, hitting one of them in the leg. In response, the officers shoot several rounds at the homeowner. One of their shots hits the homeowner and kills him. The officers claim that at that moment, they honestly and reasonably believed it was necessary to shoot the homeowner to protect themselves from being shot and killed.[3]

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2 This fact pattern is loosely based on the facts of a case in which a Wethersfield, Connecticut police officer attempted to pull over a motorist in April 2019 after noticing that the license plate on the motorist's car did not match the registration information for the vehicle. *See* Dave Collins, *Officer Is Found Justified in Fatal Shooting of Driver, 18*, ABC NEWS (Mar. 18, 2020, 2:25 PM), https://abcnews.go.com/US/wireStory/officer-found-justified-fatal-shooting-driver-18-69671125 [https://perma.cc/UJB6-WAAW]. The motorist, Anthony Jose "Chulo" Vega Cruz, came to a brief stop but then drove away. *See* Ryan Lindsay, Vanessa de la Torre & Frankie Graziano, *Videos of Fatal Wethersfield Police Shooting Released*, CT MIRROR (May 3, 2019), https://ctmirror.org/2019/05/03/videos-of-fatal-wethersfield-police-shooting-released/ [https://perma.cc/ZWP8-6MK6]. A police chase ensued. *Id.* Another officer, Layau Eulizier, joined the pursuit and rammed into Vega Cruz's vehicle head on, bringing it to a stop. *Id.* Police dashcam and other surveillance videos show Officer Eulizier getting out of his vehicle and running towards the vehicle with his gun drawn. *Id.* Officer Eulizier then ran in front of the car as it was beginning to pull away and fired multiple times into the front windshield of the car. *Id.* Officer Eulizier claims he shouted "show me your hands" three times before shooting. *Id.* Vega Cruz died two days after being shot. *Id.*

3 This fact pattern is loosely based on the facts of the Breonna Taylor case, but the facts in this hypothetical are different in significant ways from the facts of that case. First, unlike the facts in this hypothetical where the officers entered the home based on a mere hunch and without a search warrant, the police in the Breonna Taylor case sought and secured a search warrant in advance of entering Taylor's residence. Search Warrant for 3003 Springfield Drive #4, Louisville, KY 40214, No. 20-1371 (Mar. 12, 2020) [hereinafter Search Warrant for 3003 Springfield

One considering these hypotheticals might say that the officers' actions were unreasonable because, in each case, the officer's unwise (and, in Hypothetical 2, illegal) conduct preceding the fatal confrontation created the need for the use of deadly force. If, however, we narrow the time frame and focus solely on the moment that the officers pulled the trigger, both their belief in the need to use deadly force and their subsequent decision to shoot may appear more reasonable. Ordinarily, an officer who finds himself in the path of a moving vehicle coming towards him can claim that he reasonably believed it was necessary to shoot the driver to stop the driver from hitting him. An officer confronting a person with a gun, who shoots or appears as if he is about to shoot the officer, can claim he reasonably believed it was necessary to shoot the person in order to protect himself from being shot. Only when we broaden the time frame and consider whether any antecedent conduct of the officer created or increased the likelihood of a deadly confrontation, does the conduct of these officers appear less reasonable.

Drive]; Darcy Costello & Tessa Duvall, *Minute by Minute: What Happened the Night Louisville Police Fatally Shot Breonna Taylor*, LOUISVILLE COURIER J. (Sept. 15, 2020, 3:05 PM) [hereinafter Costello & Duvall, *Minute by Minute*], https://www.courier-journal.com/story/news/2020/05/14/minute-minute-account-breonna-taylor-fatal-shooting-louisville-police/5182824002/ [https://perma.cc/L93R-6BQR] (noting that Louisville Metropolitan Police Department Detective Joshua Jaynes wrote five affidavits seeking a judge's permission for no-knock searches for five different residences, one of which was for Breonna Taylor's apartment, related to a narcotics investigation and that Jefferson Circuit Judge Mary Shaw issued all five no-knock search warrants). Additionally, unlike the police in this hypothetical, the police in the Breonna Taylor case requested a no-knock warrant, which authorizes police officers to enter a home without knocking and identifying themselves prior to entering the home. *See* Jaynes Aff. for Search Warrant for 3003 Springfield Drive #4, Louisville, KY 40214, No. 20-1371 (Mar. 12, 2020) [hereinafter Jaynes Aff. for Search Warrant]; 2 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.8(g) (6th ed. 2020). The judicial officer who issued the search warrant for Breonna Taylor's apartment incorporated by reference the affidavit that requested a no-knock warrant. Search Warrant for 3003 Springfield Drive, *supra*. Finally, unlike the facts in the hypothetical where the police failed to knock and announce prior to entry, it appears the officers in the Breonna Taylor case did knock prior to entry although there is a dispute over whether the officers identified themselves as police officers. *See* Doha Madani, *FBI Investigating Death of Breonna Taylor, Killed by Police in Her Louisville Home*, NBC NEWS (May 21, 2020, 4:27 PM), https://www.nbcnews.com/news/us-news/fbi-investigating-death-breonna-taylor-killed-police-her-louisville-home-n1212381 [https://perma.cc/9C8U-2U2C] (reporting that a police spokesperson claimed the officers knocked on the door several times and "announced their presence as police" prior to entry (quoting Lieutenant Ted Eidem)); Costello & Duvall, *Minute by Minute*, *supra* (reporting that attorneys for Taylor's family explained that she and her boyfriend, Kenneth Walker, heard loud banging and called out to see who was there but did not hear a response).

"Officer-created jeopardy" refers to situations in which police officers unwisely put themselves in danger and then use force to protect themselves.[4] As Seth Stoughton notes:

> Officer-created jeopardy . . . includes the actions of officers who, without sound justification, willingly fail to take advantage of available tactical concepts like distance, cover, and concealment . . . willingly abandon tactically advantageous positions by moving into disadvantaged positions without justification, or act precipitously on their own without waiting for available assistance from other officers.[5]

If an officer is charged criminally or sued civilly for his use of force and the trier of fact is limited to considering only the moment at which the officer used force, not prior conduct of the officer that increased the risk of a deadly confrontation, the verdict in such cases will be skewed in favor of the officer from the start.

Although a handful of legal scholars have addressed the problem of officer-created jeopardy in the context of civil rights claims filed under 42 U.S.C. § 1983,[6] this Article is one of the first to focus on

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4 Leon Neyfakh, *Tamir Rice's Death Resulted from "Officer-Created Jeopardy." So Why Were No Other Officers Indicted?*, SLATE (Dec. 28, 2015, 5:19 PM), https://slate.com/news-and-politics/2015/12/tamir-rice-s-death-didn-t-lead-to-indictments-because-of-supreme-court-vagueness-on-officer-created-jeopardy.html [https://perma.cc/M4HP-3CQV]. For a discussion on "officer-created jeopardy" in relation to traffic stops, see Robin Stein, Haley Willis, Brenna Smith, Natalie Reneau, Rumsey Taylor, David Kirkpatrick, Steve Eder, Kim Barker & Michael Beswetherick, *Before the Final Frame: When Police Missteps Create Danger*, N.Y. TIMES (Oct 30, 2021), https://www.nytimes.com/interactive/2021/10/30/video/police-traffic-stops-danger-video.html [https://perma.cc/3QDB-7YB4] (examining various examples of fatal traffic stop videos, where broadening the time frame of the incident provides more information on the causes and consequences of officer-created jeopardy).

5 SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE 158 (2020).

6 *See, e.g.*, *id.* at 155–90 (discussing police tactics that can reduce the likelihood of officer-created jeopardy); Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 557 (2021) (discussing circuit split over whether the fact finder may consider pre-seizure conduct of the officer); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 292–93 (2017) (discussing results of an empirical study of the use of force policies of the fifty largest police agencies in the United States and arguing for a reasonable officer standard that takes into account the tactical training of police officers when assessing the reasonableness of an officer's use of force); Arthur H. Garrison, *Criminal Culpability, Civil Liability, and Police Created Danger: Why and How the Fourth Amendment Provides Very Limited Protection from Police Use of Deadly Force*, 28 GEO. MASON U. C.R.L.J. 241 (2018) (reviewing the federal circuit split over whether considering a police officer's pre-seizure conduct when assessing the reasonableness of that officer's use of force is appropriate); Timothy P. Flynn & Robert J. Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555 (2000) (describing the split in the circuits over the admissibility of pre-seizure conduct in the context of "suicide by police");

officer-created jeopardy in the context of state criminal prosecutions of law enforcement officers who claim their use of force was justified. Specifically, this Article examines whether the trier of fact in a state criminal prosecution should be permitted to broaden the time frame and consider conduct of the officer that increased the risk of a deadly confrontation as opposed to focusing narrowly on what the officer knew or believed at the moment the officer used deadly force. This Article argues that when the jury in a criminal prosecution of a law enforcement officer charged with a crime of violence is assessing the reasonableness of that officer's use of deadly force, that jury should be allowed to consider all of the relevant surrounding circumstances, in-

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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 (2003) (focusing on police interactions with emotionally disturbed individuals and arguing that courts should take into account the training available to and actually provided to the officers involved, accepted police practices, and the choices made by the officers leading up to the use of force as factors in the totality of the circumstances). Judges, practitioners, and even law students have weighed in on this question. *See* Jack Zouhary, *A Jedi Approach to Excessive Force Claims: May the Reasonable Force Be with You*, 50 U. TOL. L. REV. 1 (2018) (arguing that when determining whether an officer is liable for using excessive force, courts should consider pre-seizure police officer conduct if it is reckless and the proximate cause of the use of force); Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1 (2017) (discussing police excessive force cases through the lens of its disproportionate effect on young Black men and women and arguing that officers should not be permitted to use force if they predictably created the need for such force by engaging in overly aggressive tactics); Kevin Cyr, *Police Use of Force: Assessing Necessity and Proportionality*, 53 ALTA. L. REV. 663 (2016) (discussing officer-created jeopardy and its relevance to the necessity of police use of force in the Canadian legal system); Ryan Hartzell C. Balisacan, Note, *Incorporating Police Provocation into the Fourth Amendment "Reasonableness" Calculus: A Proposed Post-*Mendez *Agenda*, 54 HARV. C.R.-C.L. L. REV. 327 (2019) (discussing the Supreme Court's decision in *Los Angeles County v. Mendez*, 137 S. Ct. 1539 (2017), and the circuit split over whether pre-seizure conduct may be considered by the trier of fact in a § 1983 civil rights action); Latasha M. James, Comment, *Excessive Force: A Feasible Proximate Cause Approach*, 54 U. RICH. L. REV. 605 (2020) (arguing that courts in § 1983 cases should incorporate an officer's pre-seizure conduct into the reasonableness analysis and utilize tort law concepts of proximate causation to decide whether the officer's pre-seizure conduct caused the use of force and the victim's injuries); Aaron Kimber, Note, *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, 670–72 (2004) (critiquing the Ninth Circuit's now defunct provocation rule because it required an independent Fourth Amendment violation and supporting the Tenth Circuit's "immediately connected to" test that allows consideration of pre-seizure police conduct that increased the risk of a deadly confrontation in § 1983 lawsuits); William Heinke, Note, *Deadly Force: Differing Approaches to Arrestee Excessive Force Claims*, 26 S. CAL. REV. L. & SOC. JUST. 155 (2017) (providing an overview of the different federal circuits' approach to the question of whether pre-seizure police conduct may be considered by the trier of fact assessing the reasonableness of an officer's use of force in a § 1983 case and arguing that the Supreme Court should clarify its position and bring uniformity to the federal circuits).

cluding conduct of the police that created or increased the risk of a deadly confrontation.

State criminal courts are currently divided over whether juries should be permitted to consider the antecedent conduct of a police officer who has been charged with a crime arising out of the officer's use of force. Very few state courts have addressed this issue; most likely because there are so few criminal prosecutions of police officers.[7] Nonetheless, because this question also arises in federal civil lawsuits filed against law enforcement officers for using excessive force under 42 U.S.C. § 1983[8]—which holds public officials liable when they deprive individuals of their constitutional rights while acting under color of law—and in state civil tort cases against law enforcement officers for wrongful death, negligence, and assault and battery, it has significance beyond the state criminal prosecution context.

In § 1983 civil rights cases, the issue of whether the fact finder can consider a law enforcement officer's pre-seizure[9] conduct has split the

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7 Approximately 1,000 individuals are shot and killed by police in the United States each year. *Fatal Force*, WASH. POST (Aug. 16, 2021), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/Q399-D26G]. In the fifteen-year period between 2005 and 2020, however, only 121 officers were charged with murder or manslaughter for deaths resulting from their on-duty use of force, according to data compiled by Philip M. Stinson, a criminal justice professor at Bowling Green State University in Ohio. Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html [https://perma.cc/LE45-MGC7]. As of September 2020, only forty-four of these officers had been successfully convicted—often of lesser charges. *Id.*

8 42 U.S.C. § 1983 provides, "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 . . . ." 42 U.S.C. § 1983.

9 A "seizure" of the person occurs within the meaning of the Fourth Amendment when an officer, by means of physical force or show of authority, restrains the liberty of a citizen. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). As a general matter, if a reasonable person would have felt free to leave or terminate the encounter with the police, the individual has not been "seized." *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980). *But see* Florida v. Bostick, 501 U.S. 429, 436 (1991) ("[The defendant's] freedom of movement was restricted by a factor independent of police conduct—*i.e.*, by his being a passenger on the bus . . . . In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."). Questions abound about whether an individual has been seized in cases involving an officer's show of authority because the Court has previously indicated that an individual must submit to an officer's show of authority in order to be seized. California v. Hodari D., 499 U.S. 621, 626 (1991) ("The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. . . . It does not remotely apply, however, to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee."). An

lower federal courts and is unresolved by the U.S. Supreme Court. The Supreme Court had an opportunity to resolve this question in 2017, but explicitly declined to do so.[10] Similarly, state civil courts are split over whether the fact finder in a case involving a police officer accused of wrongful death, assault and battery, or negligence must narrowly consider only the facts and circumstances at the moment of, or right before, the officer's use of force or whether it may broaden the time frame and consider antecedent events and circumstances, including conduct of the officer that increased the risk of a deadly confrontation.[11]

This Article is primarily aimed at state legislators because they have the power to draft police use of force statutes that can specify whether the fact finder in a criminal prosecution of an officer may consider conduct of the officer that increased the risk of a deadly confrontation when assessing the reasonableness of the officer's beliefs or actions. Promisingly, in 2020, legislatures in two states and the District of Columbia did just this, enacting new use of force statutes specifying that the trier of fact must consider any conduct of the officer that increased the risk of a deadly confrontation.[12] These new use of force

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attempted seizure is not a seizure. *Id.* at 626 n.2. For a seizure to have occurred, the officer must have had the intent to stop the individual's freedom of movement. Brower v. County of Inyo, 489 U.S. 593, 596–97 (1989) ("[A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement . . . but only when there is a governmental termination of freedom of movement *through means intentionally applied*."). It is not necessary to have submission to authority when an officer applies physical force. In *Torres v. Madrid*, 141 S. Ct. 989 (2021), the Supreme Court affirmed that a Fourth Amendment seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting. *Id.* at 994. The Court explained that "[t]he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." *Id.* In § 1983 civil rights cases, in which an officer is accused of violating an individual's Fourth Amendment right to be free from unreasonable searches and seizures, federal courts use the term "pre-seizure" to refer to events and circumstances that occurred before, rather than contemporaneous with, the moment that the officer used deadly force to stop an individual. *See* Rivera v. Heck, No. 16-cv-673, 2018 WL 4354949, at *11 (W.D. Wis. Sept. 12, 2018) (describing pre-seizure conduct as conduct "leading up to the use of force"); Estate of Robinson *ex rel.* Irwin v. City of Madison, No. 15-cv-502, 2017 WL 564682, at *10 (W.D. Wis. Feb. 13, 2017) (describing an officer's pre-seizure conduct as the "decisions and actions prior to the moment" the officer used deadly force).

10 *Mendez*, 137 S. Ct. at 1547 n.* ("We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here.").

11 *See infra* Section II.C.2.

12 On July 22, 2020, the District of Columbia became the first jurisdiction in the nation to enact a police use of force statute that requires the trier of fact to consider any conduct of the law enforcement officer that increased the risk of a deadly confrontation as part of the totality of the circumstances. 67 D.C. Reg. 9161 (July 31, 2020). The Comprehensive Policing and Justice

statutes, which borrow heavily from a model statute I proposed in 2018,[13] also require the trier of fact to consider whether the officer engaged in de-escalation measures prior to using deadly force.[14] Additionally, the statutes augment the usual requirement in use of force statutes that a law enforcement officer must not use deadly force unless the officer reasonably *believed* it was immediately necessary to use such force to protect himself, herself, or another from death or serious physical injury, by making explicit that the officer's *actions* must also have been reasonable.[15]

Reform Second Emergency Amendment Act of 2020 was signed into law by Mayor Muriel Bowser on July 22, 2020, and was enacted on a temporary basis. *See* Nick Boykin, *DC's Mayor Passes Police Reform Bill After Unanimous Council Vote*, WUSA9 (July 22, 2020, 10:17 PM), https://www.wusa9.com/article/news/local/dc/washington-dc-police-bowser-passes-reform-bill/65-65f4a9c5-d658-4744-b59d-929857d1914c [https://perma.cc/A3JT-EKXF]. The D.C. Council was supposed to vote on whether to make this legislation permanent in the spring of 2021. *See* Fenit Nirappil, *D.C. Council Braces for Brawls Tuesday over Business Regulation, Criminal Justice Bills*, WASH. POST (Nov. 30, 2020, 5:58 PM), https://www.washingtonpost.com/local/dc-politics/dc-council-2020-bills/2020/11/30/3c536652-2a9b-11eb-9b14-ad872157ebc9_story.html [https://perma.cc/GU85-DASY]. Instead, it voted to reenact the Act on a temporary basis. *See* Comprehensive Policing and Justice Reform Temporary Amendment Act of 2021, 68 D.C. Reg. 005837, 005849–50 (June 4, 2021). On July 31, 2020, Connecticut passed police reform legislation that included a similar provision. H.R. 6004, 2020 Gen. Assemb., July Spec. Sess. (Conn. 2020); CONN. GEN. STAT. § 53a-22 (2020); Alec Snyder & Evan Simko-Bednarski, *Connecticut Gov. Ned Lamont Signs Sweeping Police Reform Bill*, CNN (July 31, 2020, 8:49 PM), https://www.cnn.com/2020/07/31/us/connecticut-police-reform-bill-signed/index.html [https://perma.cc/CQ5T-XXAE]. These use of deadly force provisions were amended slightly in 2021. *See* Rich Scinto, *Gov. Lamont Signs 4 New Bills into Law: What You Need To Know*, PATCH (Apr. 5, 2021, 11:32 AM), https://patch.com/connecticut/trumbull/gov-lamont-signs-4-new-bills-law-what-you-need-know [https://perma.cc/7YZ2-4TFV] (noting that the amended language "requires officers to reasonably determine no alternatives exist when making a decision to use deadly force," whereas "[p]revious language would have made officers exhaust all other alternatives first"). On October 28, 2020, Virginia Governor Ralph Northam signed police reform legislation that instructs the trier of fact assessing whether the use of deadly force was proper to consider "whether any conduct by the law-enforcement officer prior to the use of deadly force intentionally increased the risk of a confrontation resulting in deadly force being used." S. 5030, 2020 Gen. Assemb., Spec. Sess. I (Va. 2020); Adrianna Hargrove, *Governor Northam Signs Laws Advancing Police, Criminal Justice Reform in Virginia*, NBC12 (Oct. 28, 2020, 2:03 PM), https://www.nbc12.com/2020/10/28/gov-northam-signs-laws-advancing-police-criminal-justice-reform-virginia/ [https://perma.cc/AW8B-5QJR].

13 *See* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-escalation, Preseizure Conduct and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 661–65 [hereinafter Lee, *Reforming the Law on Police Use of Deadly Force*] (explaining model use of force statute, key portions of which were adopted by Washington, D.C., Connecticut, and Virginia in 2020).

14 *See* 67 D.C. Reg. 9161 (July 31, 2020); 68 D.C. Reg. 005837 (also requiring the fact finder, in assessing whether the officer's beliefs and actions were reasonable, to consider whether the officer engaged in de-escalation measures prior to using deadly force as part of the totality of the circumstances); H.R. 6004, 2020 Gen. Assemb., July Spec. Sess. § 29(c) (Conn. 2020); CONN. GEN. STAT. § 53a-22 (2020); S. 5030, 2020 Gen. Assemb., Spec. Sess. I § 19.2-83.5 (Va. 2020).

15 *See supra* note 12.

This Article is secondarily aimed at state judges overseeing state criminal prosecutions of officers charged with crimes of violence arising from their use of deadly force. In the absence of a state use of force statute or a state appellate court decision that addresses the question, state trial court judges have the discretion to either allow or deny the jury's consideration of conduct of the police that increased the risk of a deadly confrontation. This Article urges state courts to allow juries to consider such conduct as part of the totality of the circumstances that the jury must consider when deciding whether an officer's use of force was reasonable.

To a lesser extent, this Article is also aimed at federal appellate judges in § 1983 civil rights cases in which an officer is accused of using excessive force in violation of the Fourth Amendment. As discussed within, most of the federal circuit courts of appeal have already addressed this issue.[16] While federal district court judges are constrained to follow appellate decisions in the controlling jurisdiction, federal circuit court judges can either follow or overrule their own existing precedent until the Supreme Court resolves this issue. Hopefully, this Article will convince federal circuit court judges in jurisdictions that have adopted a narrow time frame approach to reverse course and permit the jury to consider antecedent conduct of the officer that increases the risk of a deadly confrontation.

This Article proceeds in three parts. Part I provides a brief overview of the law on police use of deadly force. It starts by discussing the Supreme Court's decision in *Graham v. Connor*.[17] It then provides a summary of state laws on police use of force.

Part II examines how federal and state courts have answered the question of whether the trier of fact in a case involving an officer's use of deadly force should be allowed to consider conduct of the police that increased the risk of a fatal confrontation. Part II starts by discussing the split in the lower federal courts on this question. It then examines what the Supreme Court said on this issue in its 2017 decision in *County of Los Angeles v. Mendez*.[18] Part II concludes by examining what the state courts in both the criminal and civil context have said on this issue.

Part III sets forth the case for allowing juries to broaden the time frame and consider conduct of the police that increased the risk of a deadly confrontation. This Part starts by introducing the reader to a

16 *See infra* Section II.A.

17 490 U.S. 386 (1989).

18 137 S. Ct. 1539 (2017).

theoretical construct by Mark Kelman that helps frame the issue at hand and illustrates the arbitrary nature of courts choosing either a narrow or a broad time frame. Kelman observes that trial courts overseeing criminal cases can choose either a broad or narrow time frame when assessing whether the prosecutor has met its burden of proving the actus reus, an essential element of the crime that requires proof that the defendant engaged in a voluntary act that caused the social harm.[19] In cases where the defendant is not acting with volition at the time he does the act that causes social harm, broadening the time frame or reaching back in time to find a voluntary act helps the prosecutor make its case. Narrowing the time frame helps the defendant achieve a not guilty verdict.

Similarly, in officer-created jeopardy cases, courts can choose either a broad or narrow time frame within which the jury can assess the reasonableness of the officer's actions. Choosing a narrow time frame usually helps the officer-defendant because the jury cannot consider actions the officer took or failed to take that increased the risk of the encounter turning deadly—actions that might suggest the officer's use of deadly force was not reasonable. Broadening the time frame can help the prosecution make its case that the officer acted unreasonably.

Next, Part III presents several arguments for allowing juries to consider antecedent conduct. First, in civilian homicide cases involving claims of self-defense, juries are allowed to consider conduct of the defendant preceding the fatal confrontation that increased the risk of a deadly confrontation.[20] Indeed, many states go even further and prohibit a civilian who is the initial aggressor in a conflict to assert a claim of self-defense.[21] In officer-involved shooting cases where the officer

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19 *See infra* Section III.A and text accompanying notes 262–83.

20 For example, the jury in the George Zimmerman trial was allowed to consider the fact that Zimmerman ignored the dispatcher's suggestion that he stay in his vehicle and wait for the police to arrive rather than follow and confront Trayvon Martin. *See infra* Section III.B.1. If Zimmerman had followed the dispatcher's suggestion, Trayvon Martin would probably still be alive today.

21 *See* Cynthia Lee, *Firearms and Initial Aggressors* (forthcoming) (unpublished manuscript) (on file with author) (discussing initial aggressor rules in self-defense doctrine); *see also* Castillo v. People, 421 P.3d 1141, 1148 (Colo. 2018) (noting that a person is not justified in using physical force if he is the "initial aggressor," i.e., "the person who 'initiated the physical conflict by using or threatening the imminent use of unlawful physical force'"); COLO. REV. STAT. § 18-1-704(3)(b) (2020) (barring use of justification defense by an individual who is the initial aggressor unless the individual withdraws from the encounter and effectively communicates intent to withdraw to the other person); State v. Singleton, 974 A.2d 679, 697–98 (Conn. 2009) (finding no error where jury was instructed that initial aggressor is "'the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used upon that other person' and that '[t]he first person to use physical force is not necessa-

claims he acted justifiably to protect his own safety or the safety of another person, the officer is essentially making a claim of self-defense or defense of others. It thus makes sense to allow the jury to consider the officer-defendant's antecedent conduct for the same reasons we allow juries in civilian self-defense cases to consider the civilian defendant's pre-confrontation conduct.[22]

Second, in officer-involved shooting cases, the jury is allowed to consider the victim-suspect's antecedent conduct that led the officer to perceive a need to use deadly force.[23] If the jury can consider the antecedent conduct of the victim-suspect that increased the risk of a deadly confrontation, it should be allowed to consider the antecedent conduct of the defendant-officer that increased the risk of a deadly confrontation as well.

Third, in officer-involved shooting cases, the jury is allowed to consider conduct of the police that decreased the risk of a deadly confrontation.[24] For example, if the officer called for backup, tried to calm the suspect, or used less deadly force prior to using deadly force, the jury would be allowed to consider the officer's de-escalation measures

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rily the initial aggressor'"); CONN. GEN. STAT. § 53a-19(c) (2020) (barring use of justification defense by an initial aggressor with exception for withdrawal); State v. Hughes, 84 S.W.3d 176, 179 (Mo. Ct. App. 2002) ("A person who is an initial aggressor, that is, one who first attacks or threatens to attack another is not justified in using force to protect himself from the counter-attack that he provoked."); MO. REV. STAT. § 563.031 (2020) (barring self-defense by an individual who was an initial aggressor with exceptions where withdrawal is effectively communicated and made, where the individual is a law enforcement officer using physical force under the state use of force statute, or where otherwise permitted by statute); Conley v. Commonwealth, 599 S.W.3d 756, 776 (Ky. 2019) (holding that a defendant "must use physical force prior to any act of purported self-protection" to be the initial aggressor); KY. REV. STAT. ANN. § 503.060(3)(a) (West 2020) (barring use of justification defense by an individual who was the initial aggressor with exceptions for withdrawal or use of nondeadly physical force where individual reasonably believes force being returned places the individual in "imminent danger of death or serious physical injury").

22 Ben Jones argues that police-generated killings—killings brought on by officer conduct that created or increased the risk of an encounter turning deadly—merit legal sanctions just as self-generated self-defense killings—killings by civilians who started the conflict and thus are considered initial aggressors—merit legal sanctions. Ben Jones, *Police-Generated Killings: The Gap Between Ethics and Law*, POL. RSCH. Q. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812528 [https://perma.cc/2Z47-QYEJ]. Jones is referring to the rule that an initial aggressor loses the right to claim justifiable self-defense. *See supra* note 20.

23 *See infra* Section III.B.2 (discussing several high-profile police homicide cases in which the jury heard evidence presented by the defendant-officer's counsel regarding antecedent conduct by the victim that arguably contributed to the officer's belief that deadly force was necessary).

24 *See infra* Section III.B.3 (discussing cases in which the jury was allowed to consider de-escalation measures engaged by the police prior to the police use of deadly force presented by the defendant-officers in an attempt to show that their use of force was reasonable).

in assessing the reasonableness of the officer's ultimate use of deadly force. If the jury can consider what the police did to decrease the risk of a deadly confrontation prior to using deadly force, it is only fair that the jury should be allowed to consider what the police did that increased the risk of a deadly confrontation.

