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TIME OVER MATTER: MEASURING THE REASONABLENESS OF OFFICER CONDUCT IN § 1983 CLAIMS

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In the United States, far more police encounters result in civilian and officer deaths than in other democratic countries. When a government actor uses excessive force against an individual during an arrest or investigatory stop in violation of the Fourth Amendment right against unreasonable seizure, 42 U.S.C. § 1983 provides a federal civil remedy for that individual.

In Graham v. Connor *and* Tennessee v. Garner, *the U.S. Supreme Court held that courts should assess the reasonableness of an officer's use of force to seize an individual in light of the "totality of the circumstances," which includes the severity of the crime, whether the suspect actively resisted arrest, and whether the suspect posed a threat to the officers and bystanders. However, the Court has never delineated how lower courts should assess the totality of the circumstances in excessive force claims under § 1983. Thus, circuit courts have applied varying methods to analyze law enforcement's use of force.*

This Note examines whether the Second Circuit's narrow approach, the Third Circuit's broad approach, or the Seventh Circuit's segmented approach properly identifies the circumstances to consider when measuring the reasonableness of officers' uses of force during a seizure in § 1983 claims. This Note compares the three circuit court approaches to how Canadian courts evaluate the reasonableness of police conduct in excessive force claims.

Ultimately, this Note concludes that the Third Circuit's approach, which considers causally relevant conduct, such as preseizure conduct, is truest to the notion of "totality" and should be the uniform method. As illustrated by Canadian courts, this Note argues that the Third Circuit standard incorporates de-escalation training as a factor in the reasonableness analysis.

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INTRODUCTION

On Saturday, April 15, 2017, two Fresno County, California, police officers shot and killed Isiah Murrietta-Golding, a sixteen-year-old who had fled to avoid arrest.[1] Isiah's mother brought a civil rights action under 42 U.S.C. § 1983 against the officers for excessive use of force,[2] arguing that the deadly use of force constituted an unreasonable seizure.[3] Isiah's mother asserted that, while investigating a homicide that had occurred the day before, a tactical police unit in plain clothes waited outside the home of those suspected of the crime.[4] When Isiah and his three friends drove away from the home, the officers initiated a traffic stop and told the boys to exit their vehicle.[5] Isiah's mother alleged the officers had no arrest warrant and no search warrant.[6] She further contended that the officers ordered the teens to walk backward toward the officers with their hands raised while they held the teens at gunpoint.[7] According to the plaintiff, Isiah was small: he weighed 109 pounds and was five feet four inches tall.[8] Isiah ran and the officers pursued on foot.[9] When one of the officers saw Isiah jump over the fence of an empty day care and reach for his waistband, the officer shot Isiah in the back of the head.[10]

In the United States, individuals are killed during police encounters far more often than in other democratic countries.[11] England and Wales saw roughly fifty-five fatal civilian shootings by police in twenty-four years, whereas the United States saw fifty-nine in the first twenty-four days of

1. *See* Kristin Lam, *A California Police Officer Fatally Shot a 16-Year-Old Boy in Newly Released 2017 Video*, USA TODAY (Oct. 25, 2019, 1:24 PM), https://www.usatoday.com/story/news/nation/2019/10/23/isiah-murrietta-golding-california-police-shooting-debate-2017-video/2452447001/ [https://perma.cc/49LW-U497].

2. Complaint for Damages, Injunctive and Declaratory Relief, and Demand for Jury Trial at 2, Murrietta-Golding v. City of Fresno, No. 18-CV-0314 (E.D. Cal. Mar. 6, 2018).

3. *Id.* at 9–10.

4. *Id.* at 6.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Lam, *supra* note 1.

10. *Id.*

11. Jamiles Lartey, *By the Numbers: US Police Kill More in Days than Other Countries Do in Years*, GUARDIAN (June 9, 2015, 6:00 PM), https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries [https://perma.cc/F9FS-B6JF]. *See generally* Christopher Ingraham, *Police Shootings Are a Leading Cause of Death for Young American Men, New Research Shows*, WASH. POST (Aug. 8, 2019, 7:14 AM), https://www.washingtonpost.com/business/2019/08/08/police-shootings-are-leading-cause-death-young-american-men-new-research-shows/ [https://perma.cc/PD6T-4ZTN].

2015.[12] In 2019, officers fatally shot 999 persons, over 400 of whom were people of color.[13] In addition, approximately 214 of the 999 people killed had mental illnesses.[14] Police use of force is the sixth leading cause of death for men ages twenty-five to twenty-nine,[15] ranking even higher as a cause of death for Black men in this age group.[16] From January 2020 to August 2020, 28 percent of people killed by police were Black, even though only 13 percent of the U.S. population is Black.[17] Data on unarmed victims of police use of force display an even starker disparity in fatal encounters for racial minorities.[18] In 2015, people of color comprised 37.4 percent of the population but 62.7 percent of unarmed victims of police use of force.[19] From 2013 to 2020, 17 percent of the total unarmed victims were Black, 14.5 percent were Hispanic, and 13 percent were white.[20]

Individuals harmed by officers' excessive force, deadly or nondeadly, can sue in a civil rights action pursuant to the Civil Rights Act of 1871[21] (also known as the Ku Klux Klan Act), more commonly known as a § 1983 claim.[22] Section 1983 claims provide plaintiffs with a federal remedy when a defendant-officer has violated their constitutional rights while acting under color of law.[23] Consequently, when officers violate an individual's Fourth

12. Lartey, *supra* note 11. A 2015 Bureau of Justice Statistics study on contacts between the police and the public found that the number of encounters with police involving people who were sixteen or older declined from 26 percent to 21 percent between 2011 and 2015. ELIZABETH DAVIS ET AL., BUREAU OF JUST. STAT., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 1 (2018), https://www.bjs.gov/content/pub/pdf/cpp15.pdf [https://perma.cc/UF7P-E6YA]. However, from January 2013 to December 2019, police departments in the nation's one hundred largest cities were responsible for 26 percent of deaths resulting from encounters with police. Those police departments killed four times as many unarmed Black civilians as unarmed white civilians. *Police Accountability Tool*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/cities [https://perma.cc/4GYE-QUXZ] (last visited Nov. 3, 2020). Black, Native American, and Hispanic persons face a higher risk of being killed by police than white persons. Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PNAS 16,793, 16,793 (2019).

13. Julie Tate et al., *Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/ [https://perma.cc/4VWW-KSHQ] (last visited Nov. 3, 2020).

14. *Id.*

15. *See* Ingraham, *supra* note 11. *See generally* Edwards et al., *supra* note 12.

16. *See Police Violence Map*, MAPPING POLICE VIOLENCE, https://mappingpolice violence.org [https://perma.cc/GBY8-P9DQ] (last visited Nov. 3, 2020).

17. *Id.*

18. *See* Jon Swaine et al., *Black Americans Killed by Police Twice as Likely to Be Unarmed as White People*, GUARDIAN (June 1, 2015, 8:38 AM), https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis [https://perma.cc/7HMT-5U3Q].

19. *Id.*

20. *Police Violence Map*, *supra* note 16.

21. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended in scattered sections of 18 and 42 U.S.C).

22. 42 U.S.C. § 1983; *see also* Jeremy R. Lacks, Note, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 392 (2008).

23. 42 U.S.C. § 1983. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." Monroe v. Pape, 365 U.S. 167, 184 (1961) (quoting United States

Amendment right against unreasonable seizure by using unreasonable force in light of the "totality of the circumstances," the individual may bring a § 1983 claim against the officer.[24] However, circuit courts are divided on whether "totality of the circumstances" should include preseizure conduct,[25] officers' conduct only at the moment of seizure,[26] or a segmented time frame.[27]

Canadian excessive force cases provide a useful comparison to the different approaches circuit courts have taken in the United States. Canada is the most useful comparison because of its geographic proximity to the United States, its Charter of Rights and Freedoms—which grants a guarantee against unreasonable seizure similar to the Fourth Amendment—and its rule authorizing police to employ lethal force only when they reasonably believe suspects pose an imminent threat of serious injury or death to officers or others.[28] In addition, the Criminal Code of Canada prescribes factors courts must consider in excessive force cases that are similar to the *Graham v. Connor*[29] factors laid out by the U.S. Supreme Court.[30] Like the Third Circuit, Canadian courts review relevant context to determine the reasonableness of officers' actions in excessive force claims.[31] Canadian courts also review officers' preseizure conduct and consider, among other factors, whether police attempted to de-escalate the situation.[32]

This Note recommends federal courts use a standardized view of totality of the circumstances that properly assesses the reasonableness of officers' use of force when arresting, stopping, or otherwise seizing civilians. Ultimately, this Note concludes that the Third Circuit uses the most effective standard: totality of the circumstances should include causally relevant preseizure conduct regarding an officer's use of force and should incorporate insights from Canadian law.

Part I of this Note describes the historical and legal context of § 1983 claims vis-à-vis the Fourth Amendment protection against unreasonable searches and seizures. Part II examines the Second, Third, and Seventh Circuits' differing analyses of the totality of the circumstances and outlines various legal and policy arguments for each view. It then compares the U.S. circuit courts' approaches to Canadian courts' views and explores the differences. Part III concludes that the Third Circuit's method is truest to the notion of "totality," as it (1) includes police actions leading up to the seizure

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v. Classic, 313 U.S. 299, 326 (1941)), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

24. U.S. CONST. amend. IV; *see* Graham v. Connor, 490 U.S. 386, 394 (1989); Tennessee v. Garner, 471 U.S. 1, 7 (1985).

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

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

27. *See* Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994).

28. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

29. 490 U.S. 386 (1989).

30. *See infra* Part II.B.2.

31. *See infra* Part II.B.1.

32. *See infra* Part II.B.1.

that are causally relevant to the force later used, (2) provides a fair mechanism by which both plaintiffs' and defendants' perspectives may be heard, and (3) allows courts to consider accepted police practices, particularly de-escalation, in the reasonableness analysis.[33]

I. USE OF FORCE AND THE FOURTH AMENDMENT STANDARD

Under 42 U.S.C. § 1983, plaintiffs can bring claims against officers for violating their constitutional rights while acting under color of law.[34] Congress enacted this statute to enforce liberties protected by the Fourteenth Amendment.[35]

Part I.A provides an overview of § 1983 and its history, the risks involved when officers utilize deadly force, and the disproportionate impact of police violence on people of color and those with mental illnesses. Part I.B briefly describes the Fourth Amendment protection against unreasonable seizures. Finally, Part I.C reviews two key excessive force cases in which the Supreme Court interpreted and refined the Fourth Amendment totality of the circumstances standard in the § 1983 context.

A. Excessive Force Under § 1983: Risks of the Use of Deadly Force and Disproportionate Impacts

Congress enacted § 1983 as section 1 of the Ku Klux Klan Act,[36] one of the Reconstruction civil rights acts, to enforce Fourteenth Amendment guarantees against unreasonable searches and seizures.[37] Section 1983 applies to government actors (including both state and local officials), private parties acting under state authorization, and some private parties acting alone.[38] Under the common law, police could use lethal force in self-defense or to stop fleeing felons,[39] which allowed states to exercise their police powers without federal intrusion.[40] However, under § 1983, any person acting "under color of any statute, ordinance, regulation, custom, or usage" of any state, territory, or the District of Columbia, who deprives people of their constitutional or federal rights could be subject to civil liability.[41] Thus, § 1983 provides a civil action to protect individuals against the misuse of state power.[42]

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33. *See infra* Part III.A.
34. 42 U.S.C. § 1983.
35. *See* District of Columbia v. Carter, 409 U.S. 418, 423 (1973).
36. ch. 22, § 1, 17 Stat. 13, 13 (1871) (codified as amended at 42 U.S.C. § 1983).
37. *See Carter*, 409 U.S. at 423; *see also* CONG. GLOBE, 42d Cong., 1st Sess. 335 (1871).
38. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978) (finding a policy of the New York City Department of Social Services and Board of Education that forced pregnant employees to take unpaid leaves of absence unconstitutional in a § 1983 suit brought by a female).
39. 2 WILLIAM BLACKSTONE, COMMENTARIES *131, *132–33 (stating that public justice homicide occurs when an officer kills an assaulter or "attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him").
40. Lacks, *supra* note 22, at 399.
41. 42 U.S.C. § 1983.
42. *See id.*

1. Protecting Civil Liberties

Plaintiffs bringing § 1983 claims must prove two essential elements: (1) a person acted under color of state, territory, or District of Columbia law; and (2) the person's actions deprived the plaintiff of "rights, privileges, or immunities" guaranteed by the U.S. Constitution or federal law.[43] The term "person" includes police, cities, mayors, departments of social services, and school boards.[44]

Congress enacted § 1983 to ensure principles of civil freedom and justice, thereby guaranteeing constitutional rights such as life and property.[45] Congress passed the Ku Klux Klan Act, also known as "the third force bill," with the Ku Klux Klan's lawless and brutal behavior in mind, among other unlawful activities in the Southern states.[46] The statute sought to address state actors' failure to give citizens equal protection of the law, either due to inability or unwillingness to do so.[47] Representative George Hoar highlighted the statute's purpose "to insure that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights."[48]

From 1871 to 1920, federal courts decided only twenty-one § 1983 claims, nine of which reached the Supreme Court.[49] In 1961, in *Monroe v. Pape*,[50] the Court reinvigorated § 1983 claims by making police officers civilly liable for illegal acts committed without state authorization.[51] In *Monroe*, thirteen officers forced the plaintiff and his wife to stand naked in their living room while police searched their apartment until they were later arrested without a warrant.[52] The Court held that the officers' warrantless and unreasonable search and seizure constituted action under color of law cognizable under § 1983.[53] The Court further expanded § 1983's scope in *Monell v. Department of Social Services*,[54] holding that the statute also covers municipalities and other local government units whose customs, policies, or

43. *See id.*
44. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694–95 (1978).
45. *See* Monroe v. Pape, 365 U.S. 167, 182–83 (1961), *overruled on other grounds by Monell*, 436 U.S. 658.
46. *See id.* at 174. In debates over the Act, congressmen constantly referred to an over-600-page joint select committee report investigating conditions in the South. The report detailed testimonies on the Klan's raids, murders, and other violent acts and described the state governments' weak responses. *See* CONG. GLOBE, 42d Cong., 1st Sess. 150 (1871); *see also* H.R. REP. NO. 42-22, pt. 1, at 2–3 (1872).
47. *See Monroe*, 365 U.S. at 176.
48. CONG. GLOBE, 42d Cong., 1st Sess. 335.
49. *See The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363–66 (1951) (stating that federal courts rarely adjudicated § 1983 claims before 1920).
50. 365 U.S. 167 (1961), *overruled on other grounds by Monell*, 436 U.S. 658.
51. *Id.* at 187.
52. *Id.* at 169.
53. *Id.* at 187.
54. 436 U.S. 658 (1978).

practices deprive individuals of their constitutional or federal rights.[55] The next section examines the effect of such deprivation.

2. The Dangers and Disparate Effects of Utilizing Force

Excessive force, especially deadly force, raises serious human rights concerns, including the rights to life, security of one's person, freedom from discrimination, and equal protection under the law.[56] Because law enforcement officers undertake to protect, serve, and respect human life while promoting public safety through lawful means,[57] communities largely rely on officers' responsiveness and professional judgment when officers engage with the public.[58] However, Amnesty International has argued that the frequency of shootings by police shows that lethal force disproportionately affects certain persons, including different social groups, based on age, gender, and race.[59] Disparities may be exacerbated by previous federal law not requiring police departments to report lethal encounters.[60]

Another study found that police are more likely to use deadly force against Black individuals, Native American individuals, and Hispanic men and suggested that the risk of death is highest for Black men.[61] On average, Black men have a one in one thousand chance of being killed by police as compared to a one in 2000 chance for men overall, and a one in 33,000 chance for women.[62] Individuals of all ethnic groups face the highest risk of being killed by police between the ages of twenty and thirty-five.[63] And geographical differences amplify racial inequity.[64]

In addition, police frequently encounter people with mental disabilities.[65] Officers may arrest people for crimes or take them to health facilities after

55. *See id.* at 694.

56. AMNESTY INT'L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 1 (2015), https://www.amnestyusa.org/files/aiusa_deadlyforcereportjune2015.pdf [https://perma.cc/LMG6-Y6WS].

57. *See id.*

58. *See id.*

59. *See id.* at 10.

60. *See* Gretchen Frazee, *Deadly Police Shootings Keep Happening. Data Could Be a Missing Piece*, PBS (Oct. 16, 2019), https://www.pbs.org/newshour/nation/deadly-police-shootings-keep-happening-data-could-be-a-missing-piece [https://perma.cc/G453-RBNL]. A retired Salt Lake City, Utah, police officer and vice president of the Center for Policing Equity observed: "[Police departments] can tell me how many cars are stolen, but they can't tell you how many people they killed?" *Id.*

61. Edwards et al., *supra* note 12, at 16,793.

62. *Id.*

63. *Id.*

64. *See Police Violence Map*, *supra* note 16. For example, in 2013, Buffalo, New York, had a population of 258,959, 50 percent of residents were nonwhite, and the violent crime rate was twelve murders per one thousand residents. Orlando, Florida, had a population of 255,483 in 2013, 42 percent of residents were nonwhite, and the violent crime rate was nine murders per one thousand residents. Despite the lower crime rate, Orlando police fatally shot and killed thirteen people from 2013 to 2016, whereas Buffalo police killed no one. *Id.*

65. *See Serving Safely: The National Initiative to Enhance Policing for Persons with Mental Illnesses and Developmental Disabilities*, VERA INST. OF JUST. 1 (Feb. 2019), https://

observing worrying behavior.[66] However, encounters can escalate.[67] From January to August 2019, at least 20 percent of individuals fatally shot by police had mental health concerns.[68]

3. Police Deaths in the Line of Duty

The Washington Post database suggests police shot and killed 999 people in 2019.[69] According to the National Law Enforcement Officers Memorial Fund, in that same year, 128 police officers died in the line of duty.[70] The median age was forty-three.[71] In the first half of 2020, twenty-seven police officers were shot and killed in the line of duty.[72] Although police deaths in the line of duty decreased in the first half of 2020 by 14 percent as compared to the first half of 2019,[73] the number of annual police fatalities has not been below one hundred since 1944.[74]

Accordingly, when to use deadly force constitutes one of law enforcement's most difficult and potentially irreversible decisions.[75] In *Graham*, the Supreme Court recognized an officer's need for split-second decision-making.[76] Studies have found that the high rate of civilian deaths by police in the United States is partly due to the nation's high crime and individual gun ownership rates, which often create tense situations in which

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www.vera.org/downloads/publications/serving-safely-fact-sheet-policing-mental-illness-disabilities.pdf [https://perma.cc/K7U4-B8TQ].

66. *See* 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, 264 (2003).

67. *See id.* at 264–65.

68. *See* Ingraham, *supra* note 11.

69. *See* Tate et al., *supra* note 13.