In addition, expanding the time frame to allow consideration of antecedent conduct makes sense because the jury assessing the reasonableness of an officer's use of deadly force in an officer-involved shooting case is supposed to be considering the totality of the circumstances. If the officer did something that increased the risk of a deadly confrontation, this is simply one circumstance in the totality of the circumstances that is relevant to whether the officer's overall conduct was reasonable.

Part III concludes with an analysis of possible objections to allowing the jury to consider antecedent officer conduct that increased the risk of a deadly confrontation. Most objections to broadening the time frame are grounded in concerns about prejudice or relevance, but these arguments fail to consider the equalizing and probative value of such evidence.

This Article does not focus on the very important issue of race and police use of force, an issue I have highlighted in other writings.[25] According to a recent report by the ACLU, "Black men face about a one in 1,000 chance of being killed by police over the course of their lives."[26] The same report found that "although women are less likely than men to be killed by police overall, Black women and Native American/Indigenous women are more likely to be killed by police than white women."[27] It also found that "Native American/Indigenous people and Black people experience the highest rates of fatal police shootings, followed by Latinx people."[28] Most of the studies that have been conducted on shooting and racial bias suggest that race influ-

25 *See* Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 L. & CONTEMP. PROBS. 145 (2016) [hereinafter Lee, *Race, Policing, and Lethal Force*] (providing a comprehensive examination of the social science literature on shooter bias); Cynthia Lee, "*But I Thought He Had a Gun" Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1 (2004) [hereinafter Lee, *"But I Thought He Had a Gun"*] (discussing cases in which police officers shot and killed Black individuals who were holding non-weapon objects like sunglasses or keys, mistakenly believing they were carrying a firearm).

26 ACLU, THE OTHER EPIDEMIC: FATAL POLICE SHOOTINGS IN THE TIME OF COVID-19 2 (2020). The report also noted, "One study found that young unarmed male victims of deadly force by police are 13 times more likely to be Black than white." *Id.*

27 *Id.* at 3.

28 *Id.* at 4 ("[I]n 2019, Black and Native American/Indigenous people were approximately three times more likely than white people to be fatally shot by police . . . .").

ences the decision to shoot.[29] The bulk of the shooter bias studies show that both civilians and police officers are quicker to shoot at Black suspects than they are to shoot at White suspects and are less likely overall to shoot when the suspect is White than when the suspect is Black.[30] Furthermore, both civilians and police officers have greater difficulty distinguishing a weapon from a harmless object when the person holding the object is Black.[31] Conversely, a few studies have found that officers are slower to shoot Black suspects than White suspects.[32] Despite these latter findings, it is worth noting that "even if an officer's *actual* split-second decision isn't race dependent,

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29 Lee, *Race, Policing, and Lethal Force*, *supra* note 25, at 152–58; *see also* Yara Mekawi, Konrad Bresin & Carla D. Hunter, *Dehumanization of African-Americans Influences Racial Shooter Biases*, 11 RACE & SOC. PROBS. 299, 305 (2019) (finding that high levels of White fear, low empathy, and dehumanization of African-Americans increase shooter bias); Kimberly Barsamian Kahn & Paul G. Davies, *What Influences Shooter Bias? The Effects of Suspect Race, Neighborhood, and Clothing on Decisions to Shoot*, 73 J. SOC. ISSUES 723, 732, 737 (2017) (investigating how contextual cues signaling threat or safety interact with the race of the target to moderate shooter bias and finding that factors like clothing and perceived safety of the neighborhood increase or decrease shooter bias).

30 Lee, *Race, Policing, and Lethal Force*, *supra* note 25, at 152–58 (analyzing numerous shooter bias studies, the vast majority of which found that civilian or police officer participants were quicker to mistakenly shoot unarmed Black targets over unarmed White targets). It is interesting to note that police officers often perform better than civilians in these shooter bias studies, most likely because law enforcement officers are trained in the use of force. *Id.* at 156 (citing Joshua Correll, Bernadette Park, Charles M. Judd, Melody S. Sadler, Bernd Wittenbrink & Tracie Keesee, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1020 (2007)) (finding that although police officers, like civilians, showed racial bias in their initial reactions to the various targets by recognizing that a target was armed more quickly when the target was Black than when the target was White, their ultimate shooting decisions were more accurate than those of civilians).

31 *Id.* at 153 (citing Anthony G. Greenwald, Mark A. Oakes & Hunter G. Hoffman, *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCH. 399, 404 (2003)).

32 *Id.* at 158 (citing Lois James, Bryan Vila & Kenn Daratha, *Results from Experimental Trials Testing Participant Responses to White, Hispanic and Black Suspects in High-Fidelity Deadly Force Judgment and Decision-Making Simulations*, 9 J. EXPERIMENTAL CRIMINOLOGY 189, 204 (2013) (testing police officers, civilians, and military personnel using laboratory simulators, similar to those used by law enforcement in officer training, and finding that participants took longer to shoot armed, Black suspects than White or Hispanic suspects)); Lois James, David Klinger & Bryan Vila, *Racial and Ethnic Bias in Decisions to Shoot Seen Through a Stronger Lens: Experimental Results from High-Fidelity Laboratory Simulations*, 10 J. EXPERIMENTAL CRIMINOLOGY 323, 336 (2014) (finding civilian-participants, even those with implicit racial bias, to be significantly slower to fire at Black suspects than their White or Hispanic counterparts); Lois James, Stephen M. James & Bryan J. Vila, *The Reverse Racism Effect: Are Cops More Hesitant to Shoot Black Than White Suspects?*, 15 CRIMINOLOGY & PUB. POL'Y 457, 468 (2016) (finding that "officers were significantly *less* likely to shoot unarmed Black suspects than unarmed White suspects").

the series of events that puts an officer in that position might very well be."[33]

Currently, unless the legislature or a controlling appellate court has spoken on the issue, whether the jury can consider officer conduct prior to the officer's use of deadly force rests entirely within the trial court's discretion.[34] This can lead to arbitrary and capricious results because the decision to expand or constrict the time frame may turn on the trial court's general view of law enforcement. If the court is sympathetic to the law enforcement officer, it may be reluctant to allow the jury to consider the officer's antecedent conduct, fearing that the jury will be more inclined to find against the officer if it hears about the antecedent conduct. If the court feels police officers are not usually held accountable for their actions but should be, the court may be more inclined to broaden the time frame and allow the fact finder to consider the officer's antecedent conduct. To reduce the arbitrariness necessarily arising from this type of inconsistency, state legislatures should enact use of force statutes explicitly authorizing the fact finder in a state criminal prosecution of a law enforcement officer to consider antecedent police conduct that increased the risk of the encounter turning deadly.[35]

I. A Quick Primer on Police Use of Force

Police use of force in the United States is primarily governed by two lines of authority: (1) Supreme Court decisions on what counts as excessive force under the Fourth Amendment in civil rights lawsuits brought under 42 U.S.C. § 1983,[36] and (2) state use of force statutes,

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33 Garrett & Stoughton, *A Tactical Fourth Amendment*, *supra* note 6, at 221; *see also* L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 Minn. L. Rev. 2035, 2039 (2011) (explaining how, because of implicit racial bias, an officer might evaluate behaviors engaged in by Black people as suspicious when the same behaviors by White people would not arouse the officer's suspicions).

34 *See* Greenidge v. Ruffin, 927 F.2d 789, 791–92 (4th Cir. 1991) (noting that a trial court's decision to exclude evidence of an officer's pre-seizure conduct is a procedural ruling subject only to review for abuse of discretion). Accordingly, if an appellate court has ruled on the issue, the trial court must follow that ruling. As discussed within, the appellate courts are split on this issue. *See infra* Section II.A.

35 *See supra* note 12. In passing use of force legislation requiring the trier of fact to consider whether any conduct of the officer increased the risk of a deadly confrontation, Washington, DC, Connecticut, and Virginia borrowed language from a model statute I proposed in 2018. *See* Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 13, at 664–65.

36 Even though state use of force statutes govern in criminal law prosecutions of police officers charged with crimes of violence, I discuss Supreme Court case law on the meaning of "excessive force" under the Fourth Amendment in this brief overview because the Fourth Amendment is commonly regarded as the primary vehicle for the regulation of police uses of

which specify the requirements for a law enforcement officer's claim of justifiable force in a state criminal prosecution.[37] Although there are many parallels between these two lines of authority, they are not one and the same. Supreme Court decisions control in § 1983 civil rights actions involving claims that law enforcement officers used excessive force.[38] State use of force statutes control in state criminal prosecutions of law enforcement officers charged with murder, manslaughter, or any other crime of violence who claim justifiable force.[39] An officer's claim of justifiable force in a state criminal law prosecution is much like a civilian-defendant's claim of self-defense except state use of force statutes that outline the requirements for the law enforcement defense are generally more forgiving of police officers than self-defense statutes are of civilians.[40]

Most people assume that Supreme Court case law on police use of force controls in state criminal prosecutions of law enforcement officers. Although a state that does not have a use of force statute may

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force. *See* Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, *supra* note 6, at 523–25 (noting the common wisdom is that the Fourth Amendment regulates all police uses of force when in fact, it only regulates uses of force that constitutes "seizures" of the person).

37 Police officers may also be sued civilly in state court for torts, such as wrongful death or assault and battery. *See* MATTHEW LIPPMAN, CRIMINAL PROCEDURE 429, 452 (4th ed. 2020). Additionally, an officer may be criminally prosecuted in federal court for violating 18 U.S.C. § 242, a civil rights statute that prohibits a law enforcement officer acting under color of law from willfully depriving an individual of a right protected by the Constitution or the laws of the United States. *See* 18 U.S.C. § 242. The willfulness requirement in § 242 makes it almost impossible to convict an officer charged under this statute. *See, e.g.*, Miranda Dalpiaz & Nancy Leong, *Excessive Force and the Media*, 102 CORNELL L. REV. ONLINE 1, 9 (2016) ("The willfulness standard requires the government to prove 'a specific intent to deprive a person of a federal right.' This heightened willfulness standard has made federal prosecution of section 242 cases 'significantly more difficult.'" (footnote omitted) (first quoting Screws v. United States, 325 U.S. 91, 103 (1945); and then quoting John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 809)); Jacobi, *supra*, at 809 ("There is strong evidence that the *Screws* interpretation of section 242's willfulness element has made federal prosecution of police misconduct cases significantly more difficult."). This Article focuses on reforming the law governing state criminal prosecutions of law enforcement officers who claim their use of force was justified.

38 *See* MARTIN A. SCHWARTZ, FED. JUD. CTR., SECTION 1983 LITIGATION 47–56 (Kris Markarian ed., 3d ed. 2014) (discussing Supreme Court cases governing excessive force claims under the Fourth Amendment).

39 *See* Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After* Garner, 35 ST. LOUIS U. PUB. L. REV. 109, 125–26 (2015) (observing that states enjoy broad authority to establish standards for substantive criminal law, including criminal law defenses that address when a police officer's use of force is justified, and Supreme Court case law cannot change a state's substantive criminal law).

40 *See* Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 13, at 656 (explaining differences between state use of force statutes that apply to law enforcement officers and self-defense rules that apply to civilians).

follow Supreme Court case law on police use of force,[41] in the vast majority of states that have enacted statutes on police use of force, the use of force statute—enacted by the state legislature—is what controls in a state criminal law prosecution of a law enforcement officer who claims their use of force was justified. While there may be overlap between the two lines of authority, state use of force statutes can and, in many respects, do diverge from Supreme Court case law. Contrary to common belief, state use of force statutes that appear to contradict the holdings of Supreme Court case law on excessive force in the § 1983 context are not unconstitutional by virtue of the fact that they diverge from Supreme Court case law.[42]

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41 For example, courts overseeing criminal prosecutions of police officers in Maryland, which until 2021 had no use of force statute, used to apply *Graham v. Connor*, 490 U.S. 386 (1989). *See* State v. Pagotto, 762 A.2d 97, 111–12 (Md. 2000) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (quoting *Graham*, 490 U.S. at 396–97)); State v. Albrecht, 649 A.2d 336, 349 (Md. 1994) ("[W]here the accused is a police officer, the reasonableness of the conduct must be evaluated not from the perspective of a reasonable civilian but rather from the perspective of a reasonable police officer similarly situated."). Similarly, courts in Ohio, which has no use of force statute at least as of the time this Article was being written, apply *Graham* and other Supreme Court cases on the meaning of excessive force. *See* State v. White, 29 N.E.3d 939, 947 (Ohio 2015) ("Although the Supreme Court's decisions in *Garner* and *Graham* involved an officer's civil liability for deprivation of civil rights under color of law, these cases nonetheless help to define the circumstances in which the Fourth Amendment permits a police officer to use deadly and nondeadly force. Courts therefore apply *Garner* and *Graham* in reviewing criminal convictions arising from a police officer's use of deadly force."). Contrary to conventional wisdom, states without a use of force statute on the books do not have to follow Supreme Court case law on what constitutes excessive force in their criminal prosecutions of law enforcement officers claiming they used justifiable force. *See* Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, *supra* note 6 (arguing that states and police agencies should stop blindly incorporating Fourth Amendment jurisprudence on excessive force into their laws and regulations because the Fourth Amendment is a flawed mechanism for regulating police violence). States without a use of force statute can instead apply ordinary self-defense doctrine in criminal prosecutions involving police officers charged with crimes of violence. *See, e.g.*, Rankin v. Commonwealth, No. 1671-16-1, 2018 WL 1915538, at *4 & 10 n.6 (Va. Ct. App. Apr. 24, 2018) (noting that ordinary self-defense doctrine, rather than *Graham*, applies in a prosecution of a law enforcement officer). For a list of states that did not have a use of force statute as of January 2021, see *infra* note 60. For a list of states that have incorporated Supreme Court jurisprudence into state law, regardless of whether they have a use of force law or not, see Stoughton et al., Evaluating Police Uses of Force, *supra* note 5, at 69–70.

42 *See* Flanders & Welling, *supra* note 39, at 121 (listing several states that retained the old common law rule that allowed police officers to use any amount of force, including deadly force, to effectuate the arrest of a fleeing felon, even after the Supreme Court rejected the common law rule in *Tennessee v. Garner*, 471 U.S. 1 (1985)). Supreme Court cases on excessive force govern in § 1983 cases while state statutes govern in state prosecutions of police officers. *See id.* at 125–26 ("*Garner* involved the application of a standard within a federal civil rights statute, not . . . a state criminal prosecution.").

A. Overview of Supreme Court Case Law on Police Use of Force

The Supreme Court has issued many opinions on police use of force, but *Graham v. Connor*[43] is its most cited authority on how courts should go about determining whether police use of force is excessive.[44] In *Graham*, an African American man with diabetes was handcuffed, shoved against the hood of his car after he asked the officers to check his wallet for a diabetes decal he carried, then thrown headfirst into the patrol car.[45] Graham suffered a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and a loud ringing in his right ear.[46] He brought a lawsuit against the officers involved in the incident, alleging they used excessive force in violation of his constitutional rights.[47]

The district court applied a four-factor subjective test based on the Due Process Clause and granted the officers' motion for a directed verdict, finding that the amount of force the officers used on Graham was appropriate under the circumstances.[48] The Court of Appeals for

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43 490 U.S. 386 (1989).

44 Two other Supreme Court cases on police use of force are also significant, but because I have written about these cases in prior scholarship, *see* Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 13, at 641–42, 648–50, I simply summarize them here. In *Tennessee v. Garner*, a police officer shot an African American teenager in the back of the head while the teen was attempting to flee from a house that had been broken into, even though the officer was pretty sure the teenager was unarmed. In reviewing the case, the Supreme Court rejected the common law rule in effect in Tennessee at the time, which permitted an officer to use whatever force was necessary, including deadly force, to effectuate the arrest of a fleeing felon. *See Garner*, 471 U.S. at 12–13. The Court held that only where an officer has probable cause to believe the suspect poses a threat of serious bodily harm, either to the officer or others, is it constitutionally reasonable to prevent escape by using deadly force. *See id.* at 3. Additionally, the Court suggested that an officer should give some warning prior to using deadly force, if feasible. *See id.* at 11–12. Many read *Tennessee v. Garner* as establishing two bright-line rules regarding police use of force: (1) police cannot use deadly force to stop a fleeing felon unless they have probable cause to believe the individual poses a threat of serious bodily harm to the officer or others, and (2) the officer should give a warning, if feasible, prior to using deadly force against a fleeing felon. In *Scott v. Harris*, 550 U.S. 372 (2007), Victor Harris, an African American who was rendered a quadriplegic after a police officer rammed his patrol car into the back of Harris' car, causing it to crash, sued the officer. *Id.* at 374–76. He argued that the officer's actions were not reasonable because the officer did not have probable cause to believe Harris posed a threat of serious bodily injury to the officer or others as required under *Tennessee v. Garner*. *See id.* The high-speed chase took place at night and there were very few cars on the road. *See id.* at 389 (Stevens, J., dissenting). The Supreme Court, however, rejected Harris' attempt to have the Court follow its own precedent, explaining that *Tennessee v. Garner* was simply an application of Fourth Amendment reasonableness balancing and did not set forth a bright-line rule for police officers contemplating the use of deadly force against a fleeing felon. *See id.* at 382.

45 *See* 490 U.S. at 389.

46 *Id.* at 390.

47 *Id.*

48 *Id.* at 390 (noting that the district court considered the following four factors in assess-

the Fourth Circuit affirmed, holding that in relying on the four-factor test and applying the Due Process Clause, the district court applied the correct legal standard to assess the appropriateness of the officers' use of force.[49]

The Supreme Court reversed on the ground that the lower courts erred in applying the Due Process Clause to assess Graham's claim.[50] The Court held that all civilian claims of excessive force by a law enforcement officer must be analyzed for reasonableness under the Fourth Amendment, not the Due Process Clause.[51]

According to *Graham*, in assessing reasonableness, courts should balance the individual's interests against the governmental interests.[52] Furthermore, the standard of reasonableness under the Fourth Amendment is an objective standard—an officer's actual intent is irrelevant.[53] "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[54] Under *Graham v. Connor*, officers do not have to be correct in their assessment of the need to use force; they can be mistaken as long as their mistake was reasonable.[55] Additionally,

> proper application [of reasonableness balancing] requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.[56]

In other words, reasonableness balancing is a totality of the circumstances test. *Graham v. Connor* is understood as the current standard for assessing claims of excessive force.

As Rachel Harmon and others have noted, a significant problem with the *Graham* standard is that it fails to provide meaningful gui-

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ing whether the officers used excessive force against Graham: "(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) 'whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm'" (quoting Graham v. City of Charlotte, 644 F. Supp. 246, 248 (W.D.N.C. 1986))).

49 *Id.* at 391.

50 *See id.* at 388.

51 *Id.*

52 *See id.* at 396–97.

53 *See id.* at 399.

54 *Id.* at 396.

55 *See id.*

56 *Id.*

dance to lower courts, litigants, and police officers in the field.[57] This has led to inconsistency in the application of the *Graham* standard. For example, lower courts are split over the question of whether the jury may consider whether less deadly alternatives that could have avoided the deadly conflict were available to the officer but were not taken.[58] Lower courts are also split over whether juries should be allowed to consider antecedent conduct of the officer that contributed to the risk of the encounter turning deadly.[59]

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57 Rachel Harmon, one of the Assistant Reporters to the American Law Institute's current Policing Project, observes:

> *Graham* permits courts to consider any circumstance in determining whether force is reasonable without providing a standard for measuring relevance, it gives little instruction on how to weigh relevant factors, and it apparently requires courts to consider the severity of the underlying crime in all cases, a circumstance that is sometimes irrelevant and misleading in determining whether force is reasonable.

Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U. L. REV. 1119, 1130 (2008); *see also* Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, *supra* note 6, at 545–56. To be fair, the Court explicitly stated that the trier of fact should consider "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. These factors, however, are obviously relevant and would probably be considered by the trier of fact even if the Court had not specified that they should be considered.

58 Some courts view the availability of less deadly alternatives as irrelevant to the reasonableness of an officer's use of deadly force. *See, e.g.*, Schulz v. Long, 44 F.3d 643, 649 (8th Cir. 1995) ("Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent), such as waiting for a supervisor or the SWAT team, are simply not relevant to the reasonableness inquiry."); Plakas v. Drinski, 19 F.3d 1143, 1149 (7th Cir. 1994) ("We do not believe the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable . . . ."); United States v. Melendez-Garcia, 28 F.3d 1046, 1052 (10th Cir. 1994) ("We must avoid 'unrealistic second-guessing' of police officers' decisions . . . and thus do not require them to use the least intrusive means in the course of a detention, only reasonable ones." (quoting United States v. King, 990 F.2d 1552, 1562–63 (10th Cir.1993))). Other courts recognize that whether less deadly alternatives were available to the officer but were not used is a relevant factor in deciding whether the officer's use of force was reasonable. *See* Glenn v. Wash. Cnty., 673 F.3d 864, 872 (9th Cir. 2011) ("[Whether listed in *Graham*,] other relevant factors include the availability of less intrusive alternatives to the force employed . . . ."); Chew v. Gates, 27 F.3d 1432, 1440 n.5 (9th Cir. 1994) (noting that "the availability of alternative methods of capturing or subduing a suspect may be a factor to consider" in determining whether a particular application of force was unreasonable); Estate of Heenan v. City of Madison, 111 F. Supp. 3d 929, 942 (W.D. Wis. 2015) ("The failure to use an alternative, non-deadly force is not dispositive, although whether such an alternative existed is a factual question that *may* weigh on a trier of facts' ultimate determination of objective reasonableness.").

59 *See infra* Sections II.A, II.C.

B. Overview of State Use of Force Statutes

The vast majority of state statutes on police use of force allow an officer to use deadly force against a civilian if the officer reasonably believed deadly force was necessary to effectuate an arrest, prevent the escape of a felon, or protect the officer or others.[60] A few states

60 It appears that as of November 2020, twenty-nine states explicitly relied upon a "reasonable belief" standard in their use of force statute, requiring only that the officer reasonably believed that deadly force was necessary and not explicitly requiring a finding of reasonable action by the law enforcement officer as well. *See* ALA. CODE § 13A-3-27(b) (2020); ALASKA STAT. § 11.81.370(a) (2020); ARIZ. REV. STAT. ANN. § 13-410(C) (2020); ARK. CODE ANN. § 5-2-610(b) (2020); CAL. PENAL Code § 835a(c)(1) (West 2020); COLO. REV. STAT. § 18-1-707(4.5) (2020); FLA. STAT. § 776.05(3) (2020); GA. CODE ANN. § 17-4-20(b) (2020); 720 ILL. COMP. STAT. 5/7-5 (2020); IOWA CODE § 804.8(1)(b) (2020); KAN. STAT. ANN. § 21-5227(a) (West 2020); LA. STAT. ANN. § 14:20(A) (2020); ME. REV. STAT. ANN. tit. 17-A, § 107(2) (West 2020); MINN. STAT. § 609.066(3) (2020) (not referring to the officer's beliefs in one portion of the statute, but requiring the officer's belief to be reasonable in another provision); MO. REV. STAT. § 563.046(3) (2020); MONT. CODE ANN. § 45-3-102 (West 2020); N.H. REV. STAT. ANN. § 627:5(II) (2020); N.J. STAT. ANN. § 2C:3-7(b)(2) (West 2020); N.Y. PENAL LAW § 35.30(1) (McKinney 2020); N.C. GEN. STAT. § 15A-401(d)(2)(a–b) (2020); OKLA. STAT. tit. 21, § 732(2) (2020); OR. REV. STAT. § 161.239 (2020); 12 R.I. GEN. LAWS §§ 12-7-8, 12-7-9 (2020); TEX. PENAL CODE ANN. § 9.51 (West 2020); UTAH CODE ANN. § 76-2-404 (West 2020); WASH. REV. CODE § 9A.16.040(4) (2020). Three states (Delaware, Kentucky, and Nebraska) utilized a subjective belief standard. *See* DEL. CODE ANN. tit. 11, § 467(c) (2020); KY. REV. STAT. ANN. § 503.090(2) (West 2020); NEB. REV. STAT. § 28-1412(3) (2020). Four states (Mississippi, Nevada, North Dakota, and South Dakota) did not reference the officer's belief in their use of deadly force statute. *See* MISS. CODE ANN. § 97-3-15 (2020); NEV. REV. STAT. § 200.140 (2020); N.D. CENT. CODE § 12.1-05-07 (2020); S.D. CODIFIED LAWS § 22-16-32 (2020). Four states (Idaho, Indiana, New Mexico, and Tennessee) required probable cause before an officer could justifiably use deadly force. IDAHO CODE § 18-4011 (2020); IND. CODE § 35-41-3-3 (2020); N.M. STAT. ANN. § 30-2-6 (2020); TENN. CODE ANN. § 39-11-620 (2020). At least two states and the District of Columbia require both reasonable beliefs and action before an officer can justifiably use deadly force. *See supra* note 35. As of January 2021, seven states (Maryland, Michigan, Ohio, South Carolina, West Virginia, Wisconsin, and Wyoming) did not have a use of force statute. Maryland was presented with several use of force bills in 2019 and again in 2020, but these bills failed to make it out of committee. *See* H.D. 1121, 2019 REG. SESS. (Md. 2019); H.D. 166, 2020 REG. SESS. (Md. 2020); H.D. 1090, 2020 REG. SESS. (Md. 2020). In 2021, Maryland finally enacted use of force legislation. Michael Levenson & Bryan Pietsch, *Maryland Passes Sweeping Police Reform Legislation*, N.Y. TIMES (Apr. 10, 2021), https://www.nytimes.com/2021/04/10/us/maryland-police-reform.html [https://perma.cc/ZK46-XGMA]. Under Subsection (D) (1) of Senate Bill 71, "[a] police officer may not use force against a person unless, under the totality of the circumstances, the force is necessary and proportional to: (I) prevent an imminent threat of physical injury to a person, or (II) effectuate a legitimate law enforcement objective." S. 71, 442d GEN. ASSEMB., Reg. Sess. (Md. 2021). This statute appears to require absolute necessity and proportionality rather than reasonable necessity and proportionality, but under Subsection (I)(1), "[a] police officer may not *intentionally* violate Subsection (D) . . . resulting in serious physical injury or death to a person," and if an officer does so, that officer is guilty of a misdemeanor and is subject to up to ten years in prison. *Id.* §§ (I)(1)–(2) (emphasis added). It may be harder to hold an officer accountable under Maryland's new statute than a statute that requires a showing of unreasonableness because the prosecutor must prove the officer intentionally violated the law before that officer can be found guilty and sentenced to prison.

allow an officer to use deadly force based solely on the officer's honest belief that deadly force was necessary without also requiring that the officer's belief was objectively reasonable.[61] In focusing on

61 *See, e.g.*, DEL. CODE ANN. tit. 11, § 467(c) (2020) (authorizing deadly force where all other reasonable means have been exhausted, and the officer *believes* that the arrest is for a crime involving actual or threatened physical injury, that there is no substantial risk of third party injury, and that delayed apprehension will cause a substantial risk of death or serious injury); KY. REV. STAT. ANN. § 503.090 (West 2020) (authorizing deadly force where an officer arrests someone for a felony involving actual or threatened use of deadly force and *believes* that the arrestee is likely to "endanger human life unless apprehended without delay"). Similarly, Nebraska's use of force statute provides that a police officer is justified in using deadly force if the officer is arresting someone for a felony and *believes* the force employed involves no substantial risk of injury to innocents, and either (1) the crime of arrest involved the use or threat of deadly force, or (2) there is a substantial risk that the arrestee will cause death or serious bodily injury if apprehension is delayed. NEB. REV. STAT. § 28-1412(3) (2020). Some legal scholars have argued that even though it appears to embrace a subjective belief standard, Nebraska's use of force statute in fact utilizes an objective reasonable belief standard. *See, e.g.*, STOUGHTON ET AL., EVALUATING POLICE USES OF FORCE, *supra* note 5, at 87 (citing State v. Thompson, 505 N.W.2d 673 (Neb. 1993); Wagner v. City of Omaha, 464 N.W.2d 175 (Neb. 1991)). The case law, however, does not explicitly state that the officer's belief must be reasonable. It merely states that the force used by an officer, i.e., the officer's *actions*, must be reasonable. *See* State v. Thompson, 505 N.W.2d 673, 680 (Neb. 1993) ("[U]nder the provisions of § 28-1412, a police officer in making an arrest must use only *reasonable force*, which is that amount of force which an ordinary, prudent, and intelligent person with the knowledge and in the situation of the arresting police officer would have deemed necessary under the circumstances." (emphasis added) (quoting *Wagner*, 464 N.W.2d at 180)). There is a big difference between requiring an officer's belief in the need to use deadly force to be reasonable, as most use of force statutes do, versus requiring that an officer's beliefs *and* actions be reasonable, as is now required in only a handful of jurisdictions. *See supra* note 12; Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 13, at 637, 639, 655 (discussing model use of force statute which would require both a reasonable belief and reasonable action). Some use-of-force statutes appear to adopt a subjective standard by using the word "believes," but have been interpreted as utilizing an objective, reasonable belief standard. *See* HAW. REV. STAT. § 703-307(3) (2020) ("The use of deadly force is not justifiable under this section unless: [t]he arrest is for a felony; [and t]he person effecting the arrest is authorized to act as a law enforcement officer . . . [and t]he actor *believes* that the force employed creates no substantial risk of injury to innocent persons; and [t]he actor *believes* that: [t]he crimes for which the arrest is made involved conduct including the use or threatened use of deadly force; or [t]here is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed." (emphasis added)); *id.* § 703-300 ("'Believes' means reasonably believes."); 18 PA. CONS. STAT. § 508(a) (2015) ("[A peace officer] is justified in using deadly force only when he *believes* that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he *believes* both that: (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay." (emphasis added)); *id.* § 501 ("Believes or 'belief' means 'reasonably believes' or 'reasonable belief.'"). The state of Washington previously used a subjective belief standard in its police use of deadly force statute. *See* WASH. REV. CODE § 9A.16.040(3) (2016) ("A public officer or peace officer shall not be held criminally liable for using deadly force without malice and with a good faith belief that such act is justifiable pursuant to this section."). In 2019, the state of Washington rewrote subsection 4 to § 9A.16.040, explain-

whether the officer honestly or reasonably believed in the need to use deadly force and not requiring a separate finding that the officer's actions were reasonable, the vast majority of state use of force statutes encourage the trier of fact to focus on whether the officer's fear of the suspect was reasonable.

Prior to 2020, none of the state use of force statutes on the books separately required consideration of whether the officer's acts were reasonable. In 2020, two states and the District of Columbia passed use of force legislation disallowing the use of deadly force unless both the officer's beliefs and actions were reasonable.[62] Also in 2020, Massachusetts enacted use of force legislation that disallows the use of deadly force unless necessary and proportionate to the threat of imminent harm.[63]

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ing that "good faith" reflects an objective standard rather than a subjective standard. Subsection 4 now provides, "[a] peace officer shall not be held criminally liable for using deadly force in good faith, where 'good faith' is an *objective standard* which shall consider all the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated *reasonable officer* would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual." WASH. REV. CODE § 9A.16.040(4) (2020) (emphasis added).

62 *See supra* note 12.

63 On December 31, 2020, Massachusetts Governor Charlie Baker signed a comprehensive police reform bill that includes use of force provisions. *See Gov. Baker Signs Landmark Mass. Police Reform Bill*, NBC 10 BOS. (Dec. 31, 2020, 2:07 PM), https://www.nbcboston.com/massachusetts/gov-baker-signs-revised-mass-police-reform-bill/2269498/ [https://perma.cc/JY8G-R7GM]. Massachusetts's new use of force statute requires that an officer attempt de-escalation tactics, if feasible, prior to using any force and provides that deadly force may not be used unless "necessary to prevent imminent harm to a person and the amount of force used is proportionate to the threat of imminent harm." 2020 Mass. Acts ch. 253 (to be codified at MASS. GEN. LAWS ch. 6E, § 14(b)). In 2021, Vermont enacted a new use of force statute that appears to focus solely on whether the officer's use of deadly force was reasonable and necessary without reference to the officer's beliefs, providing:

> A law enforcement officer is justified in using deadly force upon another person only when, based on the totality of the circumstances, such force is objectively reasonable and necessary to: (A) defend against an imminent threat of death or serious bodily injury to the officer or to another person; or (B) apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended.

VT. STAT. ANN. tit. 20, § 2368(c)(1) (2019). In the next clause, however, the statute specifies that the use of deadly force is "necessary" if a *reasonable* officer in the same situation would have *believed* that the use of deadly force was necessary, providing:

> The use of deadly force is necessary when, given the totality of the circumstances, an objectively reasonable law enforcement officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the officer or to another person.

Id. § 2368(c)(2).

Under current law in the vast majority of the states, the officer has a huge advantage. This is because when the jury is told that all they need to think about is whether the officer's belief in the need to use deadly force was reasonable, the jury will focus its attention on what the suspect or victim of the officer's use of force was doing. Did the individual have a gun? Was that person reaching for their waistband? Was the person resisting arrest? These are all relevant questions that help the jury differentiate between reasonable and unreasonable beliefs about the need to use deadly force, but the ultimate question in all these cases, whether implicit or explicit, is whether the officer's actual use of force was reasonable. Use of force statutes should explicitly direct the jury to consider whether the actions of the officer were reasonable.[64]

II. Officer-Created Jeopardy

On April 21, 2021, one day after former Minneapolis police officer Derek Chauvin was found guilty of murder in the death of George Floyd, a Black man named Andrew Brown Jr., was shot multiple times by law enforcement officers in Elizabeth City, North Carolina as he tried to drive away from officers who had surrounded his car

64 *See* Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 13 (proposing model use of force statute requiring a finding that the officer's beliefs and actions were reasonable for law enforcement use of deadly force to be justified and requiring the fact finder to consider whether the officer engaged in de-escalation measures prior to using deadly force and whether any conduct of the officer increased the risk of a deadly confrontation). These proposals were later adopted by the District of Columbia, Virginia, and Connecticut. *See* Masood Farivar, *US Professor Who Found Stereotypes Influence Use of Deadly Force Inspires Police Reforms*, Voice of Am. (May 11, 2021, 6:45 AM), https://www.voanews.com/usa/race-america/us-professor-who-found-stereotypes-influence-use-deadly-force-inspires-police [https://perma.cc/P9KY-F95B]; Michel Martin, *Law Professor's Research Raises Bar for Police Use of Force*, NPR: All Things Considered (May 23, 2021, 5:07 PM), https://www.npr.org/2021/05/23/999634385/law-professors-research-raises-bar-for-police-use-of-force [https://perma.cc/4UXJ-S44H].

and were attempting to execute a warrant for his arrest.[65] Brown died after being shot in the back of the head at the base of his skull.[66]

On May 18, 2021, Pasquotank County District Attorney Andrew Womble held a press conference at which he announced the sheriff's deputies who shot and killed Brown would not face criminal charges because their act of shooting Brown was justified.[67] Womble explained that Brown used his car as a deadly weapon against the officers and therefore the officers' belief in the need to use deadly force against Brown at the moment they shot at him was reasonable.[68]

If one watches the body cam footage and focuses just on the moment right before the sheriff's deputies fired at Brown, as District Attorney Womble did, one can see Brown behind the wheel of a car, turning his vehicle slowly towards the officers and brushing up against one of the officers before straightening up and driving away.[69] Wom-

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65 Timothy Bella, *Community Calls for Footage in Death of Black Man in N.C.*, WASH. POST, Apr. 24, 2021, at A3 (noting that the fatal shooting of Andrew Brown, Jr. in Elizabeth City, North Carolina came just one day after former police officer "Derek Chauvin was convicted of murder in the killing of George Floyd in Minneapolis" and occurred as police were attempting to execute an arrest warrant for Brown); Gregory S. Schneider, *In N.C. Town, Police Violence Unexpectedly Hits Home*, WASH. POST, May 2, 2021, at A3 (noting that the shooting of Andrew Brown, Jr. took place on April 21, 2021); David Nakamura, *DOJ Probe Complicated by N.C. Official*, WASH. POST, May 20, 2021, at A3 ("Brown, a 42–year–old Black man, was fatally shot as he attempted to drive away from deputies who had surrounded his car."); David K. Li, *Bodycam Video Showed Andrew Brown Jr. with Hands on Car Wheel Before N.C. Deputies Shot Him, Family Says*, NBC NEWS (Apr. 26, 2021, 7:50 PM), https://www.nbcnews.com/news/us-news/state-emergency-declared-north-carolina-city-where-deputies-fatally-shot-n1265364 [https://perma.cc/P56S-DW4Z] (reporting on the police shooting of Andrew Brown Jr.).

66 David K. Li & Deon J. Hampton, *Andrew Brown Jr. Shot Five Times, Once in Back of Head, According to Family-Backed Autopsy*, NBC NEWS (Apr. 27, 2021, 3:24 PM), https://www.nbcnews.com/news/us-news/andrew-brown-jr-shot-five-times-once-back-head-according-n1265460 [https://perma.cc/A5SC-8LGV] (according to an autopsy performed on behalf of Brown's family, Brown was shot five times); Lateshia Beachum, *N.C. Prosecutor: Deputies Who Killed Man Were Justified*, WASH. POST, May 19, 2021, at A4.

67 CBS News, *District Attorney Says Police Shooting of Andrew Brown Jr. "Was Justified,"* YOUTUBE (May 18, 2021), https://www.youtube.com/watch?v=M2LuVHxqn7Q [https://perma.cc/8KWT-HSSK] (showing part of District Attorney Womble's press conference at which he announced the shooting of Andrew Brown Jr. was justified and no charges would be filed against any of the officers involved in his death).

68 Danielle Wallace, *North Carolina DA: Andrew Brown Jr.'s Death 'Tragic' but 'Justified,'* FOX NEWS (May 18, 2021), https://www.foxnews.com/us/north-carolina-da-andrew-brown-jr-death-justified [https://perma.cc/ELK5-NDEJ] (noting that District Attorney Womble said the deputies' actions were "justified because Brown's actions caused deputies to reasonably believe it necessary to use force to protect themselves and others" (quoting statement of North Carolina District Attorney Andrew Womble)).

69 Peter Nickeas, *Why a North Carolina District Attorney Is Not Prosecuting the Andrew Brown Jr. Killing*, CNN (May 18, 2021, 8:44 PM), https://www.cnn.com/2021/05/18/us/district-attorney-andrew-brown-jr-decision/index.html [https://perma.cc/WPW6-3W2A] (playing a one-

ble viewed the fact that Brown's car made contact with the officers as evidence supporting the officers' belief that they were facing an imminent threat of death or serious bodily injury and therefore needed to shoot Brown.[70]

If, however, one broadens the time frame and looks at what preceded the moment when the officers started firing at Brown, one can see that the officers put themselves in the situation of danger when they surrounded Brown's vehicle.[71] Because Brown's vehicle was parked up against the side of a building, the only way he could get away from the officers was to turn his vehicle towards the officers before straightening out in the opposite direction. It appears he tried to get away by doing just this—initially turning his vehicle slowly towards the officers standing to the side of his vehicle and then straightening out after turning the vehicle away from the officers.[72] It does not appear that Brown was trying to ram the officers with his vehicle. It looks like he was just trying to get away from the officers. Because the officers knew where Brown lived and presumably had the make and model of his car, they probably could have found and arrested him later. Given that Brown had not shot at the officers or threatened the life of anyone else, the shooting of Brown does not appear so reasonable.[73]

Situations in which the unwise decisions or actions of the police create or increase the risk of a deadly confrontation have been called "officer-created jeopardy."[74] As described by one legal scholar,

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minute video clip released by the District Attorney at his press conference announcing that no charges would be filed against the deputies who shot Andrew Brown Jr.).

70 CBS News, *supra* note 67.

71 Nickeas, *supra* note 69 (showing video footage from the police body cameras).

72 *Id.* Paul Butler, a law professor at Georgetown University Law Center, argues that Brown's death "did not need to happen," noting that the officers "positioned themselves in front of Brown's car, and then used their vulnerability as an excuse to kill him." Paul Butler, Editorial, *Police Have a Dangerous "Dead or Alive" Mentality. Now, Andrew Brown Jr. is Dead.*, WASH. POST, May 23, 2021, at A27.

73 This Article only considers facts and evidence available at the time of publication. Therefore, this analysis is preliminary and later facts that become known may alter this analysis.

74 STOUGHTON ET AL., EVALUATING POLICE USES OF FORCE, *supra* note 5, at 156 ("'Officer-created jeopardy' refers to situations in which officers affirmatively create or passively accept unjustifiable risks or threats that could have, and should have, been avoided."); *see also* Steve Ijames, *Managing Officer Created Jeopardy*, POLICE1 (July 26, 2005), https://www.police1.com/archive/articles/managing-officer-created-jeopardy-t4w1PZChSkzfdf84/ [https://perma.cc/8TMS-SUFD] (discussing ways to manage and reduce the risk of officer-created jeopardy situations); Cyr, *supra* note 6, at 668 ("[O]fficer-created jeopardy [is] where an officer takes *unnecessary* action which then creates a situation that requires force to resolve . . . [and] is risk created by *inappropriate* police action that unreasonably deviates from established strategy and doctrine." (footnote omitted)); Jeffrey J. Noble & Geoffrey P. Alpert,

"[o]fficer-created jeopardy is, in essence, a manner of describing unjustified risk-taking that can result in an officer using force to protect themselves from a threat that they were, in part, responsible for creating."[75]

A critically important but understudied question that arises in cases involving officer-created jeopardy is whether the jury should focus only on the facts and circumstances known to the officer at the moment when the officer used deadly force or whether it should be allowed to consider any facts or circumstances relevant to the reasonableness of the officer's use of force, including conduct of the officer that may have created or increased the risk of a deadly confrontation. In other words, is a narrow time framing approach appropriate in cases where an officer's pre-shooting conduct may have created or increased the risk that the officer would need to use deadly force, or is a broad timing approach more appropriate?

Several scholars have addressed this question, primarily in the context of § 1983 litigation and how the federal courts have understood the Supreme Court's jurisprudence on "excessive force" under the Fourth Amendment.[76] This Article builds upon the existing scholarship and adds an examination of this question in the context of state criminal prosecutions of law enforcement officers whose use of force has killed or seriously injured a civilian. This Article challenges the conventional wisdom that the states must follow the Supreme Court and lower federal courts when deciding what constitutes excessive police force.[77] Contrary to popular belief, states enjoy broad authority in

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State-Created Danger: Should Police Officers Be Accountable for Reckless Tactical Decision Making?, *in* CRITICAL ISSUES IN POLICING 567, 569 (Dunham & Alpert eds., 2015) ("*Unsound* decisions in the face of predictable violent behavior sometimes set a series of events into motion that can result in tragedy." (emphasis added)); Leon Neyfakh, *Tamir Rice's Death Resulted from "Officer-Created Jeopardy." So Why Were No Other Officers Indicted?*, SLATE (Dec. 28, 2015, 5:19 PM), https://slate.com/news-and-politics/2015/12/tamir-rice-s-death-didn-t-lead-to-indictments-because-of-supreme-court-vagueness-on-officer-created-jeopardy.html [https://perma.cc/M4HP-3CQV] ("[O]fficer-created jeopardy [refers to] situations in which police officers are responsible for *needlessly* putting themselves in danger, committing an unforced tactical error that makes them vulnerable—and then using deadly force to protect themselves." (emphasis added)). As Seth Stoughton notes, "There are many situations in which officers create or accept a certain degree of risk or threat, but that do not constitute officer-created jeopardy because the officers' actions are justified under the circumstances." STOUGHTON ET AL., EVALUATING POLICE USES OF FORCE, *supra* note 5, at 156–57 ("[C]ulpability is inherent in the concept of officer-created jeopardy.").

75 STOUGHTON ET AL., EVALUATING POLICE USES OF FORCE, *supra* note 5, at 157.

76 *See supra* note 6.

77 *See* Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, *supra* note 6 (arguing that states should adopt their own rules for regulating police vio-

crafting their use of force statutes and need not follow federal civil rights jurisprudence.[78]

Seth Stoughton, a former police officer and now a law professor at the University of South Carolina, is one of the leading voices critiquing the narrow time framing approach embraced by a number of federal courts in the § 1983 context. In his recently published book with Jeffrey Noble and Geoffrey Alpert, *Evaluating Police Uses of Force*, Stoughton and his coauthors note that "[a]n officer's use-of-force decision . . . will almost always be affected by events that occur prior to use of force itself, and often prior to the subject's noncompliance, resistance, or other physical actions upon which the use of force is immediately predicated."[79] They also assert that the argument

> that an officer's conduct prior to the use of force—what [has been] referred to as "pre-seizure conduct"—is not properly part of the analysis . . . is not only self-defeating, it also runs counter to the Supreme Court's acknowledgment that meaningful review "requires careful attention to the facts and circumstances of each particular case."[80]

In *A Tactical Fourth Amendment*,[81] Brandon Garrett, another leading expert on police use of force, and Seth Stoughton observe that a narrow time framing approach, under which the possibility that the officer may have contributed to the creation of the dangerous situation is not part of the Fourth Amendment analysis,[82] unwisely ignores the fact that sound tactical police training focuses on giving the officer time to make decisions from a position of safety.[83] Garrett and Stoughton point out that a decision made early in an encounter, when there is less time pressure, can avoid putting officers into a position in which they have to make a time-pressured decision.[84] Sound police tactics, such as increasing the distance between the officers and a sus-

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lence rather than simply following whatever the Supreme Court prescribes in the Fourth Amendment context).

78 *Id.*

79 STOUGHTON ET AL., EVALUATING POLICE USES OF FORCE, *supra* note 5, at 227.

80 *Id.*; *see also* Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, *supra* note 6, at 556–59 (critiquing those federal courts that have adopted a narrow "final frame" approach to the question of the admissibility of pre-seizure conduct and pointing out that such an approach has become one sided, allowing consideration of the subject's precipitating behaviors but ignoring the officer's antecedent conduct that increased the risk of an encounter turning deadly).

81 Garrett & Stoughton, *A Tactical Fourth Amendment*, *supra* note 6.

82 *Id.* at 223.

83 *Id.* at 219.

84 *Id.* at 259.

pect or taking cover behind a physical object that protects an officer from a particular threat, can give officers more time to analyze the situation and thus reduce the risk to officers and the subject.[85] In contrast, "[a] poor tactical decision, such as stepping in front of a moving vehicle, can deprive the officer of time in which to safely make a decision about how to act, forcing the officer to make a seat-of-the-pants decision about how to respond."[86] Garrett and Stoughton argue that the training that an officer has had and the training that a reasonable officer would have received should be considered relevant circumstances in the Fourth Amendment totality of the circumstances analysis[87] and that constitutional reasonableness should be grounded in sound police tactics.[88]

In *Police Shootings: Is Accountability the Enemy of Prevention?*,[89] Barbara Armacost also critiques approaches that focus narrowly on the moment that a police officer used deadly force.[90] She argues that we should look beyond that narrow time frame and try to figure out the root causes that contributed to the police shooting, identifying possible preventive measures that can be taken at the systems level to prevent tragic shootings in the future.[91] She uses the Tamir Rice case to illustrate how legal experts asked to analyze that case applied a narrow time frame and ignored antecedent police conduct that increased the risk that the encounter would result in the use of deadly force.[92]

In *The Violent Police-Citizen Encounter*, Arnold Binder and Peter Scharf observe that "[a] police 'decision' to use, or not to use, deadly force in a given context might be better described as a contingent sequence of decisions and resulting behaviors—each increasing

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85 *Id.* at 260–61.

86 *Id.* at 259.

87 *See id.* at 299.

88 *Id.* at 303.

89 Barbara E. Armacost, *Police Shootings: Is Accountability the Enemy of Prevention?*, 80 OHIO ST. L.J. 907 (2019).

90 *See id.* at 911.

91 *See id.*

92 *See id.* at 965 ("[B]oth experts applied a very narrow timeframe—the exact moment of the shooting . . . ."); *id.* at 968 (identifying the failure of the officers to communicate their location to the dispatcher and the failure to communicate with other police officers in the area as conduct, or lack thereof, that increased the need to use deadly force); *see also* Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 13, at 675–81 (using the Tamir Rice case to show how a broad time frame can reveal tactical choices by the officers that created the need to use deadly force).

or decreasing the probability of an eventual use of deadly force."[93] "The officer, who, for example, encounters an armed robber in a store and immediately takes cover while calling for backup support, will greatly alter the probability of the incident resulting in a shooting."[94] Binder and Scharf note that "early decisions by officers may either prolong or curtail [the encounter]. For example, by seeking cover early in a confrontation, an officer can afford to engage in a more prolonged information exchange with [a suspect] than another officer without similar protection."[95]

In *A Theory of Excessive Force and Its Control*,[96] Carl Klockars provides examples to illustrate how an officer's unwise conduct can increase the risk of deadly force needing to be used later in an encounter.[97] In one example, the police receive a call about a group of teenage boys with guns.[98] Two officers, in separate vehicles, respond to the call.[99] One of the officers brings a shotgun to the site.[100] The officers find two male teens engaged in sexual intercourse inside the shack.[101] The officers order the boys to get dressed.[102] As soon as the boys are dressed, the officers try to handcuff them.[103] Both boys try to run.[104] One officer grabs one of the fleeing teens, forces him to the ground, then proceeds to handcuff him.[105] The other officer knocks the second teen to the ground with a blow to the ribs using the barrel of his shotgun.[106]

Klockars explains that that the second officer's bringing a shotgun to the scene was not something a well-trained officer would have done because carrying a shotgun "severely compromises the officer's ability to use minimal and intermediate levels of force."[107] Klockars

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93 Arnold Binder & Peter Scharf, *The Violent Police-Citizen Encounter*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 116 (1980).

94 *Id.*

95 *Id.* at 118.

96 Carl B. Klockars, *A Theory of Excessive Force and Its Control*, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 1-23 (William A. Geller & Hans Toch eds., 1996).

97 *See generally id.*

98 *Id.* at 9.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.* at 10.

notes that "[a]n officer with a shotgun in his hands is of almost no help in grabbing, restraining, or handcuffing; he or she is seriously compromised in any apprehension that involves a foot pursuit; and, for all practical purposes, he or she surrenders the option to use a baton."[108] Klockars concludes that in light of the nature of the complaint, "bringing a shotgun was a mistake because it limited the officer carrying it to using a degree of force that was too severe under the circumstances."[109] He also notes that the officer's decision to use the shotgun as an impact weapon risked the possibility of an accidental discharge and that a skilled police officer in that situation would have let the boy run by.[110] The other teen could have identified his friend and "even if he refused to do so, it would not be difficult to determine his identity and take him into custody at a later time."[111]

Today, there is growing recognition of the importance of broadening the time frame from those who study police uses of force. For example, the Bromwich Group, which was asked by the Office of the District of Columbia Auditor to investigate several recent police homicides in the District of Columbia to ensure consistency with existing law and police use of force policy in the District of Columbia, has noted the importance of broadening the scope of Washington, D.C.'s Metropolitan Police Department's ("D.C. MPD") internal investigations well beyond the moment of the use of force itself.[112] Its recent analysis of the officer-involved shooting of Deon Kay in the District of Columbia in September 2020 illustrates how an analysis that focuses solely on the moment that the officer used deadly force

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108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 OFF. OF THE D.C. AUDITOR, THE METROPOLITAN POLICE DEPARTMENT AND THE USE OF DEADLY FORCE: FOUR CASE STUDIES 2018-2019, at 95 (2021) (Recommendation #1); OFF. OF THE D.C. AUDITOR, THE METROPOLITAN POLICE DEPARTMENT AND THE USE OF DEADLY FORCE: THE DEON KAY CASE (2021) [hereinafter D.C. AUDITOR'S REPORT ON THE DEON KAY CASE]. Following an investigation of the D.C. MPD by the Civil Rights Division of the U.S. Department of Justice ("DOJ"), which found that MPD was involved in a pattern or practice of civil rights violations primarily through the excessive use of force, an independent monitoring team oversaw the implementation of a Memorandum of Agreement ("MOA") between MPD, the District of Columbia, and DOJ. *Id.* at 2. "The MOA was a detailed charter for reforming MPD but specifically focused on use of force by MPD officers." *Id.* Michael Bromwich served as the independent monitor from 2002 to 2008. *Id.* at 4. In 2015, the Office of the District of Columbia Auditor retained the Bromwich Group to review MPD policies and practices concerning the use of force. *Id.* at 2. In July 2020, the Office of the District of Columbia Auditor asked the Bromwich Group to review four fatal use of force incidents that occurred in the District of Columbia in 2018 and 2019. *Id.* at 4. The Bromwich Group was later asked to review the September 2, 2020 death of Deon Kay and the October 23, 2020 death of Karon Hylton-Brown. *Id.*

fails to recognize ways that the fatal encounter might have been avoided altogether.

Deon Kay, an eighteen-year-old Black teenager, was shot and killed by a D.C. MPD officer in Southeast Washington, D.C. on September 2, 2020.[113] Police from D.C.'s 7th District Crime Suppression Team ("CST") saw a live-streamed social media video of Kay and others brandishing firearms inside a vehicle. The video showed a distinct pink and black steering wheel cover, an interior indicating the make of the vehicle was a Dodge, and that the car was located in front of a brick building, which CST identified as a particular apartment building in the neighborhood.[114] The officers recognized Kay from previous interactions and tracked the vehicle, a Dodge Caliber, to a parking lot in an apartment complex.[115] Commenting on the shooting, then–Police Chief Peter Newsham noted that seizing illegal firearms was a priority for police in the District of Columbia and that 633 individuals had been shot in the District from January 1 through September 3, 2020, up 40 percent from the previous year.[116]

When the officers arrived on the scene, they saw a Dodge Caliber with a steering wheel cover resembling the steering wheel cover appearing in the Instagram Live feed idling in a parking spot with several people inside and the motor running.[117] They also noticed a brick wall behind the car that matched the one in the Instagram Live feed.[118] As soon as the officers turned into the driveway of the parking lot, the occupants of the Dodge opened the car doors and the man in the rear passenger seat got out of the car and started running away.[119]

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113 *See* Michael Brice-Saddler, Rachel Weiner, Peter Hermann & Clarence Williams, *Officer Fatally Shoots D.C. Man*, WASH. POST, Sept. 3, 2020, at B1.

114 D.C. AUDITOR'S REPORT ON THE DEON KAY CASE, *supra* note 112, at 11 ("While observing the Instagram Live feed, Officer Alvarez and his CST colleagues noticed specific features of the vehicle, specifically a distinctive steering wheel cover and an interior that appeared to indicate the vehicle was a Dodge. They also observed the brick wall of the building behind the car and identified that the wall probably was part of an apartment building in Patrol Service Area (PSA) 707."); *see* Peter Hermann & Michael Brice-Saddler, *Police Body-Camera Video Shows Man Fatally Shot by D.C. Police Officer Had a Gun*, WASH. POST, Sept. 4, 2020, at B1.

115 Hermann & Brice-Saddler, *supra* note 114.

116 Peter Hermann, *Police Shooting of Young Man in District Gives New Urgency to Commission Studying Law Enforcement*, WASH. POST (Sept. 11, 2020, 10:25 AM), https://www.washingtonpost.com/local/public-safety/police-shooting-of-young-man-in-district-gives-new-urgency-to-commission-studying-law-enforcement/2020/09/11/8a97c9da-ef99-11ea-ab4e-581edb849379_story.html [https://perma.cc/88S5-H8D4].

117 DC AUDITOR'S REPORT ON THE DEON KAY CASE, *supra* note 112, at 12–13.

118 *See id.* at 13.

119 *Id.*

The officers exited their patrol car and activated their body cameras.[120]

Officer Alvarez exited the police cruiser first, drew his gun, and began pursuing the man who had exited the car.[121] The officer ran past the Dodge, where the other occupants remained, but by that time the man who was running had reached the edge of the parking lot.[122] Officer Alvarez decided the man was too far away to be caught so he stopped his pursuit and holstered his gun.[123] Around the same time, Deon Kay exited the Dodge and began running towards Officer Alvarez.[124] Officer Alvarez saw a movement in his peripheral vision and turned to see Deon Kay running towards him with "what appeared to be a handgun in [his] right hand."[125] As Kay was running towards him, Officer Alvarez yelled, "Don't move! Don't move!"[126] When the officer saw Kay begin to raise the handgun in his right hand,[127] he thought Kay was about to shoot him, so he fired a single shot at Kay, which struck and killed Kay.[128]

Officer Alvarez's body cam video shows Kay with a gun in his right hand, arm extended downward, turning towards Officer Alvarez just before Kay was shot.[129] According to federal prosecutors who reviewed the case and declined to file charges against the officer, Kay raised his arm at "approximately the same instant that the officer fired."[130] Either just before, during, or after he was shot, it appears Kay threw the firearm down a grassy embankment close to where he was standing.[131] Federal prosecutors said they were "unable to determine whether Kay threw the gun deliberately or reflexively on being shot."[132] The Office of the D.C. Auditor similarly concluded that it

120 *Id.*

121 *Id.*

122 *Id.* at 13–14.

123 *Id.* at 14–15.

124 *Id.* at 15.