70. *128 Law Enforcement Officer Fatalities Nationwide in 2019*, NAT'L L. ENF'T OFFICERS MEM'L FUND, https://nleomf.org/newsroom/news-releases/128-law-enforcement-officer-fatalities-nationwide-in-2019 [https://perma.cc/D57M-GBJC] (last visited Nov. 3, 2020). Of those deaths, forty-nine were gun-related, which was 6 percent less than in 2018. *See id.*

71. *Id.*

72. *See* NAT'L L. ENF'T OFFICERS MEM'L FUND, 2020 MID-YEAR PRELIMINARY LAW ENFORCEMENT OFFICERS FATALITIES REPORT 4 (2020), https://nleomf.org/wp-content/uploads/2020/08/2020-Mid-Year-Fatality-Report_v6_8_3_20_opt.pdf [https://perma.cc/VA5C-2FHK].

73. *See id.*

74. *See 128 Law Enforcement Officer Fatalities Nationwide in 2019*, *supra* note 70.

75. William A. Geller & Kevin J. Karales, *Shootings of and by Chicago Police: Uncommon Crises* (pt. 2), 73 J. CRIM. L. & CRIMINOLOGY 331, 371 (1982).

76. Graham v. Connor, 490 U.S. 386, 396–97 (1989). Officers may be immune from personal liability if they reasonably but mistakenly believed the law permitted their use of force under the circumstances. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity protects police from liability, as well as harassment and distraction from unsubstantiated claims, when officers perform reasonably in the course of their duties. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

officers fear for their lives.[77] In 2019, over half of individuals shot and killed by police were armed.[78]

While international standards require officers to de-escalate situations and exhaust all other reasonable alternatives before using lethal force, the U.S. constitutional standard does not require police to use the least intrusive means to seize individuals.[79] The Fourth Amendment permits officers to use any reasonable means under the totality of the circumstances when seizing a person.[80]

B. Unreasonable Seizures Under the Fourth Amendment

The Framers' immediate concerns when drafting the Fourth Amendment were general warrants and writs of assistance, which gave officials unrestrained power to search and seize people and property at will.[81] Such sweeping searches and seizures offended colonists largely because they were conducted "without any evidentiary basis."[82]

In response, the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[83] It holds government officials accountable by requiring them to conduct seizures reasonably and pursuant to valid warrants.[84] However, officials may, among other exceptions, temporarily seize people without a warrant to conduct a brief investigatory stop if they have "reasonable suspicion, grounded in specific and articulable facts"[85] that "criminal activity is afoot."[86] This objective standard requires more than guesswork but less than probable cause.[87] One must consider the seizure's circumstances as a whole, and the seizure must be based on particularized facts.[88]

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77. *See* Brendan O'Flaherty & Rajiv Sethi, *How Fear Contributes to Cops' Use of Deadly Force*, THE MARSHALL PROJECT (May 1, 2019, 6:00 AM), https://www.themarshallproject.org/2019/05/01/can-understanding-fear-mitigate-police-violence [https://perma.cc/5XSY-A6HK].

78. *See* Ingraham, *supra* note 11.

79. *See* Illinois v. Lafayette, 462 U.S. 640, 647 (1983); United States v. Martinez-Fuerte, 428 U.S. 543, 556–57 (1976); *see also* Avery, *supra* note 66, at 298. *But see Use of Force: Attorney General's Use of Force Policy*, NJ.GOV (June 2000), https://www.nj.gov/oag/dcj/agguide/useofforce2001.pdf [https://perma.cc/5A8D-Q7EB] (noting New Jersey's policy that officers should try all other reasonable means before using force).

80. *See* Tennessee v. Garner, 471 U.S. 1, 7–9 (1985); *see also Graham*, 490 U.S. at 394–96.

81. *See* Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 82 (1988); *see also* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1242–44 (2016).

82. *See* Wasserstrom & Seidman, *supra* note 81, at 82; Claire Abrahamson, Note, *Guilt by Genetic Association: The Fourth Amendment and the Search of Private Genetic Databases by Law Enforcement*, 87 FORDHAM L. REV. 2539, 2555 (2019).

83. U.S. CONST. amend. IV.

84. *Id.*

85. *See* United States v. Hensley, 469 U.S. 221, 229 (1985).

86. Terry v. Ohio, 392 U.S. 1, 30 (1968).

87. *See id.* at 22.

88. *See* United States v. Cortez, 449 U.S. 411, 417 (1981).

Police stopping a pedestrian on the street may constitute a "seizure."[89] However, not all encounters between police and civilians are seizures.[90] For a seizure to occur, a government actor must restrict a person's liberty by physical force or a show of authority to which the person submits.[91] Officers show authority when, under the totality of the circumstances, reasonable persons would not feel "free to leave."[92] This is an objective standard.[93]

In *Michigan v. Chesternut*,[94] the Supreme Court identified some police actions that may constitute a seizure.[95] These included activating sirens, commanding a person to halt, displaying weapons, or aggressively driving to restrain a person's movement.[96] In *Chesternut*, the Court found that four officers did not sufficiently assert authority when they briefly accelerated their cruiser and drove around a corner to drive alongside a fleeing pedestrian.[97]

When determining the objective reasonableness of a seizure, courts examine the officer's conduct in light of the totality of the circumstances.[98] This analysis must be done from the perspective of a reasonable officer on the scene, rather than using hindsight.[99] Because the reasonableness standard is objective, courts do not consider officers' subjective beliefs, or even ill intentions, to determine whether their use of force was reasonable.[100]

C. The Fourth Amendment in Use of Force Cases: Garner *&* Graham

To prevail in excessive force claims under § 1983, plaintiffs must prove that an officer's conduct constituted a seizure under the Fourth Amendment.[101] The Supreme Court has adjudicated two major excessive force cases: *Tennessee v. Garner*[102] and *Graham*.

In *Garner*, an officer investigating an alleged nighttime burglary saw someone scaling the backyard fence, ordered him to stop, and shot him in the head when he did not.[103] The defendant-officer had killed an eighth grader who had stolen ten dollars and a purse from an unoccupied house.[104] The defendant admitted that he fired to prevent escape and reasonably believed the teenager was unarmed.[105] The Court held that using deadly force

89. *See Terry*, 392 U.S. at 16.
90. *See* United States v. Mendenhall, 446 U.S. 544, 552 (1980).
91. *See* California v. Hodari D., 499 U.S. 621, 625–26 (1991).
92. *Mendenhall*, 446 U.S. at 554.
93. *Id.*
94. 486 U.S. 567 (1988).
95. *Id.* at 575.
96. *Id.*
97. *Id.* at 575–76.
98. Tennessee v. Garner, 471 U.S. 1, 9 (1985).
99. Graham v. Connor, 490 U.S. 386, 396 (1989).
100. *Id.* at 397; *see also* Scott v. Edinburg, 346 F.3d 752, 756 (7th Cir. 2003) (stating that officers' intentions and motivations are irrelevant to the reasonableness inquiry).
101. *See Garner*, 471 U.S. at 7; *see also Graham*, 490 U.S. at 394.
102. 471 U.S. 1 (1985).
103. *Id.* at 3–4.
104. *Id.*
105. *Id.* at 3.

constitutes a seizure under the Fourth Amendment's reasonableness standard[106]—and the Fourth Amendment does not require police to exhaust every alternative before turning to lethal force.[107] Nonetheless, the Court struck down the Tennessee statute at issue as unconstitutional because it authorized deadly force against any fleeing felon.[108]

Under *Garner*, deadly force is reasonable only when necessary to prevent escape or when officers have probable cause to believe that the suspect significantly threatens serious bodily injury or death to officers or others.[109] After weighing the government's law enforcement interests against the teenager's interest in life, the Court declared it better for some felony suspects to escape than for any to die.[110]

In *Graham*, the Court expanded *Garner*'s holding to the use of nondeadly force.[111] The plaintiff, Dethorne Graham, was diabetic and went with his friend Berry to a convenience store to buy orange juice to counteract an insulin reaction.[112] Seeing the long checkout line, Graham left the store and asked Berry to drive him elsewhere.[113] The defendant, Officer Connor, became suspicious when he saw Graham leave the store quickly and initiated an investigative stop. Officer Connor told Graham to wait until the officer confirmed if anything had happened at the store, despite Graham's explanation that he was diabetic.[114] When Officer Connor called for backup, Graham exited Berry's car, ran around it, sat down on the curb, and passed out.[115] When other officers arrived, they handcuffed Graham on the sidewalk and lifted him onto the hood of Berry's car.[116] Graham regained consciousness and asked the officers to check for a diabetic decal in his wallet, but the officers told him to "shut up" and threw him into the police car.[117] The officers also prevented Graham from drinking orange juice that a friend had brought during the encounter.[118] The officers only released Graham once they discovered he had done nothing wrong.[119] As a result of the incident, Graham sustained a broken foot, bruised forehead, and an injured shoulder, among other injuries.[120] The Court held that all excessive force claims arising from an arrest, investigatory stop, or other seizure should be analyzed under the objective reasonableness standard of the Fourth

106. *Id.* at 2.
107. *See id.* at 11–12, 20–21; Scott v. Edinburg, 346 F.3d 752, 760 (7th Cir. 2003); Plakas v. Drinski, 19 F.3d 1143, 1148–49 (7th Cir. 1994).
108. *Garner*, 471 U.S. at 3. At that time, the law in many states permitted the use of force against any fleeing felon. *Id.* at 12–13.
109. *Id.* at 3.
110. *Id.* at 11.
111. *See* Graham v. Connor, 490 U.S. 386, 395 (1989).
112. *Id.* at 388.
113. *Id.* at 388–89.
114. *Id.* at 389.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 390.

Amendment.[121] Therefore, when police use unreasonable deadly or nondeadly force in an arrest or investigatory stop, the use of undue force constitutes a seizure under the Fourth Amendment.[122]

Claims of police misconduct may also be brought under other constitutional provisions, such as the Fourteenth Amendment's Due Process and Equal Protection Clauses.[123] However, because excessive force involves government intrusion on individuals that the Fourth Amendment explicitly prohibits, excessive force claims are analyzed under the Fourth Amendment objective reasonableness standard, rather than as substantive due process claims under the Fourteenth Amendment.[124] Accordingly, plaintiffs must show that the force an officer employed was objectively unreasonable in light of the totality of the circumstances.[125]

Although the reasonableness test has no precise definition or application,[126] the Court, in *Garner*, had explained that to examine the reasonableness of an officer's conduct, courts must balance the governmental interests behind the intrusion against the individual's privacy interests.[127] To balance these two interests, *Graham* identified three main factors to consider: (1) the nature and severity of the crime that led to the arrest or investigatory stop, (2) whether the suspect posed an immediate threat to the officers or others, and (3) whether the suspect actively resisted or fled to avoid arrest.[128]

Graham gave courts discretion to carefully consider the particular facts and circumstances of each case.[129] *Graham* emphasized that officers often face dangerous and unpredictable situations that may require split-second decisions.[130] Circuit courts have applied these factors in § 1983 cases involving various types of force, such as the use of choke holds[131] or tasers.[132]

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121. *Id.* at 394–95.

122. *See id.* at 394; Tennessee v. Garner, 471 U.S. 1, 7 (1985).

123. *See generally* Wayne C. Beyer, *Police Misconduct: Claims and Defenses Under the Fourteenth Amendment Due Process and Equal Protection Clauses*, 30 URB. LAW. 65 (1998).

124. *Graham*, 490 U.S. at 388. In his concurrence, Justice Harry Blackmun asserted that *Garner* did not foreclose the use of substantive due process analysis as an alternative to Fourth Amendment analysis in pre-arrest excessive force claims. *Id.* at 399–400 (Blackmun, J., concurring in part and concurring in the judgment).

125. *See Garner*, 471 U.S. at 21.

126. *See* Bell v. Wolfish, 441 U.S. 520, 559 (1979).

127. *See Garner* 471 U.S. at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

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

129. *Id.*

130. *Id.* at 397.

131. *See, e.g.*, Werner v. City of Poulsbo, 548 F. App'x 381, 382 (9th Cir. 2013) (analyzing a § 1983 claim for an officer's use of a choke hold that caused the plaintiff to have breathing difficulties); Barnard v. Theobald, 721 F.3d 1069, 1073 (9th Cir. 2013) (denying immunity for an officer's use of a choke hold during arrest that resulted in five collapsed vertebrae in the suspect's spine).

132. *See, e.g.*, Frederick v. Motsinger, 873 F.3d 641, 647 (8th Cir. 2017) (finding that tasing a suspect who was threatening officers and store customers with a four-inch knife was reasonable); Orr v. Copeland, 844 F.3d 484, 493 (5th Cir. 2016) (finding that using a stun gun on a fleeing person suspected of serious drug crimes was not excessive); Yates v. Terry, 817

Yet, the *Graham* factors did not delineate at what point before a seizure a plaintiff's or officer's preseizure conduct should be considered.[133] Thus, *Graham* and *Garner* did not provide a particular time line for the totality of the circumstances.[134] The next part analyzes three circuits' methods of assessing the totality of the circumstances in light of *Garner* and *Graham*.

II. THE DIFFERENT TOTALITY TESTS

Because the Supreme Court has not provided a conclusive test for which temporal circumstances to include when determining the reasonableness of officers' actions, the lower federal courts have developed differing tests, some narrow and some more inclusive. Part II.A analyzes the Second Circuit, Third Circuit, and Seventh Circuit jurisprudence, commentators' views, and policy considerations. Part II.A.1 examines the Third Circuit's broad causation framework, which includes relevant preseizure conduct as part of the totality of the circumstances. Part II.A.2 examines the Second Circuit's narrow framework, which focuses on the moment seizure occurs. Part II.A.3 examines the Seventh Circuit's segmented framework. Finally, Part II.B evaluates Canadian jurisprudence by discussing the "reasonable grounds" standard for officers to employ nondeadly or deadly force and factors Canadian courts use to analyze whether the use of force was justified. Part II.B then highlights circumstances Canadian courts consider in evaluating excessive force claims as they align with or differ from the Second, Third, and Seventh Circuits.

A. U.S. Circuit Courts: Relevant Circumstances in Assessing Reasonableness

The circuit courts all consider plaintiffs' preseizure actions as part of the totality of the circumstances because a suspect's actions are relevant to an officer's subsequent decisions and use of force.[135] Only a few of the circuits, however, consider officers' preseizure actions as part of the totality of the circumstances and, therefore, relevant to the reasonableness analysis.[136]

F.3d 877, 885–86 (4th Cir. 2016) (finding that tasing a suspect, who did not resist arrest, three times was unreasonable).

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

134. *See* Avery, *supra* note 66, at 265.

135. *See, e.g.*, Hensley *ex rel.* North Carolina v. Price, 876 F.3d 573, 582 (4th Cir. 2017) (noting that the plaintiff emerged from a house with a gun, hit an officer, and advanced toward other officers), *cert. denied sub nom.*, Price v. Hensley, 138 S. Ct. 1595 (2018); Zion v. Nassan, 556 F. App'x 103, 109 (3d Cir. 2014) (assessing whether the suspect colliding with a parked car and driving away at a slow speed put officers or others in significant danger); Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994) (considering the suspect's decision to avoid arrest and charge at officers with a fireplace poker).

136. *See Hensley*, 876 F.3d at 582 (assessing the circumstances, focusing on the suspect's actions immediately prior to and at the moment deputies killed the suspect); *Zion*, 556 F. App'x at 107 (analyzing causally relevant actions by both the plaintiffs and the defendants, where the officers followed the suspect despite orders to discontinue pursuit and fired at the suspect when he drove forward at a slow speed); *Plakas*, 19 F.3d at 1150 (dividing relevant

1. The Third Circuit's Broad Approach

In *Abraham v. Raso*,[137] the Third Circuit held that the reasonableness inquiry requires courts to consider relevant events and officer conduct leading up to the moment officers seize someone.[138] When analyzing the totality of the circumstances in excessive force claims, the First, Ninth, and Tenth Circuits follow this interpretation to consider context and causes before a seizure occurred.[139] However, the circuit courts following the Third Circuit's framework acknowledge that not all factors may be equally relevant.[140] One must examine preseizure conduct in terms of its causal relevance to the use of force.[141]

a. An Inclusive Time Line of Totality of the Circumstances: Causally Relevant Conduct

In *Abraham*, the decedent Robert Abraham stole clothes from a Macy's store.[142] Officer Kimberly Raso, an off-duty police officer working as a security guard, followed Abraham to his parked car.[143] When Abraham entered his car, Raso told him to stop, but Abraham backed his car out and hit another car.[144] When he began driving forward, Raso shot toward Abraham's car.[145] Shattering the driver's side window, Raso's bullet struck Abraham's left arm and passed into his chest.[146] Abraham was pronounced dead on arrival at a nearby hospital.[147]

Reversing the district court's grant of summary judgment in favor of Raso, the Third Circuit emphasized that *Garner* made it unreasonable for police to employ deadly force against fleeing felons who did not pose a significant threat to officers or bystanders.[148] Here, the evidence suggested that Raso did not stand in front of Abraham's car and, if Raso had, a jury could

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time frames and analyzing the reasonableness of an officer's responses to the plaintiff's actions in each).

137. 183 F.3d 279 (3d Cir. 1999).

138. *Id.* at 291–92.

139. *See* Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002) (holding that provocation that may constitute a constitutional violation should be analyzed separately, although "an officer [who] intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation . . . may be held liable for his otherwise defensive use of deadly force"), *abrogated by* County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017); Medina v. Cram, 252 F.3d 1124, 1132 (10th Cir. 2001) (holding that, in some cases, courts should consider police conduct that created the need to use lethal force); St. Hilaire v. City of Laconia, 71 F.3d 20, 26 (1st Cir. 1995) (stating that the court should consider police actions leading up to a shooting in assessing the seizure's reasonableness); *see also* Avery, *supra* note 66, at 282.

140. *See Abraham*, 183 F.3d at 292.

141. *See id.*

142. *Id.* at 283.

143. *Id.*

144. *Id.* at 284–85.

145. *Id.* at 285.

146. *Id.*

147. *Id.* at 286.

148. *Id.* at 288.

reasonably have found that Raso moved safely out of the way before shooting Abraham.[149]

Abraham rejected a narrow interpretation of Supreme Court case law that held that actions before the exact moment a seizure occurred cannot be considered in the totality of the circumstances analysis.[150] The Third Circuit found the narrow approach too rigid, stating that it would lead to absurd results; for instance, because seizure technically occurs the moment the bullet hits the plaintiff, this narrow rule would exclude the moment the officer pulled the trigger.[151]

Whereas in *Garner* and *Graham*, the Supreme Court focused on the recognition of split-second decision-making in tense situations, the Third Circuit's decision in *Abraham* focused on the totality language and took a broader approach.[152] The Third Circuit emphasized that the three *Graham* factors do not exclude other factors, including officers' preseizure conduct.[153] Other factors may include: (1) the type of force used, (2) the context in which police used that force, (3) the extent of the injury inflicted, (4) whether the person was armed, (5) whether the person was sober,[154] (6) whether the person interfered or attempted to interfere in officers' execution of their duties, and (7) the number of arrestees or officers involved.[155] For example, if a person possesses a firearm, flees, or commits a felony, officers reasonably can use greater force in seizing that individual as compared to an unarmed person who stops when ordered to do so.[156]

b. Arguments for the Third Circuit's Framework: True Totality and Fairness to Both Parties

Some commentators view the Third Circuit's approach as truest to the totality language established by *Graham* and *Garner*, while sufficiently providing limits to the relevant time line.[157] The Third Circuit's framework requires courts to consider only causally relevant preseizure conduct that has a bearing on the police's use of force that effectively seized the individual.[158] Professor Cynthia Lee asserted that what officers do or fail to do "that increased the risk of a deadly confrontation" is merely part of the totality of

149. *Id.* at 294.