125 *Id.* at 30 (from the DC Auditor's follow-up interview with Officer Alexander Alvarez on March 11, 2021).

126 *Id.* at 15.

127 *Id.* at ii.

128 *Id.* at ii, iv. Only ten seconds transpired from the time Officer Alvarez got out of the police cruiser and the time he shot Kay, *id.* at ii, and only about one second elapsed from the time Officer Alvarez began to turn until the time he shot Kay. *Id.* at iv.

129 Peter Hermann, *D.C. Police Shooting Galvanizes New Panel*, WASH. POST, Sept. 12, 2020, at B1.

130 Keith L. Alexander & Peter Hermann, *No Federal Charges for Officer Who Shot Youth*, WASH. POST, Nov. 20, 2020, at B2.

131 Hermann, *supra* note 129.

132 Alexander & Hermann, *supra* note 130.

was unclear from the body cam video "whether Mr. Kay threw the gun or whether it was the impact of the shot that caused the gun to fly through the air, because the shooting and the flight of the gun occur within two frames of each other."[133]

If one focuses solely on the moment right before the officer pulled the trigger, the officer's use of force appears unquestionably reasonable.[134] The officer was just eight feet from a man holding a gun who appeared to be raising his arm as if to shoot at the officer.[135] Instead of limiting its investigation in this way, however, the Office of the D.C. Auditor broadened the time frame, noting several ways in which the officers' conduct contributed to the deadly encounter, including the failure to devise a tactical plan before locating the vehicle and Officer Alvarez's decision to run past the Dodge, despite being aware that the car likely contained armed occupants, "creat[ing] a grave risk to Officer Alvarez that someone might shoot him from within the Dodge, or emerge from the Dodge with a gun, which is precisely what happened . . . ."[136] The Office of the D.C. Auditor concluded that Officer Alvarez's "split-second decision to shoot was justified," but also noted that "he unnecessarily placed himself in that situation."[137]

While there is some disagreement about how to qualitatively determine which pre-seizure conduct ought to be considered, all of the scholarly writing on the subject appear to agree that a broad time frame that takes into account pre-seizure police conduct is more appropriate than a narrow time frame that excludes such conduct from the jury's consideration at trial.[138] Despite the near consensus in the scholarly community that a broad time frame is more appropriate than a narrow time frame, the federal courts are split as to whether the jury in a § 1983 civil rights action where a law enforcement officer

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133 DC AUDITOR'S REPORT ON THE DEON KAY CASE, *supra* note 112, at 20.

134 *Id.* at iv ("At that moment, Officer Alvarez was justified in using deadly force.").

135 *Id.* at 20 ("Officer Alvarez discharged his weapon once, from approximately eight feet away from Mr. Kay.").

136 *Id.* at 36.

137 *Id.* at v. Some have criticized the Office of the D.C. Auditor for finding that the shooting was justified while also finding that the police created the risk that deadly force would be needed. For example, Yaida Ford, an attorney for Deon Kay's family, said the D.C. Auditor should not have found the shooting justified if they thought Kay's death could have been avoided with better police tactics. Peter Hermann, *Police Right to Fire but Also Erred, Audit Finds*, WASH. POST, May 26, 2021, at B1. Alluding to the fact that this was a case involving officer-created jeopardy, Ford noted that the police "created a dangerous situation that could have been avoided." *Id.*

138 *See, e.g.*, *supra* note 6.

is accused of using excessive force may consider "pre-seizure"[139] conduct of the officer that contributed to the risk of a deadly confrontation, or whether the jury must limit their consideration to the moment that the officer used force against the individual. Some federal courts have held that an officer's pre-seizure conduct is irrelevant to the question of whether the officer's use of force was reasonable or excessive and cannot be considered by the jury.[140] Other courts have held that the officer's pre-seizure conduct is just one factor in the totality of the circumstances that the jury should be permitted to weigh and consider when assessing the overall reasonableness of the officer's use of force.[141]

The state courts have not addressed this issue as robustly as the federal courts. In the civil context, the less than a dozen state courts that have addressed the time framing issue are split.[142] In the criminal context, only two states—Maryland and Ohio—have addressed the issue.[143] These states have found that antecedent conduct is not relevant and should not be considered by the jury.

This Part first examines the split in the lower federal courts on this question. It then discusses the closest Supreme Court case on point, *County of Los Angeles v. Mendez*.[144] In *Mendez*, the Court had the opportunity to settle the question of whether the jury can consider the antecedent conduct of the officer but declined to do so.[145] Instead, the Court ruled much more narrowly, striking down the Ninth Circuit's provocation rule, a rule that no other Circuit had embraced, leaving open the question of whether the officer's antecedent conduct can be considered by the jury in a case involving a claim of excessive force by the police.[146] Finally, this Part examines how the state courts have addressed the issue of whether the trier of fact should be able to broaden the time frame and consider antecedent conduct of the police that increased the risk of a deadly confrontation.

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139 For an explanation of the term "pre-seizure," see *supra* note 9.

140 *See infra* text accompanying notes 150–60.

141 *See infra* text accompanying notes 164–81.

142 *See infra* Section II.C.2 (discussing split in state civil courts).

143 *See infra* text accompanying notes 233–39 (Maryland) and 240–43 (Ohio).

144 137 S. Ct. 1539 (2017).

145 *See id.*

146 *See id.* at 1547 n.*; *infra* text accompanying note 216.

A. Federal Circuit Court Split Over Whether the Fact Finder May Consider Pre-Seizure Conduct of the Officer

Whether an officer's pre-seizure conduct may be considered by the fact finder in a § 1983 civil rights action assessing if a law enforcement officer's use of force was reasonable or excessive is an important question that has almost evenly split the federal circuits. Six federal courts of appeal—the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits—do not allow consideration of pre-seizure conduct, finding such conduct irrelevant to the reasonableness of an officer's use of deadly force.[147] These courts take the position that when assess-

147 Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996) ("Officer Proulx'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."); Terebesi v. Torreso, 764 F.3d 217, 235 n.16 (2d Cir. 2014) ("In cases [where the officer's prior conduct may have contributed to a later need to use force], courts in this Circuit and others have discarded evidence of prior negligence or procedural violations, focusing instead on 'the split-second decision to employ deadly force.'" (quoting *Salim*, 93 F.3d at 92)); Greenidge v. Ruffin, 927 F.2d 789, 791–92 (4th Cir. 1991) (finding that events that occurred before the seizure, such as the officer's failure to employ proper backup and failure to use a flashlight in accordance with standard police procedures for night time prostitution arrests, "are not relevant and are inadmissible" (footnote omitted)); Gandy v. Robey, 520 F. App'x 134, 142 (4th Cir. 2013) ("A police officer's pre-seizure conduct . . . is generally not relevant for purposes of an excessive force claim under the Fourth Amendment which looks only to the moment force is used."); Waterman v. Batton, 393 F.3d 471, 477 (4th Cir. 2005) ("[T]he reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis; rather, reasonableness is determined based on the information possessed by the officer at the moment that force is employed."); Fraire v. City of Arlington, 957 F.2d 1268, 1275–76 (5th Cir. 1992) (rejecting plaintiffs' suggestion that officer's use of force was excessive because he "manufactured the circumstances that gave rise to the fatal shooting" by failing to display his badge and identify himself while in plain clothes, which were violations of police procedure, and noting that even if the officer negligently departed from established police procedure, this would not mean the officer's use of force was excessive); Rockwell v. Brown, 664 F.3d 985, 992–93 (5th Cir. 2011) (rejecting plaintiffs' request that the court "examine the circumstances surrounding the forced entry, which may have led to the fatal shooting," and noting that "[t]he excessive force inquiry is confined to whether the [officer or another person] was in danger *at the moment of the threat* that resulted in the [officer's use of deadly force]" and concluding that the court "need not look at any other moment in time" (alterations in original)); Dickerson v. McClellan, 101 F.3d 1151, 1162 (6th Cir. 1996) ("[I]n reviewing the plaintiffs' excessive force claim, we limit the scope of our inquiry to the moments preceding the shooting."); Livermore *ex rel.* Rohm v. Lubelan, 476 F.3d 397, 407 (6th Cir. 2007) (finding it necessary to "disregard" events in the "hours and minutes" prior to use of force and instead "focus on the 'split-second judgments' made immediately before the officer used allegedly excessive force" (quoting *Dickerson*, 101 F.3d at 1162)). *But see* Kirby v. Duva, 530 F.3d 475, 482 (6th Cir. 2008) ("Where a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive."); Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992) ("[P]re-seizure conduct is not subject to Fourth Amendment scrutiny."); Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994) ("[W]e judge the reasonableness of the use of deadly force in light of all that the officer knew. . . . [at the point when the subject charged at him and] do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were cor-

ing whether an officer's use of force was unreasonable and therefore in violation of the Fourth Amendment, the fact finder's focus should be on the moment of the seizure, i.e., the moment that the officer decided to use deadly force, not on events prior to or leading up to the seizure.[148] In contrast, five federal courts of appeal—the First, Third, Ninth, Tenth, and Eleventh Circuits—allow for consideration of an officer's pre-seizure conduct when evaluating whether the officer's use of force was reasonable.[149]

1. Federal Circuits That Have Adopted a Narrow Time Frame

The federal circuit courts that limit the jury's consideration to the moment of the seizure have primarily relied on language in the Supreme Court's *Graham v. Connor* decision to validate their position. For example, in *Greenidge v. Ruffin*,[150] the Fourth Circuit considered the appellant's argument that the district court erred in excluding evidence of the officer's actions leading up to the time immediately before the arrest.[151] In rejecting this argument,[152] the court pointed out that the Supreme Court in *Graham* had instructed that

> the "reasonableness" of an officer's particular use of force "must be judged from the perspective of a reasonable officer *on the scene*, rather than with the 20/20 vision of hindsight." Most significantly, the Court further elaborated that "rea-

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rect."); Felton v. City of Chicago, 827 F.3d 632, 635 (7th Cir. 2016) (finding whether the police were justified in chasing the suspect "irrelevant because 'pre-seizure conduct is not subject to Fourth Amendment scrutiny'" (quoting *Carter*, 973 F.2d at 1332)); Marion v. City of Corydon, 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."); Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993) ("The Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general. Consequently, we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment." (citation omitted)); Schulz v. Long, 44 F.3d 643, 648 (8th Cir. 1995) (rejecting appellant's argument that the district court erred in excluding evidence that the actions of the officers preceding the seizure created the need to use force, noting that "[a]ppellant's argument is foreclosed by Supreme Court case law" (citing Graham v. Connor, 490 U.S. 386, 396 (1989) ("With respect to a claim of excessive force, the same standard of reasonableness *at the moment* applies . . . .")); Hernandez v. Jarman, 340 F.3d 617, 621–22 (8th Cir. 2003) (explaining that, in determining objective reasonableness of excessive force used, the court considers "only whether the seizure itself, not preseizure conduct, was unreasonable").

148 *See* cases cited *supra* note 147.

149 *See supra* Section II.A.2.

150 927 F.2d 789 (4th Cir. 1991).

151 *Id.* at 791.

152 *Id.* at 792 ("[E]vents which occurred before Officer Ruffin opened the car door and identified herself to the passengers are not probative of the reasonableness of Ruffin's decision to fire the shot.").

> sonableness" meant the "standard of reasonableness *at the moment*," and that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[153]

This explanation, however, ignores the fact that the Supreme Court also made clear in *Graham* that the jury should pay careful attention to the facts and circumstances of each particular case when assessing the reasonableness of an officer's use of force.[154] In other words, the Court embraced a totality of the circumstances approach, which requires consideration of all of the underlying facts and circumstances, not just those facts and circumstances that support the officer's position.[155]

Other courts embracing the narrow view have explained that because the Fourth Amendment prohibits unreasonable seizures by police as opposed to unreasonable police conduct in general, the only thing that matters in a § 1983 case is whether the seizure itself is unreasonable, not whether conduct of the officer leading up to the seizure was unreasonable. In *Cole v. Bone*,[156] for example, the Eighth Circuit noted that the issue at hand was whether the officers unreasonably seized the deceased in violation of the Fourth Amendment, and because "[t]he Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general . . . [,] we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment."[157] This explanation, however, does not acknowledge that the officer's decisions and conduct leading up to the seizure may be relevant to the reasonableness of that officer's use of deadly force.

Confusingly, some courts in the jurisdictions that require the jury to focus on the moments right before the officer's use of deadly force have also stated that the jury should be allowed to consider events leading up to the seizure and draw reasonable inferences from those

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153 *Id.* at 791–92 (alteration in original) (footnote omitted) (quoting *Graham*, 490 U.S. at 396).

154 *See Graham*, 490 U.S. at 396.

155 *Id.* ("[T]he question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.'" (alteration in original) (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985))).

156 993 F.2d 1328 (8th Cir. 1993).

157 *Id.* at 1332–33 (citation omitted).

events.[158] These courts seem to want to have it both ways: not allowing the jury to consider pre-seizure conduct of the officer that increased the risk of a deadly confrontation but allowing the jury to consider other pre-seizure events and circumstances, such as the victim's conduct that may have led the officers to believe the victim posed a deadly threat or de-escalation measures taken by the police that decreased the risk of a deadly confrontation.[159] Along these lines, some courts in the jurisdictions that view pre-seizure conduct of the officer as irrelevant have adopted a segmented approach, splitting the police-civilian encounter into segments and evaluating the reasonableness of an officer's conduct during each segment.[160]

It is misguided to limit the facts and circumstances that may be considered by the trier of fact assessing the overall reasonableness of an officer's use of force to those available to the officer at the moment when force was applied by the officer. As Seth Stoughton notes:

> This [narrow] approach fails to recognize what legal scholars, criminologists, and police practitioners have concluded without exception: an officer's approach, actions, and decisions can affect the probability and severity of an ultimate use of force. The way an officer interacts with someone, for example, can potentially provoke or prevent resistance. In the same vein, poor tactics can expose the officer to physical danger that a different approach is likely to avoid, increasing

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158 For example, in *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that "[t]he excessive force inquiry is confined to whether the Trooper was in danger *at the moment of the threat* that resulted in the Trooper's shooting Bazan[,]" while also stating that events that occurred before the Trooper chased the victim into a field "*could affect the outcome of the case*" in light of the fact that the Trooper's account of what transpired between him and the victim during that time was different from what two eyewitnesses said transpired. *Id.* at 493. Similarly, in *Estate of Williams v. Indiana State Police Department*, 797 F.3d 468 (7th Cir. 2015), the Seventh Circuit acknowledged that the rule of law in the jurisdiction was that conduct of the officer leading up to the seizure could not itself be the basis for Fourth Amendment liability. *See id.* at 483. In the very next paragraph, however, the court stated that "[t]he 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." *Id.* (emphasis added).

159 In *Gardner v. Buerger*, 82 F.3d 248 (8th Cir. 1996), the Eighth Circuit Court of Appeals stated:

> True, unreasonable police behavior before a shooting does not necessarily make the shooting unconstitutional; we focus on the seizure itself—here, the shooting—and not on the events leading up to it. But this does not mean we should refuse to let juries draw reasonable inferences from evidence about events surrounding and leading up to the seizure.

Id. at 253, *cited with approval in* Moore v. Indehar, 514 F.3d 756, 762 (8th Cir. 2008).

160 Garrett & Stoughton, *A Tactical Fourth Amendment*, *supra* note 6, at 291–92.

> the likelihood that the officer will use force to address that danger.[161]

As Stoughton points out, it is well known in policing circles that an officer's interactions can provoke resistance.[162] Consequently, police departments have developed tactics specifically designed to reduce the risk that an encounter with a suspect will turn into a deadly confrontation.[163] Officers who fail to employ the sound tactics they have been trained to use can increase the risk that an encounter will turn deadly, and this can cost officer and civilian lives.

The concerns discussed above have prompted many federal circuits to adopt a broad time frame to assess the reasonableness of an officer's use of force. These decisions are discussed in the next section.

2. Federal Circuits That Have Adopted a Broad Time Frame

Five federal courts of appeal—the First, Third, Ninth, Tenth, and Eleventh Circuits—permit the jury in a § 1983 civil rights action to consider pre-seizure events, including police officer conduct that increased the risk of a deadly confrontation, when assessing the reasonableness of the officer's use of force.[164] These courts, also relying on

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161 Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, *supra* note 6, at 557–58 (footnotes omitted).

162 *Id.* at 558 ("These observations are well known in policing: over at least the last fifty years, the industry has developed a range of tactics—that is, procedures and techniques intended to help 'limit the suspect's ability to inflict harm and advance the ability of the officer to conclude the situation in the safest and least intrusive way'—that apply in specific situations (e.g., traffic stops, domestic disputes, and active shooter scenarios), as well as tactical principles that can be applied whenever the situation permits.") (footnote omitted).

163 *Id.*

164 *See, e.g.*, St. Hilaire v. City of Laconia, 71 F.3d 20, 26 (1st Cir. 1995) ("We first reject defendants' analysis that the police officers' actions need be examined for 'reasonableness' under the Fourth Amendment only at the moment of the shooting. . . . [O]nce it has been established that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure."); Young v. City of Providence, 404 F.3d 4, 22 (1st Cir. 2005) ("[T]he [trial] court did not abuse its discretion in instructing the jury that 'events leading up to the shooting' could be considered by it in determining the excessive force question."); Abraham v. Raso, 183 F.3d 279, 291 (3d Cir. 1999) ("[W]e want to express our disagreement with those courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure.'"); Rivas v. City of Passaic, 365 F.3d 181, 198 (3d Cir. 2004) (recognizing that "reasonableness of the use of force is normally an issue for the jury" and that the jury may consider "all of the relevant facts and circumstances leading up to the time that the officers allegedly used excessive force"); Nehad v. Browder, 929 F.3d 1125, 1135 (9th Cir. 2019) ("Sometimes . . . officers themselves may 'unnecessarily creat[e] [their] own sense of urgency.' . . . Reasonable triers of fact can, taking the totality of the circumstances into account, conclude that an officer's poor judgment or lack of preparedness caused him or her to act unreasonably . . . ."); Vos v. City of Newport Beach, 892 F.3d 1024, 1034 (9th Cir. 2018) ("[T]he events leading up to the shooting, including the officers [sic] tactics, are en-

language from the Supreme Court, reason that the jury assessing the reasonableness of an officer's use of force in a § 1983 case is supposed to consider all the facts and circumstances, and conduct of the officer that increased the risk of a deadly confrontation is simply one fact or circumstance in the totality of the circumstances.

For example, in *Young v. City of Providence ex rel. Napolitano*,[165] the First Circuit rejected the officers' argument that the verdict against them should be overturned because of the erroneous admission of evidence that one of the officers left cover.[166] The court explained that "once it is clear that a seizure has occurred, 'the court should examine the actions of the government officials leading up to the seizure,'" not "solely at the 'moment of the shooting.'"[167] The court explained that this reasoning was most consistent with the Supreme Court's totality of the circumstances approach.[168]

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compassed in the facts and circumstances for the reasonableness analysis."). The Tenth Circuit used to preclude consideration of pre-seizure conduct. *See* Bella v. Chamberlain, 24 F.3d 1251, 1256 (10th Cir. 1994) ("[W]e scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment." (quoting Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993))). In 1995, the Tenth Circuit reversed course and allowed limited consideration of an officer's intentional or reckless pre-seizure conduct immediately connected with the use of force. *See* Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995) ("The reasonableness of [the officers'] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [their] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." (footnote omitted) (citing *Bella*, 24 F.3d at 1256 n.7 ("Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable."))); *see also* Medina v. Cram, 252 F.3d 1124, 1132 (10th Cir. 2001) ("In addition to considering whether the officers reasonably believed they were in danger at the time they used force, we have considered 'whether [the officers'] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.' An officer's conduct before the suspect threatens force is therefore relevant provided it is 'immediately connected' to the seizure and the threat of force." (citation omitted) (quoting Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir.1997))). Even after the Supreme Court's 2017 decision in *Mendez*, *see infra* notes 186–222, the Tenth Circuit has continued to allow consideration of pre-seizure officer conduct. *See* Estate of Ceballos v. Husk, 919 F.3d 1204, 1214 (10th Cir. 2019) ("The district court . . . correctly recognized that [t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment they used force but also on whether the officers' own conduct during the seizure unreasonably created the need to use such force. However, only reckless and deliberate conduct that is immediately connected to the seizure will be considered." (citations omitted)). The Eleventh Circuit has also adopted a broad time frame approach, allowing consideration of pre-seizure conduct by the officer that increased the risk that the encounter would require a use of force. *See* Brown v. City of Hialeah, 30 F.3d 1433, 1436–37 (11th Cir. 1994) (finding that the district court erred in prohibiting trier of fact from considering the police officer's use of a racial slur in assessing the reasonableness of the officer's use of force during arrest).

165 404 F.3d 4 (1st Cir. 2005).

166 *Id.* at 22.

167 *Id.* (quoting *St. Hilaire*, 71 F.3d at 26).

168 *Id.* ("This rule is most consistent with the Supreme Court's mandate that we consider

Similarly, in *St. Hilaire v. City of Laconia*,[169] the First Circuit rejected the argument that in a § 1983 action, the trier of fact assessing the reasonableness of the officer's actions should be limited to the moment of the shooting.[170] The court noted that in *Brower v. Inyo*,[171] the Supreme Court "held that once it has been established that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure."[172]

Another rationale put forth in support of allowing consideration of pre-seizure conduct is that an assessment of the reasonableness of an officer's use of deadly force necessarily requires consideration of pre-seizure events. As the Third Circuit noted in *Abraham v. Raso*,[173] "[h]ow is the reasonableness of a bullet striking someone to be assessed if not by examining preceding events?"[174] The Third Circuit was careful to note that it was "not saying . . . that all preceding events are equally important, or even of any importance."[175] The court explained, "[s]ome events may have too attenuated a connection to the officer's use of force."[176] It then continued, "[b]ut what makes these prior events of no consequence are ordinary ideas of causation, not doctrine about when the seizure occurred."[177]

The *Raso* court also opined that once a court allows some pre-seizure events to be considered, there is no principled way to draw the line between pre-seizure events that may be considered by the jury and pre-seizure events that must be excluded from the jury's consideration. The court highlighted the risks of line-drawing in such an arbitrary manner:

> Courts that disregard pre-seizure conduct no doubt think they [can] avoid this problem. But even rejecting the rigorous interpretation of *Hodari*, courts are left without any principled way of explaining when "pre-seizure" events start and, consequently, will not have any defensible justification

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these cases in the 'totality of the circumstances.'" (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985))).

169 71 F.3d 20 (1st Cir. 1995).

170 *See id.* at 26.

171 489 U.S. 593 (1989).

172 *St. Hilaire*, 71 F.3d at 26.

173 183 F.3d 279 (3d Cir. 1999).

174 *Id.* at 291.

175 *Id.* at 292.

176 *Id.*

177 *Id.*

> for why conduct prior to that chosen moment should be excluded.[178]

Prior to 2017, the Ninth Circuit permitted consideration of an officer's antecedent conduct but only under certain circumstances.[179] Under what was known as the provocation rule, the Ninth Circuit permitted consideration of an officer's pre-seizure conduct but only if such conduct was intentional or reckless, constituted an independent violation of the Fourth Amendment, and provoked the violent confrontation.[180] The Ninth Circuit's provocation rule directed that such pre-seizure conduct would render an otherwise reasonable use of force unreasonable.[181]

In allowing consideration of some pre-seizure conduct, the Ninth Circuit's provocation rule was better than a rule precluding any consideration whatsoever of pre-seizure conduct. The Ninth Circuit's provocation rule, however, was too restrictive in limiting the kinds of pre-seizure conduct that could be considered. Only an officer's intentional or reckless conduct that constituted an independent Fourth Amendment violation could serve as the basis for liability. If an officer engaged in negligent pre-seizure conduct, i.e., conduct that a reasonable officer would not have taken, that unreasonable conduct could not be considered by the fact finder assessing the overall reasonableness of the officer's action. If an officer violated police protocol by failing to call for backup, such pre-seizure conduct could not be considered unless it constituted a violation of the Fourth Amendment.[182]

The Ninth Circuit's provocation rule was too restrictive in another way. Not only did it limit the types of pre-seizure conduct that could be considered, it also limited the fact finder's discretion by mandating a finding that an officer's use of deadly force was unreasonable if it was the result of an intentional or reckless violation of the Fourth

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178 *Id.* at 291–92 (citing California v. Hodari D., 499 U.S. 621 (1991)).

179 In *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), the Ninth Circuit noted 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." *Id.* at 1189. As explained below, in 2017, the Supreme Court held that the Ninth Circuit's provocation rule violated the Fourth Amendment. County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017).

180 *See Billington*, 292 F.3d at 1189.

181 *See id.*

182 Aaron Kimber raises a similar point, arguing that requiring a separate Fourth Amendment violation is arbitrary and "severely limits the instances in which a plaintiff will be able to use pre-seizure police conduct." Kimber, *supra* note 6, at 665.

Amendment that created the risk of a violent confrontation.[183] A better rule would have allowed consideration of pre-seizure conduct without directing the jury to find that an officer's use of force is always unreasonable whenever intentional or reckless pre-seizure conduct that violates the Fourth Amendment is present. An officer's pre-seizure conduct should just be one factor among many others that can be considered by the fact finder assessing the reasonableness of an officer's use of deadly force but should not predetermine the liability question.[184]

The D.C. Circuit has not taken a clear position on whether pre-seizure conduct may be considered in assessing the reasonableness of an officer's use of force in a § 1983 action. Nonetheless, in reviewing a state criminal prosecution of a police officer charged with assault, the D.C. Circuit held that the jury should be allowed to consider all of the surrounding circumstances leading up to the use of force.[185] Given that the reasonableness of an officer's use of force is at issue in both state criminal prosecutions of officers charged with crimes of violence and § 1983 actions, it is likely that the D.C. Circuit would take the same position in a § 1983 action. Thus, if one counts D.C. as a jurisdiction that permits the jury to consider pre-seizure conduct of the officer, there is an even 6-6 split in the circuits over whether the jury may consider pre-seizure conduct of the officer when assessing the reasonableness of the officer's use of force.

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183 In *Mendez*, the Supreme Court raised another concern, critiquing the Ninth Circuit's provocation rule for its reliance on the subjective intent of the officer because the Fourth Amendment standard it has set forth is one of objective reasonableness. 137 S. Ct. at 1548 ("[W]hile the reasonableness of a search or seizure is almost always based on objective factors, the provocation rule looks to the subjective intent of the officers who carried out the seizure." (citation omitted)).

184 For example, in my model statute on police use of deadly force, the jury must consider any antecedent conduct of the officer that increased the risk of an encounter turning deadly, but the existence of such conduct does not mean the jury must find the officer guilty of the charged offense. *See* Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 13, at 680 ("[I]t would be up to the jury to decide whether, under the totality of the circumstances, the officer or officers in question believed and acted reasonably."). The jury retains the discretion to find the officer guilty or not guilty depending on all the facts and circumstances. *Id.* ("[W]e may not like what the jury decides, but it is the jury's prerogative, as the conscience of the community, to make these difficult decisions.").

185 *See* Barrett v. United States, 64 F.2d 148, 150 (D.C. Cir. 1933). In reversing a police officer's conviction for an assault effectuated during an arrest, the D.C. Circuit held that the lower court erred in "restrict[ing] the inquiry of the jury to the occasion of the arrest and ignor[ing] precedent circumstances." *Id.* The court noted that the jury should have been instructed that they could "take into consideration every circumstance leading up to and surrounding the arrest." *Id.*

B. The Supreme Court's Position on Whether Pre-Seizure Conduct May Be Considered by the Trier of Fact

Prior to 2017, the Supreme Court had hinted in dicta that it did not consider pre-seizure conduct of an officer relevant to the officer's use of force.[186] On May 30, 2017, the Supreme Court issued a decision in *County of Los Angeles v. Mendez*,[187] a case implicating questions about whether an officer's pre-seizure conduct can be considered in assessing the reasonableness of the officer's use of deadly force.[188]

On October 1, 2010, at approximately 12:30 p.m., Los Angeles County Sheriff's Department Deputies Christopher Conley and Jennifer Pederson shot two individuals, Angel Mendez and Jennifer Garcia (later Jennifer Mendez), his pregnant common law wife, fifteen times.[189] Deputies Conley and Pederson were part of a team of twelve officers responding to a tip that a parolee-at-large named Ronnie O'Dell had been spotted riding a bicycle in front of a home owned by Paula Hughes.[190]

Deputies Conley and Pederson were directed to clear the rear of the property for officer safety and cover the back door in case O'Dell tried to escape out the back.[191] They were told that a man named Angel lived in the backyard of the Hughes residence with a pregnant lady.[192] Deputy Conley claimed he did not hear this announcement.[193]

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186 *See* City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1777 (2015) ("[S]o long as 'a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot 'avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.'" (quoting *Billington*, 292 F.3d at 1189)). But see Brower v. County of Inyo, 489 U.S. 593 (1989), which some courts have cited as support for the proposition that the Supreme Court has allowed pre-seizure police conduct to be considered in analyzing the reasonableness of a seizure. For example, in *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999), the Third Circuit noted, "The Supreme Court has allowed events prior to a seizure to be considered in analyzing the reasonableness of the seizure." *Id.* at 292 (citing *Brower*, 489 U.S. at 599) (describing *Brower* as a case in which the decedent's estate argued that police creation of a roadblock was designed in a way likely to kill). The court explained, "if preceding conduct could not be considered, remand in *Brower* would have been pointless, for the only basis for saying the seizure was unreasonable was the police's preseizure planning and conduct." *Id.*

187 County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017).

188 *Id.*

189 *See* Mendez v. County of Los Angeles, No. CV 11–04771–MWF, 2013 WL 4202240, at *1–2, *6 (C.D. Cal. Aug. 13, 2013) (Finding of Fact 1, 130 & 131).