150. *Id.* at 291 (rejecting a narrow interpretation of *Hodari D.* that suggests a person is not seized until the bullet actually strikes).

151. *Id.*

152. *See id.* at 292.

153. *Id.*

154. *See, e.g.*, Loharsingh v. City of San Francisco, 696 F. Supp. 2d 1080, 1103 (N.D. Cal. 2010).

155. *See* Jackson v. Sauls, 206 F.3d 1156, 1170 (11th Cir. 2000); Sharrar v. Felsing, 128 F.3d 810, 822 (3d Cir. 1997), *abrogated on other grounds by* Curley v. Klem, 499 F.3d 199 (3d Cir. 2007); Chew v. Gates, 27 F.3d 1432, 1440 n.5 (9th Cir. 1994).

156. Tennessee v. Garner, 471 U.S. 1, 11 (1985).

157. *See, e.g.*, 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, 676 (2004); *see also* Avery, *supra* note 66, at 287.

158. *Abraham*, 183 F.3d at 292.

the circumstances that fact finders must consider, and the reasonableness standard is purposely broad to include all relevant facts.[159] Professor Lee noted that, in the context of de-escalation training, police chiefs and others are increasingly recognizing the importance of officers' decisions leading up to the moment they use force.[160]

In his Note, Aaron Kimber highlighted the notion in *Abraham* that "'totality' is an encompassing word,"[161] which considers both suspects' and officers' actions as pertinent information for the reasonableness test.[162] According to Kimber, by using an inclusive time line, courts more accurately understand suspects' actions in response to officers' actions, and vice versa, leading up to the moment officers exerted force.[163]

Another scholar asserted *Graham* explicitly identified the severity of the crime as a factor courts must consider and, therefore, supports the Third Circuit's consideration of causally relevant conduct because a crime's severity requires courts to contextualize the interaction beyond the moment the seizure occurred.[164] The crime also helps courts understand officers' initial tactics and civilians' responses in the chain of events leading to the choice to exercise force.[165]

Scholars favoring the Third Circuit's causal approach contend it most closely reaches a practical bright-line rule courts can use in deciding which factors, temporal and otherwise, may be considered in the reasonableness analysis.[166] One commentator emphasized that the method relies on already familiar legal principles of causation where officers may have created the circumstances that required force and the civilian's response might constitute a superseding cause.[167]

2. The Second Circuit's Narrow Approach

In *Salim v. Proulx*,[168] the Second Circuit held that courts should consider only officers' knowledge and actions immediately before and at the moment

159. 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, 679, 684. Professor Lee further explains that even if an officer increased the risk of a deadly encounter by acting negligently or violating police procedures, a jury could still find that the officer's use of force was reasonable. *Id.* at 685.

160. *Id.* at 673.

161. *Abraham*, 183 F.3d at 291.

162. Kimber, *supra* note 157, at 676.

163. *Id.* ("The incident is the combination of all the interactions between the actors involved, so there is no reason why the actions of one of those actors should always be excluded.").

164. *See* Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1, 17–18 (2017).

165. *Id.* at 28.

166. *See, e.g.*, Avery, *supra* note 66, at 287 ("The Third Circuit's decision in *Abraham v. Raso* provides the clearest rule, and the one giving the word 'totality' in the 'totality of the circumstances' standard its truest meaning."); *see also* McClellan, *supra* note 164, at 22–23.

167. *See* McClellan, *supra* note 164, at 22–23.

168. 93 F.3d 86 (2d Cir. 1996).

they seized the plaintiff with deadly force.[169] The Fourth,[170] Fifth,[171] Eighth,[172] and Eleventh Circuits[173] also examine reasonableness at the moment seizure occurs. In the case of fleeing suspects, this framework is grounded in the notion that no seizure occurs until an officer uses force to stop a fleeing suspect because the suspect did not submit to the first demonstration of police authority.[174] This framework also contemplates the need for instant decision-making in dangerous situations.[175]

a. A Narrow Time Line of Totality of the Circumstances: Immediately Before and at the Moment of Seizure

In *Salim*, the Second Circuit established its narrow view while examining an incident where the defendant, Officer William Proulx, attempted to apprehend fourteen-year-old Eric Reyes, who had escaped from juvenile detention and evaded arrest twice.[176] Officer Proulx saw Reyes near Reyes's home and pursued him when Reyes ran.[177] Reyes threw a rock that hit the officer's arm and head.[178] Officer Proulx fired a warning shot, believing Reyes had a knife; Reyes was in fact unarmed.[179] After the officer caught Reyes and they fell to the ground, a five-minute struggle ensued in which children between the ages of eight and twelve came and began hitting Officer Proulx.[180] The officer had a handgun in his pocket and wore plain clothes.[181]

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169. *Id.* at 92.

170. *See, e.g.*, Elliott v. Leavitt, 99 F.3d 640, 642 (4th Cir. 1996) (focusing on the moment immediately before firing, where the decedent had his finger on the trigger of a hidden gun while handcuffed, seated in the police car with the seat belt fastened and the window up, and the officers stood nearby); Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991) (holding that *Graham* requires the fact finder to examine the officer's actions immediately prior to and at the moment she made the split-second judgment to shoot and should exclude evidence of the officer's actions leading up to the moment immediately before the shooting).

171. *See, e.g.*, Fraire v. City of Arlington, 957 F.2d 1268, 1274 (5th Cir. 1992) (analyzing the moment of fatal shooting when the decedent tried to hit an officer with his truck, focusing less on the plainclothes officer's failure to identify himself).

172. *See, e.g.*, Schulz v. Long, 44 F.3d 643, 648 (8th Cir. 1995) ("[T]he reasonableness inquiry extends only to those facts known to the officer at the precise moment the officers effectuate the seizure."); *cf.* Avery, *supra* note 66, at 282.

173. *See, e.g.*, Menuel v. City of Atlanta, 25 F.3d 990, 995 (11th Cir. 1994) (holding that officers did not seize the emotionally disturbed decedent when they entered her home, surrounded her, and confined her to a bedroom, because she still had sufficient freedom to respond, and that seizure occurred only when the officers killed her after she fired at them).

174. *See* Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992) ("[P]re-seizure conduct is not subject to Fourth Amendment scrutiny."). *But see* Abraham v. Raso, 183 F.3d 279, 291 (3d Cir. 1999) (expressing disagreement with courts that have held that the Fourth Amendment reasonableness analysis requires fact finders to exclude "any evidence of events preceding the actual 'seizure'").

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

176. *Id.* at 88.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

Officer Proulx saw Reyes's hand touch the gun and he fatally shot Reyes as a result.[182]

The plaintiff, Reyes's mother, argued that Officer Proulx created the situation where deadly force became likely to occur by violating several police procedures leading up to the shooting.[183] The plaintiff tried to frame the incident as one in which the officer unreasonably used deadly force to arrest Reyes or prevent Reyes from escaping.[184] However, the court considered a narrower time line in determining the totality of the circumstances and viewed the situation as one of self-defense where the "'immediate threat' criterion controls" the analysis.[185]

When describing the circumstances, the court focused on the moment Officer Proulx fired the weapon.[186] Under that framework, the court considered that, at the moment Officer Proulx shot Reyes: (1) the officer had pinned Reyes down, (2) Reyes was actively resisting, (3) other children were hitting the officer, and (4) the officer believed Reyes's hand had touched the officer's gun.[187] The court found that these facts created the possibility Reyes might gain control of the gun.[188] Thus, the court found reasonable the officer's decision to shoot Reyes fatally because other reasonable officers in that position would have done the same.[189]

The court agreed with the Seventh Circuit that evidence of officers' preseizure conduct creating the need to use deadly force is irrelevant to the reasonableness analysis.[190] Rather than including whether the officer created the situation as another factor to consider, the court asserted "[t]he reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force."[191] Yet, the court did not discuss the totality of the circumstances standard.[192]

b. Arguments for the Second Circuit's Framework: Hindsight, Overdeterrence, and Irrelevant Police Conduct

Professor Lee has emphasized the importance of recognizing that officers risk their lives to protect the public and sometimes must decide on a course of action quickly in fast-changing situations with only the information available to them at the time, which could ultimately turn out to be wrong.[193] The Second Circuit's narrow approach accounts for the split-second

182. *Id.*
183. *Id.*
184. *Id.* at 91.
185. *Id.* (quoting Graham v. Connor, 490 U.S. 386, 396 (1988)).
186. *Id.*
187. *Id.* at 91–92.
188. *Id.* at 92.
189. *Id.*
190. *Id.*; *see infra* Part II.A.3.
191. *Id.*
192. *See* Avery, *supra* note 66, at 280.
193. Lee, *supra* note 159, at 690.

decisions officers must often make in the line of duty.[194] The narrow view also heeds *Graham*'s notion that courts should proceed with caution and not second-guess police actions with the luxury of twenty-twenty hindsight.[195]

As a public policy concern, Professor Lawrence Rosenthal has argued that including officers' preseizure conduct in the reasonableness analysis of their use of force would make it easier to impose liability on officers, which could lead to "over-deterrence."[196] Officers may increasingly hesitate to enforce laws out of fear of liability, which could endanger civilians' and officers' lives by encouraging offenders to commit more crimes.[197] Professor John Jeffries has further explained that, in response to the threat of legal claims, officers might make choices that seek to minimize the costs of their actions, such as choosing inaction.[198]

The narrow view also protects officers who are simply negligent, which comports with the Fifth Circuit's assertion in *Fraire v. City of Arlington*[199] that an officer's creation of the circumstances giving rise to force, like in *Salim*, where the officer did not follow police procedure,[200] is negligence at most but not a constitutional violation under § 1983.[201]

Another argument for the narrow view is that it may be more in line with what the Supreme Court considers a seizure under *California v. Hodari D.*,[202] in which the Supreme Court defined what constitutes a seizure under the Fourth Amendment. Because seizure does not occur until an officer uses physical force or shows authority to which a person submits, an officer's actions before using force may not be part of the actual seizure.[203] An officer's actions before the actual moment of seizure, such as when an officer uses lethal force or nondeadly force like a choke hold, would be ignored under the narrow view.[204] Thus, even when plaintiffs argue that police actions before the shooting created the eventual need to shoot and that police could have acted in a way that would have required less force, courts following the narrow view disregard this evidence.[205]

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

195. *Id.*

196. Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. LAW. 675, 717–19 (2016).

197. *Id.*

198. *See* John C. Jeffries Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 267 (2000).

199. 957 F.2d 1268 (5th Cir. 1992).

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

201. *Fraire*, 957 F.2d at 1276.

202. 499 U.S. 621 (1991).

203. *Id.* at 625–26; *see also* Lacks, *supra* note 22, at 425–26.

204. *See* Kimber, *supra* note 157, at 666.

205. *Cf.* Abraham v. Raso, 183 F.3d 279, 291–92 (3d Cir. 1999) (stating the need to examine preceding events to assess the reasonableness of the shooting). The Third Circuit highlighted the difficulty in adhering to the exact moment of seizure by asking: "Do you include what Raso saw when she squeezed the trigger? Under at least some interpretations of *Hodari,* Abraham evidently was not seized until after the bullet left the barrel and actually struck him." *Id.* at 291.

3. The Seventh Circuit's Segmented Approach

In *Plakas v. Drinski*,[206] the Seventh Circuit divided the circumstances surrounding the use of force into segments and examined the reasonableness of police conduct in each segment individually.[207] The court provided a somewhat vague rule about how to "carve up the incident" but explained that officers' actions at an earlier time would not necessarily make their actions in later stages unreasonable.[208] The Sixth Circuit generally supports this analysis.[209]

a. A Segmented View of Totality of the Circumstances: Individual Stages of Reasonableness

The Seventh Circuit created this segmentation framework in *Plakas*, in which it held the defendant, Deputy Jeffrey Drinski, reasonably fatally shot the decedent Konstantino Plakas in light of the circumstances as a whole.[210] Police first encountered Plakas as he walked along the road after his car had crashed into a ditch.[211] Police smelled alcohol on his breath and drove him back to the scene, and he agreed to go to the sheriff's department to submit to a test for intoxication.[212] After one officer frisked and handcuffed him, Plakas said the handcuffs hurt the burn scars on his chest.[213] Plakas then entered the police car after the officer explained that the officer must follow department policy.[214]

While driving to the sheriff's department, the officer hit the brakes when he heard the rear door open and saw Plakas fleeing.[215] Police followed Plakas to his fiancée's home, where he claimed the officer hurt him.[216] Plakas then grabbed a poker and struck the officer on the wrist.[217] Deputy Drinski, arriving later, saw Plakas leave the house and followed him with his gun drawn.[218] Deputy Drinski and two other officers pursued Plakas to a clearing in the woods.[219] Still holding the poker, Plakas said his burn scars

206. 19 F.3d 1143 (7th Cir. 1994).
207. *Id.* at 1150.
208. *Id.*
209. *See, e.g.*, Greathouse v. Couch, 433 F. App'x 370, 372–73 (6th Cir. 2011) ("We apply a 'segmented approach' to excessive-force claims, in which we 'carve up' the events surrounding the challenged police action and evaluate the reasonableness of the force by looking only at the moments immediately preceding the officer's use of force."); Claybrook v. Birchwell, 274 F.3d 1098, 1103–04 (6th Cir. 2001) (explaining that the court followed other circuits in analyzing excessive force claims by dividing the relevant circumstances into "temporal segments"); *see also* Avery, *supra* note 66, at 285.
210. *Plakas*, 19 F.3d at 1150.
211. *Id.* at 1144.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 1144–45.
216. *Id.* at 1145.
217. *Id.*
218. *Id.*
219. *Id.*

hurt and allegedly stated, "Either you're going to die here or I'm going to die here."[220] Plakas then ran toward Deputy Drinski and Deputy Drinski shot Plakas in the chest.[221] Deputy Drinski believed a tree prevented him from retreating as Plakas ran toward him.[222]

As in *Abraham*, Deputy Drinski argued and the court emphasized that this excessive force case involved force used for self-defense rather than to prevent escape.[223] The court held that Deputy Drinski acted reasonably when he shot Plakas.[224] It analyzed the circumstances by dividing the incident into five stages to determine the reasonableness of police action at each stage.[225] First, the officers could have reasonably arrested Plakas for drunk driving after meeting Plakas on the road where he exhibited signs of intoxication.[226] Second, the officers reasonably pursued a person fleeing arrest.[227] Third, the officers reasonably drew their firearms and aimed them at Plakas because he held a poker and injured one officer's wrist.[228] Fourth, it was reasonable for the officers to pursue Plakas to the forest clearing after he committed the violent offense against the officer.[229] Fifth, Deputy Drinski tried to convince Plakas to drop the poker and surrender.[230] Analyzing these segments, the court concluded that Deputy Drinski reasonably fired his weapon when Plakas charged at him with the poker.[231] The court held that unreasonable police conduct at an earlier segment would not affect the reasonableness of later conduct because the court considers each segment individually.[232] If conduct at four of the five stages was reasonable, unreasonable conduct at one stage would not render conduct at all stages unreasonable.[233]

Yet, like *Salim*, *Plakas* did not discuss the totality of the circumstances standard.[234] The Seventh Circuit found preseizure conduct irrelevant to the reasonableness analysis, but its application of this rule has been less definitive.[235] The Seventh Circuit discussed previous temporal stages depicting Plakas's behavior as relevant to the moment Deputy Drinski chose to shoot.[236] The court highlighted not only Deputy Drinski's attempt to talk

220. *Id.* at 1146.
221. *Id.*
222. *Id.*
223. *Id.*; *see* Abraham v. Raso, 183 F.3d 279, 293 (3d Cir. 1999) (noting that Officer Raso argued she acted out of self-defense when she shot Abraham because she believed Abraham was trying to hit her with his car).
224. *Plakas*, 19 F.3d at 1150.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *See id.* ("We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct.").
234. *See* Avery, *supra* note 66, at 279–80, 284.
235. *See id.* at 284–85, 287.
236. *Plakas*, 19 F.3d at 1150.

with Plakas but also other officers' conduct, from the first stage to the last.[237] Consequently, the court did not completely disregard all the actions leading up to the seizure.[238]

The court cited *Tom v. Voida*[239] as a "classic example" of the application of the segmented approach.[240] An officer stopped to help Tom who had fallen from a bicycle; Tom fled, and the officer pursued.[241] Tom pushed the officer's head into the concrete and ran.[242] The officer warned Tom three times, "[p]lease. Don't make me shoot you," before eventually shooting when Tom lunged.[243] The court did not restrict its analysis to the moment the officer drew her weapon and shot Tom when Tom lunged.[244] The court included Tom's and the officer's previous actions, from the moment the officer saw Tom fall on the street and tried to help, through the chase and Tom's violent behavior, to the moment seizure occurred when the officer shot Tom.[245]

b. Arguments for the Seventh Circuit's Framework: Split-Second Judgments and the Legally Relevant Time Frame

One argument for the segmented approach posits that, like the Second Circuit's narrow approach, the Seventh Circuit's method strictly follows *Graham*'s hesitation regarding the dangers and uncertainties officers face in civilian encounters and limits courts' ability to second-guess officers' split-second decisions.[246] The Seventh Circuit cautioned against second-guessing police because reviewing actions beyond the exact moment officers use force may always reveal different decisions they could have made that would have led to different outcomes.[247]

In *Plakas*, the court explained that defining the legally relevant time frame of events, which may be quite short, is vital in excessive force cases.[248] The court described split-second decision-making as the "briefest reflection" officers make before deciding to shoot someone fatally.[249] The court noted that officers who perceive danger to their own lives would not think about nonlethal alternatives in that moment, even though they have alternatives; for

237. *Id.* at 1147–49.
238. *See id.* at 1150; *see also* Avery, *supra* note 66, at 283–84.
239. 963 F.2d 952 (7th Cir. 1992).
240. *Plakas*, 19 F.3d at 1150.
241. *Tom*, 963 F.2d at 954–55.
242. *Id.* at 955.
243. *Id.*
244. *Id.* at 960–62.
245. *Id.*
246. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989); *see also* Jack Zouhary, *A Jedi Approach to Excessive Force Claims: May the Reasonable Force Be with You*, 50 U. TOL. L. REV. 1, 10–11 (2018).
247. *See* Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994). *But see* McClellan, *supra* note 164, at 31–32 (arguing that considering officers' causally relevant actions that led to the use of additional force may prevent overly aggressive tactics in civilian encounters).
248. *Plakas*, 19 F.3d at 1150.
249. *Id.* at 1149.

instance, Deputy Drinski could have retreated or used a colleague's tear gas.[250] The court held that the Fourth Amendment does not require police to use the least deadly, or even less deadly, alternatives as long as their particular use of force is reasonable under the totality of the circumstances.[251]

One scholar recognized that a "strength of the segmented approach" is that it provides flexibility to adjust the reasonableness analysis to complex and changing situations.[252] However, this scholar also noted that this flexibility can lead to inconsistent results and does not sufficiently account for the relationship between a series of events that has resulted in the use of force.[253]