190 Mendez v. County of Los Angeles, 815 F.3d 1178, 1184–85 (9th Cir. 2016).

191 *Id.* at 1185.

192 *Id.*

193 *Id.*

The two deputies went to the rear of the Hughes's property where they saw a shack.[194] Without knocking and identifying themselves as law enforcement officers, Deputy Conley opened the door to the shack and "pulled back a blue blanket used as a curtain to insulate the shack."[195] Upon seeing "the silhouette of an adult male holding what appeared to be a rifle pointed at them[, Deputy] Conley yelled, 'Gun!' and both deputies" started shooting.[196] A total of fifteen shots were fired.[197]

It turns out the man in the shack was not the target of the investigation but was Angel Mendez, a high school friend of Paula Hughes.[198] Hughes had allowed Mendez to build a shack in her backyard and live there with Garcia.[199] Mendez was not holding a rifle, but a BB gun he kept to shoot rats that entered the shack.[200] When Deputy Conley opened the door to the shack, Mendez was in the process of moving the BB gun so he could sit up in bed.[201]

Mendez and Garcia were both injured by the shooting.[202] Subsequently, "Mendez required amputation of his right leg below the knee."[203] Garcia, who was pregnant at the time, was shot in the back.[204]

The Mendezes sued the County of Los Angeles and Deputies Conley and Pederson, alleging a violation of their Fourth Amendment rights.[205] After a bench trial, the district court found two Fourth Amendment violations: (1) the warrantless entry into the shack, and (2) the failure to knock and identify themselves as law enforcement officers prior to entering the shack.[206] The district court also found that given Deputy Conley's reasonable but mistaken belief that Mendez was pointing a rifle at him, the officers did not use excessive force in shooting at Mendez but nonetheless concluded that the officers were liable for the shooting under the Ninth Circuit's provocation

194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.* at 1185 n.2.
199 *Id.*
200 *Id.* at 1185.
201 *Id.*
202 *Id.* at 1186.
203 *Id.*
204 *Id.* at 1185–86.
205 *Id.* at 1186.
206 *Id.*

rule.[207] The district court awarded the Mendezes close to four million dollars.[208]

The Ninth Circuit upheld the four million dollar damages award, agreeing with the district court's finding that the warrantless entry into the shack was in clear violation of the Fourth Amendment because it was not supported by exigent circumstances or any other exception to the warrant requirement.[209] The Ninth Circuit also agreed with the district court's finding that the officers violated the knock and announce rule by failing to knock and identify themselves prior to entering the shack.[210] The Ninth Circuit also found that liability was appropriate in this case even without relying on the provocation theory because the officers' warrantless entry proximately caused the ensuing injuries.[211]

The officers petitioned the Supreme Court, seeking to reverse the Ninth Circuit's ruling.[212] The main issue before the Supreme Court was the constitutionality of the Ninth Circuit's provocation rule, under which an officer could be held liable for an otherwise justifiable use of deadly force if the officer intentionally or recklessly provoked a violent confrontation through an independent Fourth Amendment violation.[213] Because the provocation rule allowed consideration of an officer's pre-seizure conduct in assessing the reasonableness of that officer's later use of deadly force, the case presented the Court with the opportunity to resolve the question that had split the lower courts—whether the trier of fact in a § 1983 case should be allowed to consider the pre-seizure conduct of an officer when assessing the reasonableness of the officer's use of force—once and for all.

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207 *Id.*

208 *Id.* ("The Mendezes were awarded roughly $4 million in damages for the shooting, nominal damages of $1 each for the unreasonable search and the knock-and-announce violation, and attorneys' fees.").

209 *See id.* at 1191, 1195.

210 *See id.* at 1191–92. Because it found that the law in the Ninth Circuit regarding whether police officers who have knocked and announced at the door to the main residence must also knock and announce before entering another residence on the curtilage was not clearly established, the court held that the deputies were entitled to qualified immunity on the knock and announce claim. *Id.* at 1192–93.

211 *See id.* at 1194.

212 *See* County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017).

213 *See id.* at 1543 (framing the issue before it as follows: "[i]f 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?").

The Supreme Court held that the Ninth Circuit's provocation rule was inconsistent with the Court's excessive force jurisprudence.[214] While there is language in the opinion that appears critical of a broad time frame,[215] instead of directly addressing the time framing question that has split the lower courts, the Court ducked the issue, stating in a footnote:

> Respondents do not attempt to defend the provocation rule. Instead, they argue that the judgment below should be affirmed under *Graham* itself. *Graham* commands that an officer's use of force be assessed for reasonableness under the "totality of the circumstances." On respondents' view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here. All we hold today is that *once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation.[216]

By leaving the time framing issue unresolved, the *Mendez* Court may have done those favoring a broad view of the totality of the circumstances a favor. Instead of prohibiting lower courts from allowing jury consideration of pre-seizure police conduct, the Court permitted lower federal courts to continue deciding on their own whether to adopt a narrow or broad time frame.

The *Mendez* Court also suggested that lower courts might resolve the issue of the admissibility of an officer's pre-seizure conduct by utilizing proximate causation analysis.[217] It noted that the court below had held that "even without relying on [the] provocation theory, the deputies [were] liable for the shooting under basic notions of proximate cause."[218] The Supreme Court chided the Court of Appeals for

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214 *Id.* at 1540.

215 *Id.* at 1546–47 ("Excessive force claims . . . are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." (quoting Saucier v. Katz, 533 U.S. 194, 207 (2001))); *id.* at 1547 (noting that the problem with the provocation rule is "it instructs courts to look back in time to see if there was a *different* Fourth Amendment violation that is somehow tied to the eventual use of force" and allows "[t]hat distinct violation, rather than the forceful seizure . . . [, to] serve as the foundation of the plaintiff's excessive force claim").

216 *Id.* at 1547 n.* (citations omitted).

217 *Id.* at 1549.

218 *Id.* at 1548 (alteration in original) (quoting Mendez v. County of Los Angeles, 815 F.3d 1178, 1194 (9th Cir. 2016)).

focusing solely on the risks associated with the failure to knock and announce, for which the officers had qualified immunity, and suggested that, on remand, the Court of Appeals should "revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset."[219]

On remand, the Ninth Circuit found that the deputies' unlawful entry without a warrant, consent, or exigent circumstances, was the proximate cause of both the shooting and the subsequent injuries sustained by the plaintiffs.[220] The court separately held that the officers were negligent under California law.[221] The court again affirmed the district court's original holding that the officers were liable for violations of the Mendezes' Fourth Amendment rights.[222] The officers sought redress in the Supreme Court again, but this time, the Court let stand the four million dollar verdict against the officers.[223]

C. State Cases on Whether Pre-shooting Conduct of the Officer May Be Considered When Assessing the Reasonableness of an Officer's Use of Deadly Force

As noted above, approximately half of the federal appellate courts hearing appeals from § 1983 cases alleging excessive force by law enforcement officers have disallowed consideration of pre-seizure conduct of the officer and the other half have allowed such consideration.[224] Contrary to the conventional wisdom that whatever the federal courts have done in the § 1983 context applies in the state civil and criminal context,[225] it is not necessary for state courts evaluating police uses of force to follow what the federal courts have said about what constitutes the appropriate time frame.[226]

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219 *Id.* at 1549.

220 *See* Mendez v. County of Los Angeles, 897 F.3d 1067, 1076–77 (9th Cir. 2018).

221 *Id.* at 1082.

222 *Id.* at 1084.

223 David G. Savage, *Supreme Court Lets Stand $4-million Verdict Against L.A. County Deputies in Shooting*, L.A. Times (Mar. 4, 2019, 9:35 AM), https://www.latimes.com/politics/la-na-pol-supreme-court-police-shooting-los-angeles-20190304-story.html [https://perma.cc/2CHQ-4HRD].

224 *See supra* text accompanying notes 147–84.

225 For example, both policing experts hired by the prosecutor in the Tamir Rice case confined their analysis to federal constitutional law, presumably because they thought federal constitutional law controlled the question of whether or not the officer who shot Rice had engaged in criminal conduct. Garrett & Stoughton, *A Tactical Fourth Amendment*, *supra* note 6, at 214.

226 In *How the Fourth Amendment Frustrates the Regulation of Police Violence*, Seth Stoughton urges "state lawmakers and administrative policymakers [to] divorce statutory and administrative regulatory mechanisms from constitutional law." Stoughton, *How the Fourth*

State courts presiding over both criminal prosecutions of law enforcement officers and civil cases involving individuals suing police officers in tort are not bound by the decisions in § 1983 cases but may choose to adopt their own standards in state criminal prosecutions and civil proceedings. In a § 1983 case when the issue is whether the officer's use of force was excessive and in violation of the Fourth Amendment, the critical question is whether the officer's use of deadly force to seize the individual was reasonable or excessive. Although ultimately unpersuasive, there is some logic to the claim that the relevant time frame in § 1983 cases is the moment of the seizure because the Fourth Amendment is the applicable law. Whether or not a Fourth Amendment seizure of the person occurred and, if so, whether that seizure was reasonable, however, is not the issue when an officer is being prosecuted for a crime or sued civilly under state tort law. Instead, the issue in a state criminal or civil case in which an officer claims his use of force was justified is whether the officer complied with the state's requirements for the use of force or self-defense, requirements that have nothing to do with whether a Fourth Amendment seizure of the person occurred or whether that seizure was reasonable.

This Section examines the state court response to the question of whether to broaden or narrow the time frame when assessing the reasonableness of an officer's use of force. It starts by examining how the state courts have dealt with this issue in the criminal context and then examines how state courts have dealt with this issue in the civil context.[227]

Amendment Frustrates the Regulation of Police Violence, *supra* note 6, at 578. Stoughton points out that, contrary to common belief, the Fourth Amendment is not the only standard for regulating police violence. *Id.* at 578–79. This is because the Fourth Amendment regulates seizures, and not all uses of force constitute "seizures" within the meaning of the Fourth Amendment. *Id.* at 579. Stoughton notes that "[t]he interests safeguarded by the Fourth Amendment . . . are both distinct and, in many cases, readily distinguishable from the interests that underlie state law and agency policy." *Id.* As an example, Stoughton notes that the California Supreme Court "has held that the concept of 'reasonableness' is narrower in the context of state negligence law than it is in the constitutional context, such that an officer's action that is considered 'reasonable' for Fourth Amendment purposes may be unreasonable as a matter of state law." *Id.* at 580 (citing Hayes v. County of San Diego, 305 P.3d 252 (Cal. 2013)).

227 In civil tort actions brought by civilians against police officers, state tort law doctrines generally control. *See* Hayes v. County of San Diego, 305 P.3d 252, 253–54 (Cal. 2013) (holding under state negligence law that tort liability can result from unreasonable use of deadly force by a law enforcement officer). Some states follow federal constitutional case law in civil tort actions brought by civilians against police officers. *See* Richardson v. McGriff, 762 A.2d 48, 56 (Md. 2000) (applying *Graham* to plaintiff's battery, gross negligence, and state constitutional claims); Wasserman v. Bartholomew, 38 P.3d 1162, 1169–70 (Alaska 2002) (affirming analysis of plain-

1. *State Criminal Cases on Whether Antecedent Conduct of a Police Officer Defendant May Be Considered by the Trier of Fact*

Surprisingly, there is a dearth of state authority on whether antecedent or pre-shooting conduct by a law enforcement officer that increased the risk of a deadly confrontation may be considered by the trier of fact in a criminal prosecution assessing the reasonableness of that officer's use of deadly force. Only two states, neither of which had a use of force statute on the books at the time their court decisions were rendered,[228] have directly addressed this issue.[229] A handful of others have indirectly addressed this issue.[230] The paucity of case law in this arena is likely due to the fact that very few officers are prosecuted for their uses of force.[231]

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tiffs' state law claims under the *Graham* "objective reasonableness" standard); Hayes v. City of Columbus, No. 13AP-695, 2014 WL 2048176, at *7 (Ohio Ct. App. May 15, 2014) (applying *Graham* to defendant officer's claim of statutory immunity under state law).

228 *See* Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 13, at 654 n.180 (listing states that previously had no use of force statute). The District of Columbia, Virginia, and Massachusetts, jurisdictions that previously had no use of force statute, enacted use of force legislation in 2020. *See supra* note 12. Maryland passed police reform legislation, including use of force legislation, in April 2021, becoming the first state to repeal its Law Enforcement Officers' Bill of Rights. Ovetta Wiggins & Erin Cox, *Maryland Enacts Landmark Police Overhaul, First State to Repeal Police Bill of Rights*, WASH. POST (Apr. 10, 2021, 10:00 PM), https://www.washingtonpost.com/local/md-politics/hogan-vetoes-police-accountibility/2021/04/09/c0ac4096-9967-11eb-962b-78c1d8228819_story.html [https://perma.cc/3T87-WRU9].

229 *See infra* text accompanying notes 232–39 (Maryland) and 240–243 (Ohio).

230 Although not directly ruling on this issue, some courts appear amenable to allowing juries in criminal prosecutions involving a police officer defendant to consider the officer's antecedent conduct in assessing the officer's culpability. In *People v. Pote*, 326 N.E.2d 236 (Ill. App. Ct. 1975), for example, a police officer was charged with murder and a jury found him guilty of involuntary manslaughter. *Id.* at 236. In affirming the defendant officer's conviction, the intermediate court of appeals noted:

> [The officer's] behavior and the circumstances under which it occurred—including the presence of a crowd of civilians and policemen, the fact that defendant had fired his gun previously, and the warning by his fellow officer not to continue shooting—support a finding that defendant consciously disregarded a substantial and unjustifiable risk that someone would be seriously injured or killed.

Id. at 240. Similarly, in *Couture v. Commonwealth*, 656 S.E.2d 425 (Va. Ct. App. 2008), a Virginia Court of Appeals suggested that if an officer creates the perception of danger and this renders his perception unreasonable or his use of force excessive, then that officer would not be entitled to a jury instruction on self-defense because he would not be justified in using deadly force to defend himself. *See id.* at 428–29 ("To the extent [the officer's] responsibility for 'creating the perception of danger,' as the jury put it, rendered his perception unreasonable or his use of force excessive, then the privilege to defend himself with deadly force would not be available.").

231 Dewan, *supra* note 7 ("Few police officers are ever charged with murder or manslaughter when they cause a death in the line of duty, and only about a third of those officers are convicted."); *see also* Zusha Elinson & Joe Palazzolo, *Police Rarely Criminally Charged for On-Duty Shootings*, WALL ST. J. (Nov. 24, 2014, 7:22 PM), https://www.wsj.com/articles/police-

Maryland is one of two states that has directly addressed the time framing issue and has taken the position that antecedent conduct of a law enforcement officer may not be considered by the trier of fact in a criminal case in assessing the reasonableness of that officer's use of force.[232]

In *Pagotto v. State*,[233] a police officer's convictions for involuntary manslaughter and reckless endangerment in connection with an incident in which the officer accidentally shot and killed the driver of a Subaru vehicle during a traffic stop were reversed in large part because the appellate court rejected the State's attempt to show that the officer's pre-shooting conduct increased the risk of a deadly confrontation.[234]

To prove the officer acted with gross criminal negligence, the mental state required for involuntary manslaughter, and simple recklessness, the mental state required for reckless endangerment, the prosecutor argued that three antecedent actions of Sergeant Pagotto increased the risk that his service weapon would be accidentally discharged: (1) approaching the victim's car with his service weapon drawn, (2) grappling with the driver with his left hand while his gun was in his right hand, and (3) placement of his trigger finger along the "slide" of his Glock, rather than underneath the trigger guard.[235]

The Maryland Court of Special Appeals, however, rejected the State's attempt to use this antecedent conduct of the officer to cast doubt on the reasonableness of the officer's use of deadly force, noting that "'[r]egardless of what had transpired up until the shooting itself[,]' in the present case, the calculated decision of [the deceased] to attempt to flee from lawful detention and to drive his car into Sergeant Pagotto's body created a new and overriding reality."[236] Focus-

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rarely-criminally-charged-for-on-duty-shootings-1416874955 [https://perma.cc/UQ8K-37M2] ("Police are rarely charged criminally for on-duty shootings . . . .").

232 Maryland state courts do allow consideration of the defendant's antecedent conduct in homicide cases involving ordinary civilians, even though they do not allow such consideration in homicide cases involving police officers. *See* State v. Thomas, 211 A.3d 274, 295–96 (Md. 2019) (finding sufficient evidence to convict defendant of involuntary manslaughter where defendant was shown to have previously "consistently distributed heroin to a substantial network of associates"); Pagotto v. State, 732 A.2d 920, 965 (Md. Ct. Spec. App. 1999); Mills v. State, 282 A.2d 147, 148 (Md. Ct. Spec. App. 1971) (affirming minor defendant's conviction of involuntary manslaughter, noting that defendant "created [a] dangerous situation" by bringing a loaded gun to a party).

233 732 A.2d 920 (Md. Ct. Spec. App. 1999), *aff'd*, 762 A.2d 97 (Md. 2000).

234 *See id.* at 965.

235 *Id.* at 930–31.

236 *Id.* at 965 (quoting Fraire v. City of Arlington, 957 F.2d 1268, 1276 (5th Cir. 1992)).

ing narrowly on the moment that the officer chose to use deadly force as the only relevant time frame, the court explained, "the claim that an officer has unreasonably used excessive force must be assessed as of the moment when the force is employed."[237] To hammer home its opinion that any pre-shooting conduct of the officer, even conduct that increased the risk of a deadly confrontation, was irrelevant, the court added, "Antecedent and allegedly negligent acts that may have contributed to the creation of a dangerous situation are not pertinent in evaluating the officer's state of mind at the critical moment when the gun, for instance, is discharged."[238] The court concluded that the evidence presented in this case was not legally sufficient to support a finding of gross criminal negligence, and therefore the charges of involuntary manslaughter and reckless endangerment should not have been submitted to the jury.[239]

Ohio is the only other state that appears to have directly addressed the issue of whether the jury in a criminal prosecution involving an officer-defendant charged with a crime of violence may consider antecedent conduct of the officer and, like Maryland, has answered the question in the negative. In *State v. White*,[240] a former police officer was convicted of felonious assault with a firearm for shooting a motorcyclist after a brief vehicle pursuit and was sentenced to ten years in prison.[241] In reversing the officer's conviction, the Ohio Court of Appeals explained that analyzing an officer's use of deadly force requires determining whether the officer reasonably perceived a threat and to make this determination, "[t]he focus is specifically on the moment he used his weapon and in the moments directly preceding it."[242] The court also noted, "Earlier errors in the officer's judgment do not make a shooting unreasonable if he was acting reasonably then."[243]

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237 *Id.*

238 *Id*.

239 *Id.* at 969. The State filed a petition for a writ of certiorari with the Court of Appeals of Maryland and Maryland's highest court affirmed the judgment of the Court of Special Appeals, holding that the evidence was insufficient to support the officer's convictions. State v. Pagotto, 762 A.2d 97, 107 (Md. 2000) ("[W]e conclude that the Court of Special Appeals was correct in its determination that there was insufficient evidence to support [Sergeant] Pagotto's convictions.").

240 988 N.E.2d 595 (Ohio Ct. App. 2013), *aff'd*, 29 N.E.3d 939 (Ohio 2015).

241 *Id.* at 600.

242 *Id.* at 614.

243 *Id.*

2. *State Civil Cases on Whether Antecedent Conduct of a Police Officer Defendant May Be Considered by the Trier of Fact*

As is the case in the criminal context, most states have not addressed whether the trier of fact in a civil excessive force case is limited to considering only the events and circumstances that existed at the moment when the officer used force or whether it may consider antecedent conduct of the officer. The states that have addressed this issue are split.

Four states—Alaska,[244] Arizona,[245] Colorado,[246] and Maryland[247]—limit the jury's consideration to the events and circumstances facing the officer at the moment when that officer used force. For example, the Court of Appeals of Maryland, the highest court in the state, was asked in *Richardson v. McGriff*[248] to decide whether the jury in a civil case brought against a police officer could consider the officer's antecedent conduct or whether the jury was limited to considering only the circumstances contemporaneous with the officer's use of force.[249] Answering this question, the court held that the jury was

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244 Lum v. Koles, 314 P.3d 546, 554 (Alaska 2013) (rejecting the Ninth Circuit's provocation theory and the argument that an officer can be held liable for an otherwise defensible use of deadly force if (1) he "intentionally or recklessly provoke[d] a violent confrontation," and (2) "the provocation is an independent Fourth Amendment violation"); *see* Maness v. Daily, 307 P.3d 894, 902–03 (Alaska 2013).

245 Robertson v. Territory, 108 P. 217, 220 (Ariz. 1910) (affirming officer's manslaughter conviction while noting that "[t]he rights of the [officer] . . . with respect to his freedom from liability for the homicide, depend upon the circumstances surrounding the transaction at the time of the homicide rather than at the time of the commission of the [victim's] misdemeanor in the street"), *aff'd sub nom.* Robertson v. Territory of Arizona, 188 F. 783 (9th Cir. 1911).

246 In a civil action brought by a police officer challenging his suspension for fatally shooting a developmentally disabled teenager and claiming that he acted in self-defense, a Colorado appellate court affirmed the officer's suspension, applying the police department's use of force policy and noting that it was typically interpreted "to cover only the circumstances existing at the moment force was used" and "the 'immediate situation' surrounding the force." Turney v. Civ. Serv. Comm'n, 222 P.3d 343, 349 (Colo. App. 2009). The court also noted, without citing any authority, that "Denver District Attorneys, investigating this and other police shootings, similarly have construed Colorado *criminal* self-defense laws to limit consideration to the 'final frame' instant when shots were fired." *Id.*

247 In *Randall v. Peaco*, 927 A.2d 83 (Md. Ct. Spec. App. 2007), the Maryland Court of Special Appeals was asked to consider whether the appellant should have been "entitled to have a fact finder assess the reasonableness of [the officer's] decision to use lethal force by resort to antecedent events." *Id.* at 88–89. The court responded, "[t]he law in Maryland . . . is that events that are antecedent to the conduct of the officer at issue do not bear on the objective reasonableness of that conduct." *Id.* at 89. The court then affirmed the lower court's grant of the officer's motion for summary judgment. *Id.* at 93.

248 762 A.2d 48 (Md. 2000).

249 The court framed the issue as follows:

limited to considering only the circumstances contemporaneous with the officer's use of force and was not entitled to consider the antecedent conduct of the officer.[250]

In contrast, six states—California,[251] Illinois,[252] Kansas,[253] Louisiana,[254] Montana,[255] and Washington[256]—and the District of Colum-

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> The principal issue . . . is whether, in determining the necessity and objective reasonableness of Officer McGriff's conduct when the closet door was opened by Officer Catterton, the jury should have been permitted to consider whether the officers violated any police guidelines or regulations in entering the apartment without additional back-up and in failing to turn on the kitchen lights. The question is thus one of permissible focus: is the jury limited to considering only the circumstances contemporaneous with the "seizure"—what immediately faced McGriff when the closet was opened—or was it entitled to consider as well the reasonableness of the officer's antecedent conduct?

Id. at 56.

250 *Id.* at 63 ("[W]e hold that the trial court did not err in excluding the evidence subject to the *in limine* ruling . . . ."). In a later case, the Maryland Court of Special Appeals described the holding in *Richardson v. McGriff* as follows: "The Court [in *McGriff*] concluded that the reasonableness of an officer's use of deadly force should be determined by examining the circumstances at the moment or moments directly preceding the use of deadly force." Mayor of Balt. v. Hart, 891 A.2d 1134, 1141 (Md. Ct. Spec. App. 2006), *aff'd*, 910 A.2d 463 (Md. 2006).

251 *See* Hayes v. County of San Diego, 305 P.3d 252, 263 (Cal. 2013) ("Law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability."). Notably, the California Supreme Court cited *Grudt v. City of Los Angeles*, 468 P.2d 825, 830–31 (Cal. 1970), a previous case in which the court held that in a wrongful death action against the city and police officers arising from a fatal shooting of the plaintiff's husband, the jury may consider the pre-shooting conduct of officers in assessing whether a law enforcement officer who shot and killed a driver who accelerated toward him was negligent. *See Hayes*, 305 P.3d at 256. Commenting on the facts of *Grudt*, the *Hayes* court noted that although "the shooting in *Grudt* appeared justified *if examined in isolation*, because the driver was accelerating his car toward one of the officers just before the shooting[,]" considering "the totality of the circumstances, including the pre-shooting conduct of the officers, might persuade a jury to find the shooting negligent." *Id.*

252 In *Price v. City of Chicago*, 97 N.E.3d 188 (Ill. App. Ct. 2018), a wrongful death civil action against a police officer, the Illinois Appellate Court noted that it was up to the jury to consider the evidence—which included evidence of both the officers' and the victim's pre-shooting conduct—and decide "who to believe and whether the intimate contact" between the officers and the decedent put the defendant "in such a position that deadly force was unjustified." *See id.* at 197.

253 In *Estate of Randolph v. City of Wichita*, 459 P.3d 802 (Kan. Ct. App. 2020), the decedent's estate and family members asserted a variety of tort claims against a police officer, including battery for using his taser and pistol against the decedent, who had a mental illness. *Id.* at 809. The officer asserted that he acted in self-defense and acted in accordance with stand your ground rules in shooting the decedent, who had emerged from the house and was walking toward the officer. *See id.* at 818. In reversing the trial court's entry of summary judgment for the officer on the battery claim, the Court of Appeals noted that the facts "do not establish that [the officer] merely stood his ground" but "moved toward [the decedent], as if to engage him[,]" which was a relevant consideration for the fact finder. *Id.*

254 In *Kyle v. City of New Orleans*, 353 So. 2d 969 (La. 1977), a civil suit brought against

bia[257] allow the trier of fact in a civil case involving allegations that a police officer used excessive force to consider antecedent conduct of the officer in assessing the reasonableness of the officer's use of force. One of these decisions deserves mention for its colorful "tiger in a cage" analogy. In *District of Columbia v. Evans*,[258] a wrongful death action brought by a shooting victim's mother against police officers, plaintiff's counsel argued that the officers' pre-shooting conduct was "analogous to someone entering a cage with a tiger in it."[259] Counsel

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several police officers and the city of New Orleans, the Louisiana Supreme Court appeared to consider the officers' pre-shooting conduct in finding that the officers had used excessive force. *Id.* at 973. In listing what factors should be considered in a totality of the circumstances analysis, the court included "the existence of alternative methods of arrest." *Id. But see* Mathieu v. Imperial Toy Corp., 646 So. 2d 318, 324 (La. 1994) (noting in a civil case filed against the City of New Orleans and police officers for shooting an armed suspect that "the existence of other available alternative methods does not, in and of itself, render the method chosen *unreasonable*").

255 In *Scott v. Henrich*, 958 P.2d 709, 712 (Mont. 1998), the plaintiff presented expert testimony opining that "the officers' role in the events leading up to the shooting death of [the decedent] was unreasonable" because the officers employed an "'assault' on the doorway." *Id.* at 712. The court reversed the trial court's entry of summary judgment for the officers, explaining that in light of the plaintiff's evidence, "reasonable jurors could differ as to whether the officers acted reasonably on the day of the shooting." *Id.* at 713.