B. Canadian Law Comparison: De-escalation Measures, Preseizure Conduct, and the "Reasonable Grounds" Standard

This part analyzes Canadian excessive force cases in light of the U.S. circuit courts' broad, narrow, and segmented approaches. In addition to its geographic proximity, other factors render Canadian jurisprudence a useful point of comparison. Canada's Charter of Rights and Freedoms guarantees rights akin to the Fourth Amendment guarantee against unreasonable searches and seizures.[254] Canadian law also authorizes police to employ lethal force only when they reasonably believe suspects pose an imminent threat of serious injury or death to officers or others.[255]

Further, the Canadian government does not generally have a systematic method to document encounters between police and the public where force is used,[256] just as the United States does not have an official national database to record police-involved deaths.[257] The Canadian government tracks fatal police shootings if the officer is criminally charged.[258] However, in the province of Ontario, as of January 1, 2020, the Anti-Racism Act[259] requires the Ontario Ministry of the Solicitor General to collect data on the race of individuals involved in use-of-force incidents to identify and monitor

250. *Id.*
251. *Id.*
252. *See* McClellan, *supra* note 164, at 14–15.
253. *See id.* at 15–16 ("[A] test that focuses on dividing pre-seizure evidence based on temporal limitations is not suited to analyze a dynamic interaction between an officer and a civilian.").
254. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).
255. *See* Canada Criminal Code, R.S.C. 1985, c C-46, § 25(4).
256. *See* Inayat Singh, *2020 Already a Particularly Deadly Year for People Killed in Police Encounters, CBC Research Shows*, CBC NEWS (July 23, 2020), https://newsinteractives.cbc.ca/fatalpoliceencounters/ [https://perma.cc/DTW4-AV5J].
257. *See* Frazee, *supra* note 60.
258. Michael James, *Video in Toronto Killings Shows Divide Between U.S. and Canada Deadly Force*, USA TODAY (Apr. 26, 2018, 4:16 PM), https://www.usatoday.com/story/news/2018/04/26/video-toronto-killings-shows-divide-between-u-s-and-canada-deadly-force/551798002/ [https://perma.cc/C4SN-MN65] (highlighting that a University of Toronto criminology student lamented the lack of a centralized database for police violence).
259. S.O. 2017, c 15 (Can.).

potential racial bias in policing.[260] When officers use a firearm or other weapon, Ontario police must complete a "Use of Force Report."[261]

In Canada, much like in the United States, the effects of police use of force are felt disproportionately by race and by gender.[262] Black and Indigenous Canadians are more likely to be killed by police than non-Black or non-Indigenous Canadians.[263] Black individuals comprised 2.92 percent of the Canadian population over the past twenty years but were 8.63 percent of civilian deaths caused by police.[264] Indigenous persons comprised only 4.21 percent of the Canadian population but were 16 percent of deaths caused by police.[265] In addition, a Statistics Canada study found that in 2012, one in five people who had a police encounter had a mental disability.[266]

1. Police Use of Force in the United States and Canada

Despite the similarities, stark contrasts exist between police use of force in the United States and Canada. There are generally far fewer civilian deaths caused by police in Canada than in the United States.[267] The first comprehensive analysis of fatal encounters with Canadian police, using data from ten major police forces, found that 461 fatal police encounters occurred from 2000 to 2017.[268]

This number is much lower than the 999 fatal police encounters in the United States in 2019,[269] which may be partly due to the nations' different population sizes.[270] As another striking example, in 2017, Winnipeg, Canada, saw only five police shootings of civilians, two of which resulted in deaths.[271] Canadian police training may partly explain the fewer deaths

260. *Id*.
261. *Id.*
262. Singh, *supra* note 256.
263. *Id.*
264. *Id.*
265. *Id.*
266. JILLIAN BOYCE ET AL., CANADIAN CTR. FOR JUST. STAT., MENTAL HEALTH AND CONTACT WITH POLICE IN CANADA, 2012, at 14 (2015), https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2015001/article/14176-eng.pdf?st=jwlTwewj [https://perma.cc/LE7P-G2H8].
267. *See* Lartey, *supra* note 11 (stating that Canadian police fatally shoot an average of twenty-five people per year, whereas in 2015, police in California alone, a state with a 10 percent larger population than Canada, fatally shot nearly seventy-five people in just five months).
268. *See* Jacques Marcoux & Katie Nicholson, *Deadly Force: Fatal Encounters with Police in Canada: 2000–2017*, CBC NEWS (2018), https://newsinteractives.cbc.ca/longform-custom/deadly-force [https://perma.cc/Q3QF-KCUA].
269. Tate et al., *supra* note 13.
270. In 2015, nearly 285 million more people lived in the United States than in Canada. *See International Programs: Demographic Overview—Custom Region—United States*, U.S. CENSUS BUREAU, https://www.census.gov/data-tools/demo/idb/region.php?T=13&RT=0&A=both&Y=2015&C=US&R= [https://perma.cc/M22K-L25Y] (last visited Nov. 3, 2020); *Population Estimates on July 1st, by Age and Sex*, STATS. CAN., https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000501 [https://perma.cc/T4DU-S6KR].
271. Holly Caruk, *4 Police Shootings in 2019 'A Lot': Watchdog*, CBC NEWS (Mar. 4, 2019), https://www.cbc.ca/news/canada/manitoba/police-shooting-toll-city-cops-union-1.5042477 [https://perma.cc/3E48-TT58].

because it focuses on de-escalation, rather than confrontation.[272] Toronto Police Service data show that of 30,000 encounters with suspects in 2017, Toronto police used force in only around 0.5 percent.[273]

CBC News data suggests that Canadian police fatally shoot an average of approximately nineteen civilians per year.[274] Of the 461 civilians killed by police from 2000 to 2017, approximately 116 were unarmed and nearly two-thirds were killed when police shot them.[275] One law enforcement scholar at Canada's Simon Fraser University has stated that people have a higher chance of surviving encounters with Canadian police than with U.S. police.[276]

Another important difference is the greater availability of firearms in the United States.[277] According to the Small Arms Survey, the United States had over 393 million civilian-held guns in 2017 (about 46 percent of the worldwide total) but Canada had only about thirteen million.[278] Canada also has a far lower gun crime rate.[279] American police may be more likely to employ greater degrees of force because people they encounter are more likely to have guns.[280]

2. The Canadian Charter and Criminal Code

In 1982, the United Kingdom enacted the Canada Act of 1982, which incorporated the Constitution Act of 1982 and ended the U.K. Parliament's legislative authority over Canada.[281] Part I of the Constitution Act of 1982 set out the Canadian Charter of Rights and Freedoms ("the Charter"), constitutionalizing fundamental rights and freedoms for any person in Canada in matters related to government action.[282]

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272. *See* James, *supra* note 258.
273. *See id.*
274. Marcoux & Nicholson, *supra* note 268.
275. *Id.*
276. James, *supra* note 258.
277. *See id.*
278. AARON KARP, SMALL ARMS SURV., ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS 4 (2018), http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf [https://perma.cc/G44V-VC6U].
279. *See* Anna Alvazzi del Frate, *A Matter of Survival: Non-lethal Firearm Violence*, *in* SMALL ARMS SURV., SMALL ARMS SURVEY 2012, at 79, 93 (2012), http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2012/eng/Small-Arms-Survey-2012-Chapter-03-EN.pdf [https://perma.cc/975T-MYF4].
280. *See* David Hemenway et al., *Variations in Fatal Police Shootings Across US States: The Role of Firearm Availability*, 96 J. URB. HEALTH 63, 71 (2019) (finding a correlation between household gun ownership and killings by police).
281. ADAM DODEK, THE CANADIAN CONSTITUTION 36–37 (Jenny McWha ed., 2d ed. 2016). The Canada Act of 1982 distributed legislative authority among the federal government and Canada's ten provinces—Alberta British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Québec, and Saskatchewan. Canada's three territories, the Northwest Territories, Nunavut, and Yukon, fall within its federal legislative authority. *Id.* at 39.
282. *See id.* at 37; *see also Guide to the Canadian Charter of Rights and Freedoms*, GOV'T OF CAN. (June 8, 2020), https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html [https://perma.cc/9JEC-D78T].

Section 7 of the Charter guarantees "life, liberty and security of person," and Section 8 provides the "right to be secure against unreasonable search or seizure."[283] Section 24(1) delineates the right to bring suit when "rights or freedoms, as guaranteed by this Charter, have been infringed or denied."[284]

In Canadian law, "seizure" is defined narrowly.[285] Under section 8, seizure is the "taking of a thing from a person by a public authority without that person's consent."[286] Courts employ a totality of the circumstances test to determine whether seizure of such property is reasonable.[287]

Section 7 protections of liberty often refer to guarding persons in a physical sense in incidents of physical restraint, such as imprisonment,[288] or state actions affecting one's ability to move freely.[289] The purpose of section 7 is to conform government activities interfering with "life, liberty and security" to principles of "justice and fair process."[290] Courts examine section 7 in two steps: (1) whether a government actor deprived someone of life, liberty, or security of the person; and (2) whether the deprivation conformed to fundamental principles of justice.[291]

Plaintiffs must show a "sufficient causal connection" between the alleged government action and the deprivation of life, liberty, or security.[292] Plaintiffs satisfy this standard by establishing a reasonable inference by balancing probabilities.[293] Courts focus on the right to life where a defendant's action directly or indirectly caused death or increased the risk of death.[294]

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283. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). One difference between the Charter and the U.S. Bill of Rights is that section 1 of the Charter explicitly directs courts to balance the rights guaranteed by the Charter against the government's right to reasonably limit those rights. *Id.* ("[The] Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

284. *Id.* § 24(1).

285. *See* SUSANNE BOUCHER & KENNETH LANDA, UNDERSTANDING SECTION 8: SEARCH, SEIZURE, AND THE CANADIAN CONSTITUTION 11 (2005).