256 In *Beltran-Serrano v. City of Tacoma*, 442 P.3d 608 (Wash. 2019), a homeless man brought a civil suit against the City of Tacoma for negligence and assault and battery, arising from an encounter with a police officer that resulted in the plaintiff being shot multiple times. *Id.* at 609. After the trial court granted the City's motion to dismiss, the plaintiff filed a motion for direct discretionary review with the Washington Supreme Court. *Id.* at 611. The Washington Supreme Court reversed, noting that under the standard governing the use of deadly force by a police officer, "the facts of this case must be evaluated under the totality of the circumstances, *including* [*the officer's*] *pre-shooting conduct*." *Id.* at 613 (emphasis added). Previously, an intermediate court of appeals in a civil case in which survivors and estate of an individual fatally shot by police officers brought a § 1983 action and state tort claims against the City of Spokane and its officers, ruled the opposite way, stating, "We must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene, applying a 'standard of the moment.'" Estate of Lee *ex rel.* Lee v. City of Spokane, 2 P.3d 979, 986 (Wash. Ct. App. 2000) (quoting Staats v. Brown, 991 P.2d 615, 625 (Wash. 2000)). To hammer home this point, the court added, "We look only at the actual seizure, not the events leading up to the seizure." *Id.*

257 For example, in *Barrett v. United States*, 64 F.2d 148 (D.C. Cir. 1933), the Court of Appeals for the District of Columbia considered whether it was prejudicial error in a criminal prosecution of a police officer for assault for the trial court to have restricted the jury to considering only the circumstances surrounding the arrest and not antecedent knowledge of the officer about the victim being suspected of murder. *Id.* In that case, the defendant-officer had requested but was denied a jury instruction that would have instructed the jury that they were allowed to "take into consideration every circumstance leading up to and surrounding the arrest and also any knowledge which the officer may possess concerning the danger of effecting the arrest." *Id.* at 150. The appellate court held that it was prejudicial error for the trial court to have "restricted the inquiry of the jury to the occasion of the arrest and [to] ignore[] precedent circumstances." *Id.*

258 644 A.2d 1008 (D.C. 1994).

259 *Id.* at 1021. The plaintiff argued that "the officers' [pre-shooting] conduct in pursuing

added, "once you are in that cage[,] you might have to kill that tiger."[260] The D.C. Court of Appeals agreed and held that the plaintiff's "tiger in a cage" theory should have been presented to a jury.[261]

III. Broadening the Time Frame

In this last Part, I set forth several arguments in favor of broadening the time frame and allowing the trier of fact in a state criminal prosecution of a law enforcement officer to consider officer-created jeopardy, i.e., unwise conduct of the officer that increased the risk of a deadly confrontation. Before laying out these arguments, I provide a theoretical framework for understanding the issue at hand. After laying out the arguments supporting a broad time frame, I address possible objections to a broad time frame.

A. Broad vs. Narrow Time Framing in Mark Kelman's Interpretive Construction in the Criminal Law

In *Interpretive Construction in the Substantive Criminal Law*,[262] Mark Kelman unmasks an interpretive time-framing construct operating in the context of the voluntary act requirement in the criminal law. As first-year law students learn when they study criminal law, a basic element common to all crimes is the actus reus requirement.[263] The actus reus element is proven by showing that the defendant engaged in a voluntary act, or an omission where there was a legal duty to act, that caused social harm.[264] A voluntary act is commonly understood as a volitional movement of the body willed by the actor.[265]

The need for a voluntary act as a prerequisite for criminal liability is reflected in *Martin v. State*,[266] a case that appears in many criminal law casebooks. In *Martin*, an Alabama court overturned the conviction of an intoxicated man who was removed from his home by police

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[the victim] outside his home . . . agitated [the victim] . . . rather than calming him down[,]" and created the officers' need to use deadly force. *Id.*

260 *Id.*

261 The court agreed with plaintiffs, noting that the "evidence that [the officer] entered the scene suddenly, with her gun drawn, . . . coupled with the expert's testimony that [the officer] had not followed required police procedures in the way she approached the scene" supported the plaintiff's theory. *Id.*

262 Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 Stan. L. Rev. 591 (1981).

263 *See generally* Joshua Dressler, Understanding Criminal Law § 9.01, at 83–93 (8th ed. 2018) (discussing the actus reus requirement).

264 *Id.* at 83.

265 *See id.* § 9.02[C][2], at 86–89.

266 17 So. 2d 427 (Ala. Ct. App. 1944).

and taken onto the highway, then arrested for being drunk on a public highway.[267] The court found in favor of Mr. Martin because he did not voluntarily appear in public while intoxicated.[268] In other words, he did not engage in a voluntary act as is generally required before one can be convicted.

Another important case that appears in the actus reus section of many criminal law casebooks is *State v. Decina*.[269] In this case, a man with a history of epileptic seizures lost consciousness while driving due to an epileptic seizure, then struck and killed four schoolchildren.[270] Mr. Decina was found guilty of four counts of criminal negligence in the operation of the vehicle resulting in death.[271]

Even though much of the majority's discussion centers on questions of culpability and whether Mr. Decina had the requisite mens rea to be found guilty, *State v. Decina* is included in most criminal law casebooks because it allows law students to learn about the defense of unconsciousness. The unconsciousness defense allows a defendant who was unconscious at the time of the act that caused the social harm to be acquitted on the ground that a key element of the crime, the actus reus requirement, cannot be satisfied.[272] If the defendant was unconscious at the time of his act, the prosecution cannot prove that a voluntary act by the defendant caused the social harm.[273] Voluntary acts are willed, volitional movements of the body, but a person who is unconscious is not willing their body to move.[274]

Decina gives law students the opportunity to think about whether an individual who has an epileptic seizure at the wheel is acting voluntarily when he crashes his vehicle and causes the death of another human being. Judge Desmond, concurring in part and dissenting in part in *Decina*, argued that Mr. Decina was not acting voluntarily

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267 *Id.* at 427.

268 *Id.* ("Under the plain terms of this statute, a voluntary appearance is presupposed . . . an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer.").

269 138 N.E.2d 799 (N.Y. 1956).

270 *See id.* at 801–03.

271 *See id.* On appeal, his convictions were reversed because communications he had with his doctor were improperly admitted into evidence. *Id.* at 804.

272 *See* WAYNE R. LAFAVE, CRIMINAL LAW § 9.4, at 612 (6th ed. 2017).

273 *See id.* at 612 § 9.4(1).

274 DRESSLER, *supra* note 263, § 9.02[C][2], at 88 ("With a voluntary act, a human being—a person—and not simply an organ of a human being, causes the bodily action. Thus, when *D*'s arm strikes V as the result of an epileptic seizure, we sense that D's *body*, but not *D* the person, has caused the impact.").

when he drove his car into the school children and therefore could not be held criminally liable for their deaths, explaining:

> One cannot while unconscious "operate" a car in a culpably negligent manner or in any other "manner." The statute makes criminal a particular kind of knowing, *voluntary*, immediate operation. It does not touch at all the involuntary presence of an unconscious person at the wheel of an uncontrolled vehicle.[275]

The majority rejected Judge Desmond's argument but instead of countering the dissent's actus reus argument, the majority focused on Mr. Decina's culpable state of mind.[276] Emphasizing Mr. Decina's knowledge and recklessness, the majority explained:

> [T]his defendant knew he was subject to epileptic attacks and seizures that might strike *at any time*. He also knew that a moving motor vehicle uncontrolled on a public highway is a highly dangerous instrumentality capable of unrestrained destruction. With this *knowledge*, and without anyone accompanying him, he deliberately took a chance by making a conscious choice of a course of action, in disregard of the consequences which he knew might follow from his conscious act, and which in this case did ensue.[277]

Kelman compares the results in *Martin* and *Decina*, noting that the *Martin* court focused narrowly on the moment when the police took Mr. Martin from his house out onto the public highway to reach its conclusion that Mr. Martin did not voluntarily put himself on the public highway while intoxicated.[278] In contrast, even though Mr. Decina was not acting voluntarily at the time he drove his car into the schoolchildren—because at that time, he was unconscious due to an epileptic seizure—a majority of the court felt Mr. Decina acted with the requisite voluntariness.[279] Kelman explains that the only way the *Decina* court could find a voluntary act was by broadening the time frame. In other words, the court had to reach back in time to find a voluntary act—Mr. Decina's voluntary decision to get behind the wheel, turn the key to start the ignition, and start driving.[280]

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275 *Decina*, 138 N.E.2d at 808 (Desmond, J., concurring in part and dissenting in part) (emphasis added).

276 *See generally* 138 N.E.2d 799.

277 *Id.* at 803–04.

278 *See* Kelman, *supra* note 262, at 603.

279 *Id.*

280 *Id.*

Kelman notes that the *Martin* court, like the *Decina* court, could have reached back in time to find a voluntary act had it wanted to find Mr. Martin criminally liable. He explains:

> [I]t is quite possible that the defendant was arrested for activity he was engaging in at home: for instance, beating his wife. Why did the court not consider saying that the voluntary act at time one (wife beating) both posed a risk of and caused a harmful involuntary act at time two (public drunkenness) and assess[] the voluntariness of the alleged criminal act with reference to the wider time-framed scenario?[281]

Continuing to compare the *Decina* case to the *Martin* case, Kelman notes, "[i]t cannot be that the involuntary, harmful act at time two was unforeseeable. The probability of an epileptic blackout is almost certainly far lower than the probability of ending up in public after engaging in behavior likely to draw police attention."[282]

Now, we have no evidence that Mr. Martin was beating his wife. We do not even know if Mr. Martin had a wife, but it is still the case that the *Martin* court could have easily broadened the time frame and found a voluntary act. It could have found that Martin voluntarily put the bottle of alcohol to his lips and drank the liquor that made him intoxicated, which caused him to be loud and boisterous, and likely led his neighbor to call the police.

Kelman concludes that depending on how broadly or narrowly the court construes the relevant time frame, a court can find a voluntary act and hold the defendant criminally liable, or the court can say that the defendant did not act voluntarily and relieve the defendant of criminal liability.[283] Shifting between broad and narrow time frames by different courts results in arbitrary results.

Just as an interpretive time framing construct operates in the background of ordinary criminal law cases—influencing how the voluntary act requirement in the criminal law gets applied, which in turn affects whether a criminal defendant can even be convicted of a crime—an interpretive time framing construct operates in the background in officer-involved shooting cases. And just as courts hold the key as to how broadly or narrowly to construe the time frame for determining whether a defendant engaged in a voluntary act that caused the social harm, courts that oversee criminal prosecutions of law enforcement officers, civil cases involving law enforcement officer-de-

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281 *Id.* at 604 (footnote omitted).

282 *Id.* (footnote omitted).

283 *Id.*

fendants charged with torts under civil tort law, and § 1983 cases hold the key as to how broadly or narrowly to construe the relevant time frame for determining the reasonableness of a law enforcement officer's use of deadly force.

B. Reasons to Broaden the Time Frame

There are at least three reasons why the trier of fact should be allowed to broaden the time frame and consider any conduct of the officer that increased the risk of a deadly confrontation. First, in ordinary homicide cases in which a civilian is charged with having killed another person and claims self-defense, the jury may consider conduct of the defendant that increased the risk of a deadly confrontation.[284] Officer-defendants claiming self-defense should not be treated more leniently than civilian-defendants claiming self-defense. If anything, law enforcement officers should be held to a higher standard than civilians because they are entrusted with the authority to use deadly force and are trained in the use of such force.[285]

Second, in officer-involved shooting cases, the jury is allowed to consider conduct by the victim that led the officer to believe it was necessary to use deadly force to protect the officer or another.[286] If the jury is allowed to consider the victim's pre-shooting conduct that increased the risk of a deadly confrontation, it should be allowed to consider conduct of the officer that increased the risk of a deadly confrontation.

Third, in officer-involved shooting cases, the jury is permitted to consider conduct of the officer that decreased the risk of a deadly confrontation that supports the officer's argument that his use of deadly force was appropriate.[287] For example, if the officer took cover, called for backup, tried to calm the suspect, or used less deadly force prior to

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284 *See infra* Section III.B.1.

285 *See* Rachel Tecott & Sara Plana, *Maybe U.S. Police Aren't Militarized Enough. Here's What Police Can Learn from Soldiers*, WASH. POST (Aug. 16, 2016, 5:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/16/maybe-u-s-police-arent-militarized-enough-soldiers-are-better-trained-to-deescalate/ [https://perma.cc/N6AW-6KGA] (arguing that "[t]he legal standard should be higher for police than for civilians" because "police officers have a job that necessarily puts them in tense and often violent situations that they should be trained to de-escalate"); Nancy A. Ruffin, *Why Police Officers Need to Be Held to Higher Standards*, HUFFINGTON POST (Dec. 6, 2017, 3:56 PM), https://www.huffpost.com/entry/why-police-officers-need-_b_12158042 [https://perma.cc/JGP8-VJYX] (arguing that because law enforcement officers choose a job that necessarily involves the risk of death and are trained in ways that the average American is not, they should be held to a higher standard).

286 See *infra* Section III.B.2 for examples.

287 *See infra* Section III.B.3.

using deadly force, the jury not only is allowed but is encouraged by the officer-defendant's attorney to consider this de-escalation conduct in assessing the reasonableness of the officer's use of force. If the jury can consider conduct of the officer that decreased the risk of a deadly confrontation, it should be allowed to consider conduct of the officer that increased the risk of a deadly confrontation as well.

1. Juries in Civilian Homicide Cases Are Allowed to Consider Antecedent Conduct of the Defendant in Assessing the Defendant's Claim of Self-Defense

The first reason to broaden the time frame and allow a jury to consider an officer's antecedent conduct is that this is already common practice in ordinary criminal cases involving civilians asserting self-defense. When an ordinary civilian is charged with murder, manslaughter, assault, or battery and claims self-defense, the jury assessing the defendant's claim of self-defense may consider conduct by the defendant that increased the risk of a deadly confrontation, even if that conduct occurred prior to the moment in time when the defendant used deadly force against the victim.

Take, for example, the Trayvon Martin case, or, more accurately, the George Zimmerman case. Zimmerman was the Neighborhood Watch Captain who became a household name once it became known that he shot and killed an unarmed Black teenager named Trayvon Martin.[288] Martin was walking back to his father's fiancee's place after going to the store to get some candy and a non-alcoholic beverage when he was confronted by Zimmerman.[289] Zimmerman had called 911 to report Martin as a suspicious person and was told by the 911 dispatcher to stay in his vehicle and wait for police to arrive.[290] Zim-

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288 Dan Barry, Serge F. Kovaleski, Campbell Robertson & Lizette Alvarez, *Race, Tragedy and Outrage Collide After a Shot in Florida*, N.Y. TIMES (Apr. 1, 2012), https://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html [https://perma.cc/ZSF3-GWWN] (providing detailed background information on Trayvon Martin, George Zimmerman, and their encounter). *See generally* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555 (2013) [hereinafter Lee, *Making Race Salient*] (using the death of Trayvon Martin to examine the operation of implicit racial bias in cases involving self-defense claims).

289 Greg Botelho & Holly Yan, *George Zimmerman Found Not Guilty of Murder in Trayvon Martin's Death*, CNN (July 14, 2013, 11:50 AM), https://www.cnn.com/2013/07/13/justice/zimmerman-trial/index.html [https://perma.cc/AK4E-79NS] (noting "[t]he deadly encounter took place on February 26, 2012, as Martin walked back to his father's fiancee's house through the rain from a Sanford convenience store[,]" carrying a bag of Skittles and a drink). *See also* Lee, *Making Race Salient*, *supra* note 288, at 1557–58.

290 Melanie Jones, *Trayvon Martin Case: 911 Tapes 'Not as Conclusive as People Think,' Says Defense Attorney*, INT'L BUS. TIMES (Mar. 23, 2012, 2:56 PM), http://www.ibtimes.com/

merman, however, disregarded the 911 dispatcher's suggestion and confronted Martin.[291] He claimed he shot Martin in self-defense after the two got into a physical fight and Zimmerman found himself on the ground with Martin on top, punching him.[292]

The jury was presented with evidence of Zimmerman's antecedent conduct that increased the risk of a deadly confrontation—namely, that Zimmerman got out of his vehicle and confronted Martin, disregarding the dispatcher's suggestion not to follow Martin.[293] Zimmerman's act of confronting Martin set in motion the events that culminated in a physical confrontation with the two males fighting with each other and Martin getting shot and killed.[294] Despite the fact

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trayvon-martin-case-911-tapes-not-conclusive-people-think-says-defense-attorney-429306 [https://perma.cc/9TBX-XU28].

291 *See id.* (noting that Zimmerman ignored the dispatcher's directive not to follow the teenager when Martin began to move away, stopped his car, and got out with his gun on him); *see also* Lee, *Making Race Salient*, *supra* note 288 at 1557–58.

292 CHRISTOPHER F. SERINO, SANFORD POLICE DEP'T, REPORT OF INVESTIGATION 4 (2012); *see also* Lee, *Making Race Salient*, *supra* note 288, at 1158.

293 Sean Noffke, the 911 dispatcher who responded to Zimmerman's call, testified at Zimmerman's trial and told the jury that he suggested that Zimmerman not follow Martin. *See First Witnesses Take Stand in Zimmerman Trial*, CBS MIAMI (June 24, 2013, 2:40 PM), https://miami.cbslocal.com/2013/06/24/opening-statements-monday-in-zimmerman-trial/ [https://perma.cc/NZ4P-5UKN]; Stephen Loiaconi, *Get Caught Up: Week 1 of Zimmerman Trial*, CNN (June 29, 2013, 5:47 PM), https://www.cnn.com/2013/06/29/justice/zimmerman-trial-recap/index.html [https://perma.cc/JMS5-AF2P]. Zimmerman did not take the stand, but the jury heard through recorded police interviews with Zimmerman that he pursued Martin, initially in his car and later on foot. *The Zimmerman Trial, Day by Day*, N.Y. TIMES, at Day 6 (July 12, 2013), https://archive.nytimes.com/www.nytimes.com/interactive/2013/07/12/us/zimmerman-highlights.html [https://perma.cc/QNA7-L8VK].

294 Some have argued that the judge's failure to give the jury an initial aggressor instruction was one of the reasons Zimmerman was acquitted. *See* Alafair Burke, *What You May Not Know About the Zimmerman Verdict: The Evolution of a Jury Instruction*, HUFFINGTON POST (Sept. 14, 2013), https://www.huffpost.com/entry/george-zimmerman-jury-instructions_b_3596685 [https://perma.cc/MH2X-R9Z2] (pointing out that even under Florida's defendant-friendly "stand your ground" self-defense statute, initial aggressors cannot claim self-defense, and opining that the judge's refusal to tell the juries about this aspect of the law may have been the reason for Zimmerman's acquittal). *But see* Michael J.Z. Mannheimer, *Trayvon Martin and the Initial Aggressor Issue*, PRAWFSBLAWG (Mar. 26, 2012, 10:46 PM), https://prawfsblawg.blogs.com/prawfsblawg/2012/03/trayvon-martin-and-the-initial-aggressor-issue.html [https://perma.cc/5WHE-964F] (arguing that merely following someone to ask them questions does not, without more, make one an initial aggressor for purposes of self-defense law). For commentary on race and the Zimmerman case, see Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1119, 1182 (2017) (noting that Martin was vulnerable to being racially profiled by Zimmerman because unknown Black individuals in the neighborhood were seen as intruders); Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1707 (2019) (using the George Zimmerman case as an example of "violence justified by fear of a person who looks unfamiliar and out of place"); Cynthia Lee, *(E)Racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91, 101–07 (2014)

that Zimmerman arguably started the affray by confronting Martin and demanding that he explain his presence in the neighborhood, the jury acquitted Zimmerman of all charges.[295]

Law enforcement officers claiming justifiable force are basically arguing that they acted in self-defense. Subject to few exceptions, law enforcement officers should be held to at least the same standard as ordinary civilians.[296] Arguably, law enforcement officers should be held to a higher standard than ordinary civilians because law enforcement officers are given the authority to use deadly force in the line of duty and are trained in the use of deadly force.[297]

2. *In Officer-Involved Shooting Cases, the Jury Is Allowed to Consider Antecedent Conduct of the Victim*

A second reason to broaden the time frame and allow juries in officer-involved shooting cases to consider antecedent conduct of the officer that increased the risk of a violent confrontation is that juries in these types of cases are typically allowed to consider antecedent conduct of the victim that may have increased the risk of a violent confrontation.[298] If the jury can consider antecedent conduct of the

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(critiquing the enforcement of colorblindness at the Zimmerman murder trial); Cynthia Lee, *Denying the Significance of Race: Colorblindness and the Zimmerman Trial*, *in* TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE 31 (Kenneth J. Fasching-Varner et al. eds., 2014) (explaining how all of the legal actors involved in the Trayvon Martin case denied the significance of race to Trayvon Martin's detriment).

295 *See* Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html [https://perma.cc/E5YA-CHYY] As a general matter, if one is the initial aggressor in a confrontation, one loses the right to claim self-defense. *See supra* note 21. One can be the initial aggressor even if one is not the first person to use physical force. DRESSLER, *supra* note 263, § 18.02[B][1] (noting that one who "unlawfully brandishes a weapon and threatens to kill [another person]" is an initial aggressor and loses the right to act in self-defense). Dressler notes that "courts are split on whether words alone can render a person the aggressor." *Id.*

296 SpearIt, *Firepower to the People! Gun Rights & the Law of Self-Defense to Curb Police Misconduct*, 85 TENN. L. REV. 191, 249 (2017) (arguing that police should be held to a higher standard than civilians because "[t]hey are the ones with training and temperament that should make violence a last resort").

297 *Id.*; *see also* Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 13, at 687 ("[U]nlike ordinary civilians, police officers are entrusted with the power to use force . . . . When an officer allegedly abuses that power, that officer should be held to a higher standard than ordinary civilians."); Lee, *"But I Thought He Had a Gun," supra* note 25, at 48 (noting that law enforcement officers are currently held to a higher standard than civilians because we compare the law enforcement officer on trial to the reasonable law enforcement officer and that it makes sense to increase the scrutiny when one takes a human life).

298 For example, in *Robinson v. State*, 473 S.E.2d 519 (Ga. Ct. App. 1996), involving a state criminal prosecution of two White police officers who shot and killed a Black man in a parking

victim that supports an officer's claim that he reasonably believed it was necessary to use deadly force against the victim to protect the officer or another against the threat of death or serious bodily injury, it is only fair to allow the jury to consider antecedent conduct of the officer that undermines the officer's argument that his use of deadly force was reasonable.

For example, during closing arguments in former Minnesota police officer Derek Chauvin's trial, Erik Nelson, the former officer's attorney, told the jury not to focus solely on the 9 minutes and 29 seconds during which his client pressed his knee into the neck of George Floyd—an unarmed African American man who was stopped under suspicion of having passed a counterfeit twenty dollar bill at a Cup Foods convenience store—but instead to consider the totality of the circumstances.[299] Nelson explained that focusing on the 9 minutes and 29 seconds Chauvin's knee was on Floyd's neck "ignores the previous 16 minutes and 59 seconds."[300] He then played video clips of the officers struggling to get Floyd into the patrol car before the officers wrestled Floyd onto the ground in an effort to show the jury why his client's use of force on Floyd was necessary and appropriate.[301] Chauvin, who was charged with second-degree unintentional murder, third-degree murder, and second-degree manslaughter in Floyd's death, was convicted on all three counts.[302]

Similarly, the jury in the case involving the officer-involved shooting death of Laquan McDonald, a 17-year-old African American male, in Chicago, Illinois was allowed to hear about McDonald's pre-shooting conduct that made Officer Jason Van Dyke, the officer who

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lot, the jury was allowed to consider the fact that prior to being shot, the victim had threatened another person with a knife. *See id.* at 520; *see also* State v. Smith, 807 A.2d 500, 509–10 (Conn. App. Ct. 2002) (suggesting it was proper for the jury to consider the conduct of the victim in deciding whether it was reasonable for the officer to believe that deadly force was necessary to defend himself or others).

299 N'dea Yancey-Bragg, Tami Abdollah, Grace Hauck, Kevin McCoy & Eric Ferkenhoff, *Derek Chauvin Trial Closing Statements: Prosecutors Tell Jurors to 'Believe Their Eyes'; Defense Emphasizes 'Totality of the Circumstances*,' USA TODAY (Apr. 20, 2021, 9:29 AM), https://www.usatoday.com/story/news/nation/2021/04/19/derek-chauvin-trial-live-george-floyd-jury-closing-arguments/7123640002/ [https://perma.cc/26K5-RY77].

300 *Id.* (statement of lead defense attorney, Eric Nelson).

301 Amy Forliti, Stephen Groves & Tammy Webber, *Key Moments in Closing Arguments of Chauvin Trial*, SF GATE (Apr. 27, 2021, 12:50 AM), https://www.sfgate.com/news/article/Key-moments-in-closing-arguments-of-Chauvin-trial-16125867.php [https://perma.cc/LKY9-MG9C].

302 Alexandra Hutzler, *Derek Chauvin Found Guilty on All Three Counts in Death of George Floyd*, NEWSWEEK (Apr. 20, 2021, 5:09 PM), https://www.newsweek.com/derek-chauvin-found-guilty-all-three-counts-death-george-floyd-1584007 [https://perma.cc/73NV-2MBP].

shot McDonald, perceive his life to be in danger.[303] Even though McDonald, who was holding a large knife at his side, was not advancing toward Officer Van Dyke nor being aggressive towards anyone else at the moment he was shot, Officer Van Dyke's attorneys presented evidence that prior to being shot, McDonald had used the knife he was holding to slash the tire on a patrol car and damage its windshield to support Officer Van Dyke's claim that he believed McDonald posed a threat to human life.[304] Attorneys for Officer Van Dyke were also allowed to present evidence of McDonald's history of violent outbursts and drug use even though Officer Van Dyke had never met McDonald prior to the night he shot him and did not know about the teen's past.[305]

In the Walter Scott case, in which law enforcement officer Michael Slager was charged with murder after he was caught on video chasing an unarmed Black man, Walter Scott, and shooting him in the back five times after stopping Scott for a broken tail light,[306] attorneys for Officer Slager were permitted to present evidence to the jury re-

303 Michael Lansu & Mark LeBien, *Chicago Police Officer Found Guilty of 2nd-Degree Murder of Laquan McDonald*, NPR (Oct. 5, 2018, 3:01 PM), https://www.npr.org/2018/10/05/654465522/chicago-police-officer-found-guilty-of-second-degree-murder-of-laquan-mcdonald [https://perma.cc/8GZR-J3CD].

304 *See* Megan Crepeau & Stacy St. Clair, *5 Takeaways from the First Day of the Jason Van Dyke Trial*, CHI. TRIB. (Sept. 17, 2018, 5:45 PM), https://www.chicagotribune.com/news/laquan-mcdonald/ct-met-laquan-mcdonald-jason-van-dyke-trial-20180917-story.html [https://perma.cc/LY6F-TCUS] (describing how Officer Van Dyke's defense team argued that McDonald raised the threat level when he slashed the tire on a patrol car and scraped its windshield); *see also* Kori Rumore & Chad Yoder, *Minute by Minute: How Jason Van Dyke Shot Laquan McDonald*, CHI. TRIB. (Jan. 18, 2019, 7:32 PM), https://www.chicagotribune.com/news/laquan-mcdonald/ct-jason-vandyke-laquan-mcdonald-timeline-htmlstory.html [https://perma.cc/8UQ4-QMDX] (noting that Laquan McDonald slashed the tire on a patrol car between 9:53 and 9:56 PM and was first shot at 9:57 PM). There is, however, a big difference between damaging property and threatening human life, which is why the rules for self-defense and defense of others are different from the rules for defense of property. Even though one has a right to use deadly force in self-defense subject to conditions, one generally does not have a right to use deadly force to protect one's personal property. DRESSLER, *supra* note 263, § 20.02[B][3], at 248 ("Deadly force is not permitted in defense of property, even if it is the only means available to prevent the loss.").

305 Lansu & LeBien, *supra* note 303 (noting that Officer Van Dyke's lawyers called current and former Cook County Juvenile Detention Center employees who testified that McDonald "got into fights, needed to be restrained, and admitted to taking PCP" even though prosecutors unsuccessfully argued that McDonald's past was irrelevant because Van Dyke had never met McDonald prior to the night he shot and killed the African American teenager).

306 Matthew Vann & Erik Ortiz, *Walter Scott Shooting: Michael Slager, Ex-Officer, Sentenced to 20 Years in Prison*, NBC NEWS (Dec. 9, 2017, 11:25 AM), https://www.nbcnews.com/storyline/walter-scott-shooting/walter-scott-shooting-michael-slager-ex-officer-sentenced-20-years-n825006 [https://perma.cc/F8NG-3PWS] (noting that according to the coroner, "[Officer] Slager fired eight shots at Scott as he ran away, striking him five times, including three in the back").

garding Walter Scott's failure to pay child support and drug use even though Officer Slager had no knowledge of any of this history at the time he shot Scott.[307] Despite the video clearly showing Officer Slager shooting Scott in the back as Scott was running away and then appearing to plant his taser next to Scott after Scott was lying lifeless on the ground,[308] the jury could not reach a unanimous verdict, leading the judge to declare a mistrial.[309] The ability of Officer Slager's attorneys to paint Walter Scott as a deadbeat dad and a drug user,[310] while emphasizing the dangerous work that police officers do, particularly in low-income, high-crime neighborhoods like the one in which the shooting occurred, helped convince at least three jurors and one alternate juror in the state criminal case that Officer Slager was not guilty of any crime at all.[311]

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307 *See* Alan Blinder, *Walter Scott's Character Scrutinized in Trial of Officer Who Killed Him*, N.Y. TIMES (Nov. 3, 2016), https://www.nytimes.com/2016/11/04/us/walter-scott-michael-slager-trial.html [https://perma.cc/UST4-4MMZ] (noting comments about Walter Scott's history of child support debts and drug use during opening statements in the murder trial of the officer who killed him); Brenda Rindge, Andrew Knapp, Brooks Brunson & Erin Gillespie, *WATCH: Judge Declares a Mistrial in Murder Trial for Former Officer Michael Slager*, POST & COURIER (Dec. 2, 2016), https://www.postandcourier.com/news/watch-judge-declares-a-mistrial-in-murder-trial-for-former-officer-michael-slager/article_48ba1684-a10b-11e6-a639-a3b9a114da5f.html [https://perma.cc/FRL8-XSAP] (noting testimony from defense witnesses about Scott's history of child support debts and drug use).

308 *See* Keith O'Shea & Darran Simon, *Closing Arguments End in Slager Trial, No Verdict Reached*, CNN (Dec. 2, 2016, 9:09 AM), http://www.cnn.com/2016/11/30/us/michael-slager-murder-trial-walter-scott [https://perma.cc/WXV4-MEW5].

309 Darran Simon, Keith O'Shea & Emanuella Grinberg, *Judge Declares Mistrial in Michael Slager Trial*, CNN (Dec. 6, 2016, 9:31 AM), http://www.cnn.com/2016/12/05/us/michael-slager-murder-trial-walter-scott-mistrial [https://perma.cc/6KRP-AYQ9].

310 *See* Blinder, *supra* note 307.

311 Guest Lecture by Attorney Jared Fishman in the author's Criminal Procedure class at The George Washington University Law School on February 20, 2020, and email correspondence between the author and Mr. Fishman dated November 23, 2020. Fishman was the federal prosecutor who worked on the Walter Scott case on the federal side. Several jurors from the South Carolina prosecution felt so strongly that Officer Slager was innocent that they wrote letters to the judge overseeing the federal civil rights case against Slager prior to Slager's sentencing, urging leniency for Slager. *See* Andrew Knapp, *Michael Slager's Sentencing to Mark End of Still-Contested Courtroom Battle in Walter Scott Killing*, POST & COURIER (Sept. 14, 2020), https://www.postandcourier.com/news/michael-slagers-sentencing-to-mark-end-of-still-contested-courtroom-battle-in-walter-scott-killing/article_843d4232-d385-11e7-9df4-0fdb6c8c45bb.html [https://perma.cc/45RB-SA72]. In the end, Officer Slager pled guilty to a federal civil rights charge of using excessive force. *See* Holly Yan, Khushbu Shah & Emanuella Grinberg, *Ex-officer Michael Slager Pleads Guilty in Shooting Death of Walter Scott*, CNN (May 2, 2017, 9:07 PM), http://www.cnn.com/2017/05/02/us/michael-slager-federal-plea/index.html [https://perma.cc/B5WU-QLL2]. As a result of his guilty plea, Slager was sentenced to twenty years in prison. *See* Mark Berman, *Former S.C. Police Officer Who Shot Unarmed Man is Sentenced to 20 Years*, WASH. POST, Dec. 8, 2017, at A2.

Rachel Harmon suggests a related reason to allow the jury to consider the officer's pre-seizure conduct.[312] In her important article arguing that police use of force law should include necessity, imminence, and proportionality requirements just as ordinary self-defense law does, Harmon notes that the Supreme Court in *Graham v. Connor* called for consideration of the nature of the suspect's crime even though it is the officer who is the one on trial in a § 1983 case.[313]

Cara McClellan raises a similar critique,[314] noting that the Supreme Court in *Graham v. Connor* "explicitly identifie[d] the severity of the crime as one of the factors that courts must consider."[315] McClellan ties her critique more closely to the problem of narrow time framing in the use of force context, noting that considering the severity of the crime committed by the individual means courts must "contextualize an interaction beyond the temporal period when the seizure happened."[316] McClellan compares the severity of the crime, which involves consideration of conduct that the victim-suspect was suspected of committing prior to the officer's use of force on that individual, to pre-seizure conduct of the officer, which is also a "non-contemporaneous factor that can provide context for interpreting the reasonableness of the seizure itself."[317]

Seth Stoughton highlights the double-standard that courts are applying in this situation: "With regard to the officer, the courts look only at the use of force itself or, perhaps, a few seconds prior to the use of force. With regard to the subject, however, the courts are willing to adopt a much more expansive perspective."[318] Like Harmon and McClellan, Stoughton observes that courts broaden the time frame when it comes to the victim-suspect's behavior while narrowing the time frame when dealing with the officer's conduct.[319] Stoughton notes that "[i]n application, . . . 'final frame' perspective becomes one-sided, determining the reasonableness of a use of force by looking to

312 *See generally* Harmon, *supra* note 57.

313 *See id.* at 1164.

314 McClellan, *supra* note 6, at 19–23 (arguing that courts should apply proximate causation analysis to decide § 1983 excessive force claims).

315 *Id.* at 17.

316 *See id.*

317 *Id.*

318 Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, *supra* note 6, at 558.

319 *Id.* ("*Graham* . . . direct[s] courts to consider the severity of the crime even when the subject is suspected of having committed it minutes, hours, days, or weeks earlier.").

the subject's precipitating behaviors but ignoring the officer's [precipitating conduct]."[320]

The severity of the crime that the victim is suspected of having committed or trying to commit is a factor that the Supreme Court has indicated is relevant to the reasonableness of the officer's use of force.[321] The crime that the victim was committing or trying to commit involves conduct of the victim prior to the moment of the officer's use of force.[322] If the trier of fact can consider antecedent conduct of the victim when assessing the reasonableness of the officer's use of force, the trier of fact should be allowed to consider antecedent conduct of the officer as well.

3. *Jury Is Allowed to Consider De-escalation Conduct of the Officer that Decreased the Risk of a Deadly Confrontation*

A third reason to broaden the time frame is that the jury in an officer-involved shooting case is allowed to consider de-escalation tactics used by a law enforcement officer—antecedent conduct that *decreases* the risk of a confrontation turning deadly—when assessing the reasonableness of the officer's use of force. If the officer took cover, called for backup, or tried to talk with or calm the individual, the jury may consider this conduct in assessing the reasonableness of the officer's use of force.[323] If the jury can consider antecedent actions of the police that *decreased* the risk of a deadly confrontation, it should be able to consider antecedent actions of the police that *increased* the risk of a deadly confrontation.

For example, in a September 2016 case involving the shooting of an unarmed Black man in Tulsa, Oklahoma by a White female police officer,[324] Officer Betty Shelby—charged with first-degree manslaughter in the death of Terence Crutcher—was permitted to testify at trial about her efforts to de-escalate the situation before she shot Crutcher.[325] Shelby told the jury that she talked with Crutcher for

320 *Id.* at 559.

321 Graham v. Connor, 490 U.S. 386, 490 (1989) (describing factors relevant to the reasonableness of an officer's use of force).

322 McClellan, *supra* note 6, at 17.

323 *Id.*

324 Wall Street Journal, *Police Release Footage of Deadly Tulsa Shooting*, YouTube (Sept. 20, 2016), https://youtu.be/LJd4ThiQjEg [https://perma.cc/9U7U-5TZ4] (showing video footage released by the Tulsa Police Department of the officer-involved shooting of Terence Crutcher).

325 *See* KTUL, *Betty Shelby Takes Stand in Own Defense, Alternate Juror Joins Panel*, ABC News Channel 8 Tulsa (May 15, 2017), https://ktul.com/news/local/testimony-continues-as-shelby-manslaughter-trial-enters-2nd-week [https://perma.cc/BZ3Z-W4KR].

three minutes and twenty-four seconds and asked him to get down on his knees before she shot him.[326] Shelby said she fired out of fear when she killed Crutcher, even though he had his hands above his head and was walking away from her when he was shot.[327] Shelby was acquitted.[328] No weapon was found either on Crutcher or in his car immediately after the shooting.[329]

In *Hernandez v. City of Pomona*,[330] family members of a man shot and killed by police officers while fleeing brought a wrongful death action against the officers and the city.[331] The issue on appeal had nothing to do with whether antecedent conduct of the officer that increased the risk of a deadly confrontation could be considered by the jury.[332] What is significant about this case, however, is that the officers were all in favor of having the jury consider their pre-shooting conduct, which included the fact that prior to the fatal shooting, one officer had refrained from shooting the suspect even after another officer had incorrectly shouted that the suspect had a gun and that the officers had tried to stop the decedent with a police dog prior to shooting him.[333]

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326 *Id.*

327 Faith Karimi, Eric Levenson & Justin Gamble, *Tulsa Officer Acquitted in Fatal Shooting of Terence Crutcher*, CNN (May 18, 2017, 3:39 AM), https://www.cnn.com/2017/05/17/us/tulsa-police-shooting-trial/index.html [https://perma.cc/E3KL-KTRS]. Shelby said she shot Crutcher because she thought he was reaching into his vehicle to get a weapon. *Betty Shelby, Police Officer Cleared in Terence Crutcher Killing, Resigns*, CBS NEWS (July 14, 2017, 3:05 PM), https://www.cbsnews.com/news/betty-shelby-police-officer-cleared-terence-crutcher-killing-resigns/ [https://perma.cc/4JEN-MSC6].

328 Karimi et al., *supra* note 327 (noting that after nine hours of deliberation, the jury acquitted Officer Betty Shelby in the shooting death of Terence Crutcher).

329 *Man Fatally Shot by Tulsa Police Had No Gun, Chief Says*, ABC13 HOUS. (Sept. 19, 2016), https://abc13.com/unarmed-black-man-shot-by-police-terence-crutcher-shooting-tulsa-pd/1518062/ [https://perma.cc/3F84-UMSL] (reporting that "Tulsa Police Chief Chuck Jordan announced Monday before the department released the shooting footage that 40-year-old Terence Crutcher had no weapon on him or in his SUV" and presenting police released video footage of the shooting).

330 207 P.3d 506 (Cal. 2009).

331 *See id.* at 510–11.

332 The issue on appeal was whether a federal judgment in favor of law enforcement officers in a civil rights claim brought under 42 U.S.C. § 1983 had preclusive effect in a subsequent state wrongful death action based on the same underlying facts. *See id.* at 510. The California Supreme Court held that the prior federal judgment collaterally estopped the plaintiffs from pursuing their wrongful death claim. *Id.*

333 *Id.* at 511, 518. Although disagreeing with the officers' claim that the federal court and jury made a finding as to the reasonableness of the officers' pre-shooting conduct, the California Supreme Court acknowledged that because the jury was instructed to consider the totality of the circumstances, the jury "necessarily considered *the evidence* regarding the officers' pre-shooting conduct." *Id.* at 518.

4. *Police Conduct That Increases the Risk of a Deadly Confrontation is Simply Part of the Totality of the Circumstances*

An additional reason to broaden the time frame and allow the jury to consider conduct of the officer that increased the risk of the encounter turning deadly is that such conduct is simply part of the totality of the circumstances that the jury is supposed to consider in cases where an officer is on trial for his use of deadly force. Moreover, in other contexts in which a totality of the circumstances approach is used, the standard is applied very broadly. For example, in cases involving informants, courts assessing whether a police officer had probable cause to search or seize apply a broad totality of the circumstances approach rather than the more narrowly circumscribed two-prong test developed in *Aguilar v. Texas*[334] and *Spinelli v. United States*[335] that it previously applied.[336] When assessing whether an interrogation violated a defendant's due process rights, courts apply a broad totality of the circumstances approach under which almost any fact is relevant to the question of whether the defendant's confession was voluntary or coerced.[337]

C. *Which Pre-Seizure Conduct Should the Trier of Fact Be Allowed to Consider?*

In addition to the temporal question of how narrowly or broadly to frame the inquiry into the reasonableness of an officer's use of force, Judge Jack Zouhary suggests courts should also attend to the qualitative issue of what types of antecedent conduct should be considered relevant to the excessive force analysis.[338] There are a few

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334 378 U.S. 108 (1964).

335 393 U.S. 410 (1969).

336 Illinois v. Gates, 462 U.S. 213, 230–31 (1983) ("[The] totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip." (footnote omitted)). Under the previous *Aguilar-Spinelli* test, a court had to find both a basis of knowledge underlying the informant's tip and veracity of the informant or reliability of the information provided by the informant before it could conclude that a search or seizure was supported by probable cause. *Id.* at 228–29.

337 *See* 1 JOSHUA DRESSLER, ALAN C. MICHAELS & RIC SIMMONS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATIONS § 22.02[B][1], at 395 (7th ed. 2017) [hereinafter DRESSLER ET AL., UNDERSTANDING CRIMINAL PROCEDURE] ("The voluntariness of a confession is now assessed . . . from "the totality of all the surrounding circumstances . . . ."). Dressler notes that one problem with the totality of the circumstances standard as applied in the interrogation context is that "the police receive less guidance than if they were required to follow a bright-line rule" *Id.*

338 Zouhary, *supra* note 6, at 20.

ways one could limit the types of antecedent conduct considered by the jury.

Some commentators have suggested that courts should impose a causation requirement when broadening the time frame, requiring that the antecedent conduct of the officer be closely connected to the later decision to use force.[339] I agree that there should be a causal connection between the antecedent police conduct and the later use of force. In suggesting a broadening of the time frame, I am not suggesting that the jury consider things that happened well before the encounter between the officer and the victim even started. I would not, however, urge courts to add a proximate causation requirement to the justifiable force inquiry. The rules regarding proximate causation in the criminal law are complex and confusing.[340] Indeed, my law students find proximate causation to be one of the most challenging subjects when they study Criminal Law. If proximate causation is confusing to law students,[341] it is likely to be even more confusing to jurors with no background in the law.[342] It is beyond the scope of this Article to determine what type of causal standard, if any, ought to be imposed in officer-created jeopardy cases, but I flag this as an issue that courts allowing antecedent conduct will need to address.

Others might suggest that courts should impose a mens rea requirement. For example, one might argue that the officer's antecedent conduct must have been intentional or reckless before it can be con-

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339 *See, e.g.*, *id.* at 21 (arguing that courts should apply proximate causation analysis in § 1983 cases where the officer's pre-seizure conduct created the need to use force); James, *supra* note 6 (arguing that courts in § 1983 cases should utilize tort law concepts of proximate causation to decide whether the officer's pre-seizure conduct caused the police use of force and the victim's injuries); Kimber, *supra* note 6, at 677 (proposing a closer fit between the pre-seizure conduct and the use of force akin to proximate causation in torts); Balisacan, *supra* note 6, at 327, 353–54 (arguing that litigants should use the proximate cause approach, asserting that an officer's previous acts proximately caused the resulting injury as opposed to "arguing that those acts affect the reasonableness of [the officer's] eventual use of force"); McClellan, *supra* note 6 (arguing that traditional principles of causation in tort law can be applied to the *Graham v. Connor* reasonableness analysis in excessive force cases).

340 *See* James, *supra* note 6, at 612.

341 *See* Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 50 (1991) ("[T]he consensus of law students and others is that proximate cause remains a hopeless riddle.").

342 To establish murder or manslaughter, for example, the prosecutor must prove beyond a reasonable doubt that the officer's voluntary acts proximately caused the social harm of death in its case-in-chief. *See* Garrison, *supra* note 6, at 257. It would be confusing for the jury to have to do a second proximate cause analysis on the officer's defense of justifiable force, this time asking whether the officer's antecedent conduct proximately caused the officer's later use of deadly force.

sidered by the trier of fact, a requirement found in the Tenth Circuit.[343]

I would not recommend following the Tenth Circuit's requirement that the officer's prior decision or act must have been intentional or reckless for several reasons. First, intent and recklessness in the criminal law are subjective states of mind. Not only would requiring intent or recklessness add another layer of complexity to the question of whether the officer's use of force was justified, but a subjective standard would also be inconsistent with the objective reasonableness standard that currently governs in most use of force statutes.[344] Second, negligent conduct, by definition, is unreasonable conduct.[345] If an officer does something unreasonable at time one that increases the risk that the officer will need to use deadly force at time two, this is relevant to whether the officer's use of force was reasonable.[346] Adding a requirement that the officer's antecedent conduct must have been intentional or reckless unnecessarily limits what the jury can consider.

It is best to keep things straightforward and simply say that if an officer's antecedent conduct created or increased the risk of the encounter turning deadly, the jury may consider that conduct as part of the totality of the circumstances. If the facts support such an argument, the defendant-officer can argue that his conduct was merely negligent and therefore should not lead to a finding of liability. Conversely, if the facts support such an argument, the prosecutor can argue that the officer's antecedent conduct was intentional or reckless, making liability more appropriate.

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343 *See* Medina v. Cram, 252 F.3d 1124, 1132 (10th Cir. 2001); Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995).

344 Except in a very few jurisdictions, an objective reasonableness standard governs whether an officer's use of force will be considered justifiable. *See supra* note 61 (listing the three states that require the officer's belief to be honest, not reasonable). This was a concern raised by the Supreme Court when it struck down the Ninth Circuit's provocation rule as inconsistent with the Fourth Amendment. County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1548 (2017) ("[W]hile the reasonableness of a search or seizure is almost always based on objective factors, the provocation rule looks to the subjective intent of the officers who carried out the seizure." (citation omitted)).

345 "A person's conduct is 'negligent' if it constitutes a deviation from the standard of care that a reasonable person would have observed in the actor's situation." DRESSLER, *supra* note 263, § 10.04[D][2][a], at 126.

346 *See generally* Paul H. Robinson, *Causing the Conditions of One's Own Defense*: *A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985) (arguing that we should focus on the actor's culpability as to committing an offense at the time he caused the conditions of his defense, time one, rather than solely focusing on just the actor's conduct and culpability at the time of the offense, time two).

Remember that in weighing all the facts and circumstances, the jury can either accept or reject the officer's claim of justifiable force. The mere fact that an officer's antecedent conduct created or increased the risk of a deadly confrontation does not mean the jury must find the officer guilty of the charged offense,[347] just as lack of such conduct does not mean the jury must find the officer not guilty.

D. Possible Objections

This section explains and responds to just a few of the possible objections to allowing the consideration of officer conduct that increased the risk of a deadly confrontation, i.e., officer-created jeopardy conduct. First, one might object to allowing the jury to consider such conduct on the ground that this will unfairly tilt the scales against the officer. Second, one might object on the ground that such conduct is irrelevant. Third, one might object on the ground that allowing the jury to consider such conduct will cause police officers to hesitate and cost police officer lives. Finally, one might object on the ground that in the Fourth Amendment context, the Supreme Court has time and again stated that even if the police created the conditions allowing a particular exception to the warrant requirement to apply, as long as the police officer's conduct was lawful or not violative of the Fourth Amendment, the exception will apply.

1. Objection One: Consideration of Officer-Created Jeopardy Will Unfairly Tilt the Scales Against the Officer

Law enforcement officers might object to allowing or requiring the jury to consider police conduct that increased the risk of a deadly confrontation on the ground that this will unfairly tilt the scales against the charged officer. Officers may worry that once the jury considers police conduct that increased the risk of a deadly confrontation, it will necessarily find against the officer on trial.

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347 *See* Stein et al., *supra* note 4 ("'It doesn't necessarily mean all police officers are going to be found guilty because the jury is looking at this wider frame,' said Cynthia Lee, a law professor at George Washington University. 'My hope is that by having jurors consider these sorts of things, that it will encourage police on the ground to change behavior in a way that will make everybody safer.'"). For example, in the George Zimmerman case, the jury heard evidence about Zimmerman's antecedent conduct that increased the risk of a deadly confrontation, and yet found Zimmerman not guilty of murder. *See generally supra* notes 288–95. Juries in cases involving police officer defendants might hear similar evidence and not be persuaded that the officer's ultimate use of deadly force was unreasonable. For example, in analyzing the 2020 police shooting of Deon Kay in Washington, D.C., the Office of the D.C. Auditor found the shooting justified even though the officers engaged in pre-shooting conduct that increased the risk that they would need to use deadly force. *See supra* text accompanying notes 113–37.

This, however, is not necessarily what will happen. Allowing, or even requiring, the jury to consider antecedent conduct of the officer that increased the risk of a deadly confrontation is not the same as a directive telling the jury that they must find the officer guilty if the officer did something that increased the risk of a deadly confrontation. Depending on the facts and circumstances of the case, a jury considering conduct of the officer that increased the risk of a deadly confrontation may find that the officer's use of force was reasonable and therefore justified or it may find that the officer's use of force was unreasonable and not justified.[348]

Indeed, the same forces that encourage jurors today to find in favor of law enforcement officers who are charged with a crime of violence are likely to continue to operate even in jurisdictions that allow or require the jury to consider antecedent police conduct that increased the risk of a deadly confrontation. Jurors know that police officers work under uncertain, rapidly evolving, and potentially dangerous conditions and that officers put their lives on the line to protect the community's safety.[349] Many jurors are and will continue to be reluctant to send an officer to prison for using deadly force on the job especially if the victim was in fact armed. Even in cases in which it turned out the victim was unarmed, the jury may give the officer the benefit of the doubt and acquit the officer if the officer testifies that he honestly but mistakenly believed the victim had a weapon and provides reasons that support his belief, such as the victim's refusal to show his hands or the victim moving his hands towards his waistband, a place where individuals often keep their guns. Allowing the jury to consider antecedent conduct of the officer simply helps to balance the scales so that the scales are not tilted overwhelmingly in favor of the officer from the start.

For an example of this, consider the Breonna Taylor case, which illustrates how antecedent conduct by police may increase the risk of a deadly confrontation, yet not necessarily result in a finding of unjusti-

348 *See, e.g.*, Grazier *ex rel.* White v. City of Philadelphia, No. 98-CV-6063, 2001 WL 1168093, at *12 (E.D. Pa. July 26, 2001) (rejecting plaintiffs' motion for a new trial after jury found police officers not liable despite hearing evidence "that [Officer] Hood failed to identify himself, had his gun drawn as he walked towards [the] car, began to fire before the car even started to accelerate, and stood in one spot as he fired, with no apparent concern for his safety"); Noel v. Artson, 641 F.3d 580, 584–86 (4th Cir. 2011) (affirming denial of plaintiffs' motion for a new trial following jury verdict in favor of defendant police officers despite evidence that officers failed to knock and announce prior to entering residence and then fatally shot a woman with a gun within).

349 *See* Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 13, at 638.

fiable force.[350] Breonna Taylor was a 26-year-old Black woman who worked as an emergency medical technician ("EMT") and shared an apartment in Louisville, Kentucky with her sister.[351] Taylor, who had no prior criminal history, was killed by police during the execution of a search warrant on her home.[352] The police were investigating suspected drug trafficking activity involving firearms.[353] One of the targets of their investigation was a man named Jamarcus Glover.[354] Glover, a former boyfriend of Taylor's, had been seen by police entering and leaving Taylor's apartment, and police believed he was using Taylor's home to stash drugs or drug money.[355]

After midnight on March 13, 2020, Taylor and her boyfriend, Kenneth Walker, were awoken by loud banging on the front door of Taylor's apartment.[356] They called out, asking who was there, but did not hear a response.[357] Thinking they were about to be robbed, Walker, a licensed gun owner, grabbed his gun.[358] When two plain-

350 The facts of the Taylor case are highly contested. In highly contested cases, reasonable individuals may consider the same facts and come to different conclusions. *See, e.g.*, Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (discussing results of a study in which approximately 1,350 Americans viewed the same dashcam video of the high-speed police chase in the *Scott v. Harris* case, yet disagreed about whether the police officer who rammed his patrol car into the back of Harris's vehicle, rendering him a quadriplegic, used reasonable versus excessive force). Moreover, much of the evidence that is known to the government and the attorneys for Taylor's family is not publicly available, so the analysis offered here may not be complete.

351 Darcy Costello & Tessa Duvall, *'Get Your Damn Story Straight': What We Know About Louisville Woman Breonna Taylor's Death*, LOUISVILLE COURIER J. (Oct. 12, 2020, 9:51 AM), https://www.usatoday.com/story/news/nation/2020/05/14/breonna-taylor-what-know-louisville-emt-killed-police/5189743002/ [https://perma.cc/38BA-F6HN] [hereinafter Costello & Duvall, *'Get Your Damn Story Straight'*] (discussing the March 13, 2020, shooting death of Breonna Taylor, a 26-year-old emergency room technician); Costello & Duvall, *Minute by Minute*, *supra* note 3 (discussing the March 13, 2020, shooting death of Breonna Taylor and noting that "Taylor's sister, Juniyah Palmer, typically stayed in the second bedroom").

352 Costello & Duvall, *Minute by Minute*, *supra* note 3; Rukmini Callimachi, *Breonna Taylor's Life Was Changing. Then the Police Came to Her Door.*, N.Y. TIMES (Aug. 30, 2020), https://www.nytimes.com/2020/08/30/us/breonna-taylor-police-killing.html [https://perma.cc/22PC-CEAT] (noting that Taylor had "had no criminal record and was never the target of an inquiry" and that the police only considered her of any interest because of her association with her ex-boyfriend, Jamarcus Glover).

353 Search Warrant for 3003 Springfield Drive, *supra* note 3; Jaynes Aff. for Search Warrant, *supra* note 3.

354 *Id.*

355 *Id.*

356 Costello & Duvall, *Minute by Minute*, *supra* note 3.

357 *See id.*

358 Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to*

clothes officers burst through the door,[359] Walker fired one shot, which hit one of the officers in the leg.[360] The officers returned fire.[361] In the hail of bullets, Taylor was shot and killed.[362] No drugs were found in Taylor's apartment.[363]

If we focus solely on the moment when the officers began shooting, the officers' use of deadly force appears eminently reasonable. They had just entered an apartment, which they believed contained evidence of narcotics trafficking and possible firearms,[364] with a search

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Know About Breonna Taylor's Death, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/Q3J5-VK5G].

359 Amina Elahi, *No Arrests or Charges So Far in Breonna Taylor's Shooting Death*, NPR (July 13, 2020, 5:08 AM), https://www.npr.org/2020/07/13/890328388/no-arrests-or-charges-so-far-in-breonna-taylors-shooting-death/ [https://perma.cc/5SDZ-UD93] (noting that the officers were in plain clothes).

360 Costello & Duvall, *Minute by Minute*, *supra* note 3 ("When police entered, Walker fired one shot—which he described as a 'warning,' because he thought intruders were breaking in—and struck Mattingly in the leg."). Initially, Walker claimed that Taylor shot the officer. *Say Her Name: Breonna Taylor*, ABC 20/20 (Nov. 21, 2020), https://abc.com/shows/2020/episode-guide/2020-11/20-say-her-name-breonna-taylor [https://perma.cc/3LBP-DKU4] (showing Walker telling police in the parking lot of Taylor's apartment that Taylor shot the gun). Walker was arrested and charged with attempted murder. Costello & Duvall, *Minute by Minute*, *supra* note 3. Those charges were later dropped. *Id.*

361 *See Say Her Name: Breonna Taylor*, *supra* note 360.

362 *Id.*

363 Costello & Duvall, *Minute by Minute*, *supra* note 3 ("No drugs were recovered from Taylor's home."). While it appears that the police were wrong about Taylor's apartment being used as a stash house because they did not find any drugs in Taylor's apartment, the law requires assessment of the facts and circumstances known to the police at the time they applied for the search warrant when determining whether probable cause to support the warrant existed. *See, e.g.*, Maryland v. Garrison, 480 U.S. 79, 85 (1987) ("Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued. Just as the discovery of contraband cannot validate a warrant invalid when issued, so is it equally clear that the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant."). The law does not allow the police to use the fact that they were correct in their belief that a residence contained firearms and drugs to retroactively justify a search warrant that was lacking in probable cause at the time the warrant was issued. California v. Acevedo, 500 U.S. 565, 599 (1991) (Stevens, J., dissenting) ("Neither evidence uncovered in the course of a search nor the scope of the search conducted can be used to provide *post hoc* justification for a search unsupported by probable cause at its inception."). Similarly, the law does not allow the application of hindsight bias to fault the police if they have probable cause to believe a residence contains evidence of criminal activity at the time they apply for a search warrant but the search turns up no evidence of a crime. *See Garrison*, 480 U.S. at 85 ("[W]e must judge the constitutionality of [police] conduct in light of the information available to them at the time they acted.").

364 The search warrant indicated that the targets of the investigation were suspected of owning firearms. Search Warrant for 3003 Springfield Drive, *supra* note 3. Many policymakers believe drug trafficking and firearms go hand in hand, which is why law enforcement officers believe the execution of search warrants on residences suspected of drug trafficking to be particularly dangerous. *See* Press Release, Ronald A. Parsons Jr., United States Attorney, Department

warrant,[365] meaning a judge agreed there was probable cause to believe there was evidence of criminal activity within,[366] and an occupant of the apartment had just fired a gun at them, hitting one of the officers. As a general matter, police officers are allowed to use deadly force when they reasonably believe such force is necessary to protect themselves or others from death or serious bodily injury.[367] Because one of the officers had just been shot in the femoral artery,[368] a jury could conclude that it was reasonable for the officers to believe they needed to use deadly force to protect themselves against death or further serious bodily injury.

If, however, we broaden the time frame and consider whether any conduct of the police prior to the moment when the police returned fire increased the risk of a deadly confrontation, the reasonableness of the officers' use of deadly force is not so clear. A lawsuit filed by Breonna Taylor's family asserts that the officers violated the constitutional requirement that police knock and identify themselves prior to entering a residence.[369] The officers, however, claim they

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of Justice, Eagle Butte Man Indicted on Drug Trafficking and Firearm Charges (Sept. 14, 2020), https://www.atf.gov/news/pr/eagle-butte-man-indicted-drug-trafficking-and-firearm-charges [https://perma.cc/9SSF-DC2Y] ("It is common to find drug traffickers armed with guns in order to protect their illegal drug product and cash, and enforce their illegal operations."); Meagan Docherty, Edward Mulvey, Jordan Beardslee, Gary Sweeten & Dustin Pardini, *Drug Dealing and Gun Carrying Go Hand in Hand: Examining How Juvenile Offenders' Gun Carrying Changes Before and After Drug Dealing Spells Across 84 Months*, 36 J. QUANTITATIVE CRIMINOLOGY 993, 994 (2019) ("Youth who deal drugs are more likely to carry guns, possibly to defend their turf from rivals, discourage theft of their supply, and/or resolve violent disputes likely to occur in open air drug markets.").

365 *See generally* Search Warrant for 3003 Springfield Drive, *supra* note 3.

366 The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. Accordingly, a valid warrant must be supported by probable cause. *See* 1 DRESSLER ET AL., UNDERSTANDING CRIMINAL PROCEDURE, *supra* note 337, § 10.03 (discussing search warrant requirements). A valid warrant must also be supported by Oath or affirmation. *Id.* § 10.03[B]. Additionally, a valid warrant must state with particularity the place to be searched and the persons or items to be seized. *Id.* § 10.03[C].

367 *See supra* text accompanying notes 60–62 (discussing state use of force statutes).

368 *See* Laurel Wamsley, *Louisville Police Officer Files Lawsuit Against Boyfriend of Breonna Taylor*, NPR (Oct. 30, 2020, 2:32 PM), https://www.npr.org/2020/10/30/929563647/louisville-police-officer-files-lawsuit-against-boyfriend-of-breonna-taylor [https://perma.cc/9VAJ-ZQ66] (noting that Sergeant Jonathan Mattingly was shot in the femoral artery in his upper thigh).

369 *See* Doha Madani, *FBI Investigating Death of Breonna Taylor, Killed by Police in Her Louisville Home*, NBC NEWS (May 21, 2020, 4:27 PM), https://www.nbcnews.com/news/us-news/fbi-investigating-death-breonna-taylor-killed-police-her-louisville-home-n1212381 [https://perma.cc/9C8U-2U2C].

banged on the door several times and shouted "police" before entering the apartment.[370]

The Supreme Court has held that, as part of the Fourth Amendment's reasonableness requirement, officers executing a search warrant must knock and identify themselves as police prior to entering a home.[371] There are several reasons for requiring officers to knock and announce prior to entry. Knocking and announcing helps protect the lives of both occupants and the police by giving the occupants notice that officers with lawful authority—not criminals—are at the door.[372] Knocking and announcing also serves to protect dignity and privacy interests by giving the occupants, who may be in a state of undress, the ability to compose themselves before answering the door.[373] In addition, knocking and announcing helps to protect against property damage by giving the occupants within the chance to answer the door before police break it down.[374]

If officers fail to knock and identify themselves prior to entering a residence, arguably the officer's conduct (or lack thereof) will increase the risk of a deadly confrontation because occupants within the residence might think, as Walker and Taylor thought, that the officers are potential robbers or burglars. Not knowing that those entering the residence are police, the occupants of the residence might try to stop the

370 *Id.* (reporting that a police spokesperson claimed the officers knocked on the door several times and "announced their presence as police" prior to entry).

371 *See* Wilson v. Arkansas, 514 U.S. 927 (1995) (holding that the Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity before forcibly entering). The Fourth Amendment's knock-and-announce rule, however, is not an absolute rule. The Court has also held that if there is reasonable suspicion that knocking and announcing would be futile or dangerous, then officers do not have to knock and announce. *See id.* at 936 (recognizing that the knock-and-announce requirement can give way "under circumstances presenting a threat of physical violence" or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given").

372 *See id.* at 931–32.

373 Hudson v. Michigan, 547 U.S. 586, 594 (2006) (recognizing that the knock and announce rule protects "privacy and dignity" interests that can be destroyed by sudden entrance without notice). In February 2019, for example, Chicago police broke down the door of an innocent Black woman's home with a battering ram and handcuffed the social worker while she was naked. Dom Calicchio, *Chicago Mayor 'Blindsided' by Report of Botched Police Raid, Handcuffed Naked Woman*, Fox News (Dec. 17, 2020), https://www.foxnews.com/politics/chicago-mayor-blindsided-by-report-of-botched-police-raid-handcuffed-naked-woman [https://perma.cc/LMK8-C8XT]. Anjanette Young had just come home from work and was changing when the officers broke into her home. *Id.* The officers got the wrong house; the person they were looking for lived next door. *Id.* Video of the botched raid, showing Young crying, "[y]ou've got the wrong house!" numerous times, was not released until December 2020. *Id.*

374 *Hudson*, 547 U.S. at 594.

intruders by using deadly force in self-defense. If occupants of a residence try to shoot police officers entering that residence, the entering officers are likely to respond with deadly force to protect themselves from getting shot and killed by the occupants.

In the Breonna Taylor case, the police requested a no-knock warrant through an affidavit supporting the issuance of a search warrant.[375] The judge incorporated that affidavit by reference, so it appears that she intended to issue a no-knock warrant,[376] which gave the executing officers the authority to enter Taylor's apartment without knocking and announcing.[377] The detective who prepared the affidavit was not among the officers executing the warrant.[378] At the last minute, the officers' supervisor told them to knock and announce be-

375 *See* Jaynes Aff. for Search Warrant, *supra* note 3. A no-knock warrant authorizes the police to enter a residence without knocking and announcing prior to entry. *See* Richards v. Wisconsin, 520 U.S. 385, 396 n.7 (1997) ("A number of States give magistrate judges the authority to issue 'no-knock' warrants if the officers demonstrate ahead of time a reasonable suspicion that entry without prior announcement will be appropriate in a particular context."); 2 LaFave, *supra* note 3, § 4.8(g) ("A small number of jurisdictions have adopted legislation permitting magistrates to issue search warrants specifically authorizing entry without prior announcement upon a sufficient showing to the magistrate of a need to do so, either to prevent destruction of evidence or to prevent harm to the executing officer."). A judicial officer may issue a no-knock warrant if the judicial officer finds reasonable suspicion that knocking and announcing would be dangerous or lead to the destruction of evidence. *See Richards*, 520 U.S. at 396 n.7; Wilson v. Arkansas, 514 U.S. 927, 936 (1995).

376 *See* Search Warrant for 3003 Springfield Drive, *supra* note 3; *see also* Costello & Duvall, *Minute by Minute*, *supra* note 3 (noting that Louisville Metropolitan Police Department Detective Joshua Jaynes wrote five affidavits seeking a judge's permission for no-knock searches for five different residences, one of which was for Breonna Taylor's apartment, related to a narcotics investigation and that Jefferson Circuit Judge Mary Shaw issued all five no-knock search warrants).

377 Some legal scholars have raised questions about whether the judge's statement in the warrant that she was incorporating by reference the affidavit was sufficient to make the warrant a no-knock warrant. Conversation with Jonathan Witmer-Rich, Assoc. Dean for Academic Enrichment and Baker & Hostetler Professor of Law, Cleveland-Marshall College of Law, at the 2020 Virtual ABA Crim. Just. Section Acad. Roundtable (Nov. 12, 2020); *see also* Jonathan Witmer-Rich & Michael J.Z. Mannheimer, *The Common Law's Search Rules Should Have Protected Breonna Taylor* 1–4 (Nov. 4, 2020) (unpublished manuscript) (on file with author). There appears to be a split in the federal courts over whether a search warrant that incorporates by reference an affidavit requesting no-knock authority gives the police the authority to enter a residence without knocking and identifying themselves prior to entry. For example, the Sixth Circuit has held that the mere fact that a magistrate judge incorporates by reference an affidavit that requests no-knock authority is insufficient to grant no-knock authority. *See* United States v. Smith, 386 F.3d 753, 761 (6th Cir. 2004). In contrast, the Seventh Circuit has held that a search warrant that incorporates by reference an affidavit that asks for no-knock authority is a no-knock warrant even if the magistrate judge does not explicitly grant no-knock authority on the face of the warrant. *See* United States v. Mattison, 153 F.3d 406, 410 (7th Cir. 1998).

378 Detective Joshua C. Jaynes prepared the affidavit in support of the search warrant. *See* Jaynes Aff. for Search Warrant, *supra* note 3. Sergeant Jonathan Mattingly, Detective Myles

cause Taylor was a "soft target."[379] This explains why the officers banged on the door to Taylor's residence even though it appears they had the authority not to do so.[380]

Hearing these facts, a jury could find that the officers' use of deadly force was justifiable, even if the jury also believed that the officers failed to identify themselves as police officers prior to entry, and thus increased the risk of a deadly confrontation.[381] It is difficult to hold officers liable for returning fire when being shot at given that they acted within their constitutional authority.

Complicating the analysis, however, is the fact that the validity of the search warrant has been called into question. The attorneys for the family have asserted that there was a false statement in the affidavit supporting the search warrant, and therefore the entire warrant should be invalidated.[382] If the judge were to find the remaining information in the affidavit insufficient to support such the finding of probable cause, then the entire warrant could be deemed invalid.[383] If the

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Cosgrove, and Detective Brett Hankison were the officers who executed the warrant. Costello & Duvall, *Minute by Minute*, *supra* note 3.

379 Radley Balko, Opinion, *Correcting the Misinformation About Breonna Taylor*, WASH. POST (Sept. 24, 2020, 4:50 PM), https://www.washingtonpost.com/opinions/2020/09/24/correcting-misinformation-about-breonna-taylor/ [https://perma.cc/3WLM-AU8T] ("The police claim[ed] they were told after the fact to disregard the no-knock portion and instead knock and announce themselves, because, by that point, someone had determined that Taylor was a 'soft target'—not a threat, and not a major player in the drug investigation.").

380 Walker and Taylor heard banging on the front door, prompting them to call out "Who's there?" but did not hear a response. Costello & Duvall, *Minute by Minute*, *supra* note 3.

381 In a state like Kentucky, where an estimated 54.6% of adults own a gun, it should have been foreseeable to the officers that breaking down the door to a home might lead a licensed gunowner to react the way Kenneth Walker reacted. *See* TERRY L. SCHELL, SAMUEL PETERSON, BRIAN G. VEGETABILE, ADAM SCHERLING, ROSANNA SMART & ANDREW R. MORRAL, RAND CORP., STATE-LEVEL ESTIMATES OF HOUSEHOLD FIREARM OWNERSHIP 21 fig.2 (2020).

382 *See* Darcy Costello, *Breonna Taylor Attorneys: LMPD Supplied 'False Information' on 'No-Knock' Warrant*, LOUISVILLE COURIER J. (May 16, 2020, 11:36 AM), https://www.courier-journal.com/story/news/local/2020/05/16/breonna-taylor-attorneys-say-police-supplied-false-information/5205334002/ [https://perma.cc/5ATZ-CPUM]. The Supreme Court has held that if there is a false statement in the affidavit supporting a search warrant and that statement was made either knowingly or with reckless disregard for the truth, that statement must be stricken from the affidavit. *See* Franks v. Delaware, 438 U.S. 154, 155–56 (1978) (holding that a hearing must be held when a defendant makes a substantial preliminary showing that a false statement necessary to the finding of probable cause was included in the warrant affidavit, either knowingly and intentionally or with reckless disregard for the truth). Given the allegation of a false statement in the warrant affidavit, a judicial officer would need to decide: (1) whether the statement was indeed false; (2) whether the officer who prepared the affidavit knowingly lied or included the statement with reckless disregard for the truth or falsity of the statement; and (3) whether the rest of the information in the affidavit is sufficient to support the initial finding of probable cause to believe contraband or evidence of a crime was in Taylor's apartment. *See id.*

383 *See Franks*, 438 U.S. at 156 (holding that if the allegation of perjury or reckless disre-

warrant in the Taylor case were to be invalidated, then the entry into Taylor's apartment would be treated as a warrantless entry. A jury might then find that police officers in plain clothes entering a home without a warrant in the middle of the night without identifying themselves as police unnecessarily and unlawfully increased the risk of a deadly confrontation and conclude that the officers' later use of deadly force was unreasonable.

2. *Objection Two: An Officer's Antecedent Conduct That Increased the Risk of a Deadly Confrontation Is Irrelevant to Whether the Officer's Use of Deadly Force Was Justified*

A second objection is that an officer's antecedent conduct—even if that conduct increased the risk of a deadly confrontation—is irrelevant and therefore should not be considered by the jury. There are two variations to this argument.

First, this irrelevancy objection is akin to the reasoning of the federal circuit courts of appeal that disallow consideration of pre-seizure conduct. Under this reasoning, the only thing that matters under the Fourth Amendment is whether the seizure itself was unreasonable, not whether the officer's pre-seizure actions were unreasonable.[384] Therefore, the only events and circumstances the jury should consider are those that were present at the moment of the seizure, not events and circumstances that preceded that time.[385]

While this argument is not persuasive even in the § 1983 context, given the Supreme Court's clear direction that the jury should consider the totality of the circumstances when assessing the reasonableness of an officer's use of force and the fact that an officer's pre-seizure conduct is simply a circumstance in the totality of the circumstances,[386] it is even less convincing in the context of a state criminal

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gard is established by the defendant by a preponderance of the evidence and the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided). It is unclear whether the entire warrant would be invalidated. The family's attorneys have alleged that the following sentence in the affidavit is false: "Affiant verified through a US Postal Inspector that Jamarcus Glover has been receiving packages at 3003 Springfield Drive #4." Costello, *supra* note 382; *see also* Andrew Wolfson, Darcy Costello & Tessa Duvall, *Judge Says She Is 'Concerned' Detective May Have Lied to Get Breonna Taylor Search Warrant*, LOUISVILLE COURIER J. (Oct. 1, 2020, 8:34 PM), https://www.courier-journal.com/story/news/local/breonna-taylor/2020/10/01/breonna-taylor-case-judge-concerned-lmpd-cop-lied-get-warrant/5883362002/ [https://perma.cc/5C9F-TCNT].

384 *See supra* text accompanying notes 147–57.

385 *See supra* text accompanying notes 147–57.

386 *See supra* text accompanying notes 164–77.

prosecution of a law enforcement officer where the focus is not on whether the individual has been reasonably "seized" within the meaning of the Fourth Amendment. The concept of "seizure" is only relevant if the Fourth Amendment is implicated. It is not relevant when the issue is whether an officer's claim of justifiable force should lead to his acquittal.

A second permutation of this irrelevancy argument is that antecedent conduct of the officer that increased the risk of a deadly confrontation would only be relevant in a state criminal prosecution if an officer is charged with a crime like reckless endangerment, involuntary manslaughter, or murder of the depraved heart variety, i.e., cases in which the state must prove a reckless or grossly reckless state of mind.[387] If, prior to using deadly force, the officer recklessly increased the risk of a deadly confrontation, the officer's reckless antecedent conduct would support the State's argument that the defendant acted recklessly and thus had the requisite mens rea for the charged offense. If, however, an officer is charged with a crime that requires intent as the mens rea, such as first-degree murder or second-degree murder under an intent to kill theory of malice aforethought, then it might be argued that the officer's prior reckless conduct is not relevant because it would not show that the officer had the requisite intent to kill.

This objection rests on the fact that most state use of force laws today focus on whether the officer's belief in the need to use deadly force was reasonable without separately requiring reasonable action on the part of the officer. If the only question the jury needs to answer is whether the officer reasonably believed it was necessary to use deadly force at the moment when he pulled the trigger, then arguably the only things that matter are the facts and circumstances known to the officer at the moment the officer decided to use deadly force.

My response to this objection is twofold. First, at least a few states today explicitly require in their use of force statute a finding of reasonable action or reasonable use of force by the officer.[388] In these states, an officer's prior conduct that created or increased the risk of a deadly confrontation is relevant to the overall reasonableness of the officer's ultimate use of force because the jury must assess the overall reasonableness of the officer's actions.

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387 I thank Jonathan Witmer-Rich for raising this objection at the ABA Criminal Justice Section's Virtual Academic Roundtable on November 12, 2020.

388 *See* text accompanying notes 12–15, 34 (discussing police use of deadly force legislation requiring both reasonable beliefs and reasonable action enacted in 2020 in the District of Columbia, Connecticut, and Virginia).

Second, even in states that use reasonable belief language in their use of force statutes and do not explicitly require reasonable action in addition to a reasonable belief, a reasonable act is implicitly required.[389] After all, the primary underlying question in cases where the officer has been charged with a crime of violence and claims justifiable force is whether the officer's use of force was reasonable or whether it was excessive. Whether or not the use of force statute explicitly requires the jury to find a reasonable act, the main question the jury must decide is whether the officer's use of force was reasonable or unreasonable. An officer's prior conduct that unnecessarily increased the risk of a deadly confrontation is thus relevant because it suggests the officer's later use of force may not be as reasonable as it might appear without such consideration.

3. Objection Three: Allowing Juries to Consider Antecedent Conduct of the Officer That Increased the Risk of a Deadly Confrontation May Cause Officers to Hesitate and Cost Officers Their Lives

A third objection to allowing juries to consider antecedent conduct of the officer that increased the risk of a deadly confrontation is that officers will hesitate and refrain from using deadly force in situations in which they should use such force, and this will cost them their lives.[390] This argument presents a legitimate concern but is ultimately unpersuasive for two reasons. First, when an officer feels his or her life is in danger, the instinct to self-preserve will likely overcome any worry about future prosecution. Second, law enforcement officers should try to act in ways that reduce the risk that encounters with civilians will turn deadly. One way to encourage officers to engage in tactical decisions that reduce the risk that the officer will need to use deadly force is by making sure the trier of fact can consider the conduct of the officer that increased the risk of a deadly confrontation.

As Brandon Garrett and Seth Stoughton note, good police officers are trained to reduce the risk that an encounter with a civilian

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389 *See* Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 13, at 683 ("By disaggregating beliefs from actions, and requiring jurors to find that the officer's beliefs and actions were both reasonable, my model legislation makes explicit the normative inquiry that is merely implicit in most current statutes.").

390 As Seth Stoughton notes, "In the use-of-force context, the instrumental concern is reflected in the prediction that aggressive review and criticism may lead officers to improperly hesitate or refrain from using force when the situation legitimately requires it, thus exposing themselves and others to unnecessary danger." Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, *supra* note 6, at 576.

will escalate and turn into a deadly confrontation.[391] Indeed "[t]he focus of sound tactical training is on giving officers time to make decisions from a position of safety and to de-escalate to avoid the need for force."[392] Creating time is an essential part of good police practice because "[e]ven the best-trained officers may have bad judgment when they are forced to make truly split-second decisions, in large part because they lack the time to consider alternative approaches."[393] Garrett and Stoughton point out that "a decision made early in an encounter, or even before an encounter begins, when there is no time pressure can avoid putting officers into a position where they have to make a time-pressured decision."[394] If an officer acts contrary to such tactical training, unnecessarily creating or increasing the risk that an encounter will require the use of deadly force, that officer is acting unreasonably.[395]

4. Objection Four: The Supreme Court Has Made Clear in Other Contexts That an Officer's Antecedent Conduct Does Not Affect the Constitutionality of the Officer's Later Actions

A fourth objection relies on the fact that the Supreme Court has suggested, in other contexts, that a law enforcement officer's prior conduct creating the conditions allowing an exception to the warrant requirement to apply does not negatively affect the constitutionality of the officer's later actions so long as the officer's prior conduct was lawful.[396] Therefore, according to this argument, an officer's lawful antecedent conduct that increased the risk of a deadly confrontation should not affect the reasonableness of the officer's later use of force.

For example, in *Kentucky v. King*,[397] the Court considered whether the exigent circumstances exception to the warrant require-

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391 Garrett & Stoughton, *A Tactical Fourth Amendment*, *supra* note 6, at 302 ("A tactical Fourth Amendment analysis would focus on whether officers acted contrary to sound police tactics by unreasonably creating a deadly situation, and asking whether a cautious approach could have given them time to take cover, give warnings, and avoid the need to use deadly force.").

392 *Id.* at 219.

393 *Id.* at 253.

394 *Id.* at 259.

395 STOUGHTON ET AL., EVALUATING POLICE USES OF FORCE, *supra* note 5, at 155 ("[A]n officer's poor tactics can expose them to an otherwise avoidable threat, which increases the likelihood that they will use force to address that threat . . . .").

396 *See, e.g.*, Kentucky v. King, 563 U.S. 452 (2011); Georgia v. Randolph, 547 U.S. 103 (2006).

397 563 U.S. 452 (2011).

ment "applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence."[398] Previously, the Kentucky Supreme Court held that because the police were the ones who created the exigency by banging on the door of the wrong apartment and announcing their identity as police officers, the government could not rely on the exigent circumstances exception to excuse the lack of search warrant.[399] The Supreme Court, however, disagreed with the Kentucky Supreme Court and allowed application of the exigent circumstances exception, holding that because the conduct of the officers prior to their entry into the apartment was lawful, i.e., in compliance with the Fourth Amendment, it did not matter that the officers created the exigency.[400]

Another example of the Supreme Court disregarding officer-created conduct leading to the application of an exception to the warrant requirement can be found in the third-party consent context. In *Georgia v. Randolph*,[401] the Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."[402] In explaining the parameters of its decision, the Court stated:

> So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value

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398 *Id.* at 455.

399 King v. Commonwealth, 302 S.W.3d 649, 651 (Ky. 2010) ("We hold that police were not in hot pursuit of a fleeing suspect, and that, with regard to the imminent destruction of evidence, any exigency was police-created."). In this case, police set up a controlled buy of crack cocaine outside an apartment complex. *King*, 563 U.S. at 455. An undercover officer observed the buy from an unmarked police car in a nearby parking lot. *Id.* at 455–56. After the buy concluded, the officer signaled to other officers to arrest the suspect who was moving quickly towards the breezeway of an apartment building. *Id.* at 456. Uniformed police officers ran to the breezeway. *Id.* They heard a door shut and detected the odor of marijuana. *Id.* At the end of the breezeway, the officers found two apartments. *Id.* They did not know which apartment the suspect had entered. *Id.* Because they smelled marijuana coming from the apartment on the left, they banged loudly on the door of that apartment and announced that they were the police. *Id.* As soon as they started banging on the door, they heard people inside moving. *Id.* Thinking that drug-related evidence was about to be destroyed, the officers kicked in the door and entered the apartment where they found marijuana and powder cocaine in plain view. *Id.* at 456–57. The officers later discovered that the initial target of their investigation had run into the apartment on the right. *See id.* at 457.

400 *King*, 563 U.S. at 469 ("[W]e conclude that the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.").

401 547 U.S. 103 (2006).

402 *Id.* at 120.

> in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.[403]

This language seems to suggest that if police officers purposely remove the target of the investigation from the home in order to avoid having that individual present and objecting to police entry, then the consent of the remaining co-tenant would not be valid and the warrantless entry into the home would violate the Fourth Amendment.

In *Fernandez v. California*,[404] however, the Court rejected that interpretation of this language. The defendant in *Fernandez* argued that the above specified language in *Georgia v. Randolph* meant the warrantless entry into his home was invalid because the police removed him after hearing his objection to their entry in order to obtain consent to enter from his co-tenant without having him present and objecting at the entrance to the home.[405]

Justice Alito, writing for the Court, rejected the defendant's argument, calling the above language from *Georgia v. Randolph* dictum.[406] Justice Alito explained that because the police had probable cause to arrest Fernandez for domestic violence, his removal from the premises was lawful and therefore it did not matter that the officers may have removed him to avoid having him physically present and objecting when they went back to seek his co-tenant's consent to their entry.[407] Justice Alito explained that "an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason."[408]

I think the Court was wrong to reject the police-created emergency doctrine in *Kentucky v. King*. I also disagree with the *Fernandez v. California* Court's refusal to recognize the language in *Georgia v. Randolph* clearly stating that if police remove a tenant from the entrance to the home in order to avoid a possible objection, the consent of the remaining co-tenant should not suffice to uphold the warrantless entry. Nonetheless, these decisions are in line with the Court's other Fourth Amendment decisions disregarding the police officer's

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403 *Id.* at 121–22.

404 571 U.S. 292 (2014).

405 *See id.* at 302.

406 *Id.* ("In *Randolph*, the Court suggested in dictum that consent by one occupant might not be sufficient if there is 'evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.'").

407 *Id.* at 302–03.

408 *Id.* at 303.

subjective intent and favoring police officers over civilians suspected of criminal activity.

It is important to remember that what the Supreme Court has prescribed in the Fourth Amendment context does not determine what a state court or legislature can say about when police use of force is justified.[409] State legislatures and state courts have the power and authority to be more protective of their citizens' rights and go beyond what the Supreme Court has prescribed as the constitutional floor.[410] In officer-involved shooting cases, the Supreme Court has set "reasonableness" as the constitutional floor with little to no guidance as to what constitutes reasonable police conduct. State courts and legislatures can and should go above this floor and make clear that police conduct that increases the risk of a deadly confrontation can affect the reasonableness of an officer's use of force and thus the trier of fact in a state criminal prosecution of a law enforcement officer who claims justifiable force may consider such conduct in assessing the reasonableness of the officer's use of force.

Conclusion

When law enforcement officers put themselves in situations of danger that could have been avoided and then use deadly force to protect themselves, they engage in officer-created jeopardy. A narrow time frame that requires the factfinder to focus narrowly on what was going on at the moment when the officer pulled the trigger tilts the scales in favor of the officer who is on trial for killing or seriously injuring a human being. The trier of fact in a criminal prosecution against an officer, who claims justifiable force, should be allowed to broaden the time frame and consider police conduct that increased the risk of an encounter turning deadly when assessing the reasonableness of an officer's use of force. It makes sense to broaden the time frame to include consideration of officer-created jeopardy because such conduct affects the reasonableness of the officer's use of force. It is unfair to disallow such consideration when the trier of fact is allowed to consider antecedent conduct of the victim as well as antecedent conduct of the officer that supports the officer's decision to use

409 *See* Flanders & Welling, *supra* note 39, at 125–26; Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, *supra* note 6, at 579 ("The interests safeguarded by the Fourth Amendment . . . are both distinct and, in many cases, readily distinguishable from the interests that underlie state law and agency policy.").

410 *See* Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, *supra* note 6, at 579–82.

force. Furthermore, the jury in officer-involved shooting cases is told to assess the reasonableness of the officer's use of force by considering the totality of the circumstances. Conduct of the officer that increased the risk of a deadly confrontation is a factor in the totality of the circumstances that bears on the reasonableness of the officer's use of deadly force. The jury should not be precluded from considering such conduct.