286. R. v. Dyment, [1988] 2 S.C.R. 417, 431 (Can.).

287. R. v. Cole, 2012 SCC 53, para. 39, [2012] 3 S.C.R. 34, 47 (Can.). The reasonableness grounds requirement for excessive force claims is found in section 25 of Canada's Criminal Code. Canada Criminal Code, R.S.C. 1985, c C-46, § 25.1.

288. R. v. Vaillancourt, [1987] 2 S.C.R. 636, 652 (Can.).

289. R. v. Heywood, [1994] 3 S.C.R. 761, 789 (Can.). This concept is similar to *Hodari D.*'s definition of "seizure," where officers must show authority that restricts a person's ability to move freely. *See* California v. Hodari D., 499 U.S. 621, 625–26 (1991).

290. *See* Charkaoui v. Canada, 2007 SCC 9, para. 19, [2007] 1 S.C.R. 350, 371 (Can.).

291. *See, e.g.*, R. v. White, [1999] 2 S.C.R. 417, 436 (Can.); R. v. S. (R.J.), [1995] 1 S.C.R. 451, 479 (Can.).

292. *See* Canada (Att'y Gen.) v. Bedford, 2013 SCC 72, para. 76, [2013] 3 S.C.R. 1101, 1138–39 (Can.).

293. *Id.*

294. *See* Chaoulli v. Quebec (Att'y Gen.), 2005 SCC 35, paras. 112–24, [2005] 1 S.C.R 791, 846–850 (Can.); *see also* Carter v. Canada (Att'y Gen.), 2015 SCC 5, para. 62, [2015] 1 S.C.R 331, 367 (Can.).

Unlike in the United States, in Canada, criminal law falls exclusively within the federal jurisdiction.[295] Under section 25(1) of Canada's Criminal Code, law enforcement, including private persons and peace officers, may use "as much [legally authorized] force as is necessary."[296] Section 25 shields officers from criminal or civil liability only if the law sufficiently justified their uses of force.[297] Under the "reasonable grounds" standard, officers have legal authorization to exercise force if they reasonably believe that using force likely to cause death or serious bodily harm is necessary to protect officers or others from death or serious harm.[298]

In addition to requiring reasonable grounds for officers to employ necessary force, the code lists certain considerations for analyzing whether the use of force was justified.[299] The Canada Criminal Code factors include: whether police arrested the suspect with or without a warrant, the suspect's alleged offense, whether the suspect fled to avoid arrest, whether such flight could reasonably be prevented by less violent means (unlike U.S. Supreme Court precedent),[300] and whether officers reasonably believed the degree of force was necessary to protect officers and others from imminent or future death or serious bodily harm.[301]

Finally, section 26 of the code explicitly states that all law enforcement officers who are authorized to use force are "criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess."[302] Thus, permissible police interference with individual liberty, including exerting nondeadly or deadly force against a person, must be no more than what is reasonably necessary to prevent death or serious harm to officers or others.[303]

The next section highlights elements in Canadian use-of-force cases as they align with or differ from the Second, Third, and Seventh Circuits.

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295. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 91(27) (U.K.).

296. Canada Criminal Code, R.S.C. 1985, c C-46, § 25.1.

297. *See, e.g.*, Sharpe v. London Police Serv. Bd., [2010] O.J. No. 4720 (Can. Ont. Super. Ct. J.) (holding that sections 25 and 26 authorize police to use as much force as reasonably necessary to prevent people from interfering in lawful arrests); *see also* Eccles v. Bourque, [1975] 2 S.C.R. 739, 742 (Can.) (holding that plainclothes but armed police who trespassed to make an arrest acted reasonably and were justified on common-law principles). *But see* R. v. Asante-Mensah, 2003 SCC 38, para. 4, [2003] 2 S.C.R. 3, 9 (Can.) (holding that determining reasonableness of force in terms of trespass to property to accomplish an arrest requires the court "to focus on what is reasonable in all the circumstances").

298. Canada Criminal Code, R.S.C. 1985, c C-46, § 25.

299. *Id.*

300. *See* Illinois v. Lafayette, 462 U.S. 640, 647 (1983); United States v. Martinez-Fuerte, 428 U.S. 543, 556–57 (1976).

301. Canada Criminal Code, R.S.C. 1985, c C-46, § 25.

302. *Id.* § 26. Under justification provisions, specially designated officers are immune from unlawful acts while enforcing federal law or during investigations. Officers must receive written authorization unless the unlawful act was necessary to preserve someone's life, avoid compromising covert operations, or prevent imminent loss of evidence for indictable offences. *Id.* § 25.

303. *See* R. v. Asante-Mensah, 2003 SCC 38, para. 58, [2003] 2 S.C.R. 3, 31 (Can.).

3. Circumstances Canadian Courts Consider

In Canada, a holistic view of the context is relevant to determining the reasonableness of an officer's actions in excessive force claims,[304] similar to the Third Circuit's Fourth Amendment standard.[305] To decide the reasonableness of police use of force in an arrest, in *R. v. Nasogaluak*,[306] the Supreme Court of Canada looked not only at the immediate moment officers exerted force but also at an earlier point in time when police received a tip about an intoxicated driver.[307] In a case where a court analyzed two instances of police forcibly taking an emotionally disturbed man to a hospital, the Supreme Court of Newfoundland and Labrador even examined a phone call a bystander had had with an officer long before officers arrived on the scene.[308] When analyzing the reasonableness of police conduct in the excessive force claim, the court focused on events preceding the moment at issue, including the police conduct that led to the use of force.[309] In another case, to determine the reasonableness of an officer firing a projectile to suppress a riot, the court found the officer's training, experience, and orders of the day relevant to the reasonable grounds analysis and that a judge should be a "doppelganger" to officers, accompanying them throughout relevant events.[310]

In Canada, whether police attempt to de-escalate the situation also plays a role in evaluating excessive force claims, and this evaluation involves reviewing officers' preseizure conduct.[311] In 2013, after the fatal shooting of an eighteen-year-old Toronto civilian armed with a switchblade knife, the Ontario ombudsman[312] began investigating Ontario police de-escalation training for situations where force might be used.[313] In 2014, the Toronto

304. *See* Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 168 (Can.) ("[W]here the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one.").

305. *See supra* Part II.A.2.

306. 2010 SCC 6, [2010] 1 S.C.R. 206 (Can.).

307. *Id.* para. 10.

308. *See generally* Meadus v. Royal Nfld. Constabulary Pub. Complaints Comm'n, 335 NFLD & P.E.I.R. 46 (Can. Nfld. Sup. Ct. Trial Div. (Gen.)).

309. *Id.*

310. *See* Berntt v. Vancouver (City), 1999 CarswellBC 1197, paras. 24–25 (Can. B.C. C.A.) (WL).

311. *See Nasogaluak*, 2010 SCC 6, para. 10; *see also* Kevin Cyr, *Police Use of Force: Assessing Necessity and Proportionality*, 53 ALTA. L. REV. 663, 666–67 (2016) (asserting that whether "police attempt to de-escalate situations before using force is either an increasing expectation by the public and the courts, or one that is becoming more clearly defined" and that "[t]his increased focus on de-escalation has resulted in tangible new requirements placed on the police").

312. *See Ombudsman*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/ombudsman [https://perma.cc/3VZG-ZG49] (last visited Nov. 3, 2020) (defining ombudsman as "a government official . . . appointed to receive and investigate complaints made by individuals against abuses or capricious acts of public officials").

313. *See generally* PAUL DUBÉ, OMBUDSMAN OF ONT. A MATTER OF LIFE AND DEATH (2016), https://www.ombudsman.on.ca/Files/sitemedia/Documents/OntarioOmbudsmanDeescalationEN_1.pdf [https://perma.cc/S4KS-J2DC].

Police Service asked Justice Frank Iacobucci, a former justice of the Supreme Court of Canada, to review its lethal force training and policies, especially with mentally disabled individuals.[314] Justice Iacobucci's findings focused on de-escalation tactics.[315] The report emphasized that force must be reasonably necessary in the circumstances and "should always be a last resort" because "[r]esolving conflicts through communication rather than force is the goal."[316]

As a result of this increased focus on de-escalation, Canadian policing policies have changed.[317] For example, British Columbia implemented a policy under which officers must first try to de-escalate a situation before using conducted electrical weapon tasers.[318] One scholar, a former member of the Royal Canadian Mounted Police for fourteen years, reasoned that other exercises of force, not only tasers, should create an obligation to de-escalate before using force.[319] In addition, the Edmonton Police Service and University of Alberta researchers explored ways to improve police encounters with mentally disabled individuals and helped train officers in communication and de-escalation techniques.[320] Within six months, deadly and nondeadly force used toward people with mental disabilities decreased by over 40 percent, although other initiatives may have contributed to the decrease as well.[321]

Canadian courts recognize that police endure certain intense and quickly changing situations, just as *Salim* emphasized based on *Graham* and *Garner*.[322] Like *Graham*, *Berntt v. Vancouver (City)*[323] warned against judges analyzing officer conduct through twenty-twenty hindsight.[324] The Supreme Court of Canada acknowledged that "the police are often required to make split-second decisions in fluid and potentially dangerous

314. FRANK IACOBUCCI, TORONTO POLICE SERV., POLICE ENCOUNTERS WITH PEOPLE IN CRISIS 14 (2014), https://www.torontopolice.on.ca/publications/files/reports/police_encounters_with_people_in_crisis_2014.pdf [https://perma.cc/3NRC-L5MB].

315. *Id.* at 17, 153.

316. *Id.* at 194.

317. *See, e.g.*, Olivia Bowden, *Tory Tables 'Sweeping' Reforms to Toronto Police, Including Budget Reallocation*, CBC (Aug. 11, 2020), https://www.cbc.ca/news/canada/toronto/tory-police-reform-1.5681916 [https://perma.cc/N4NM-ZK48].

318. *See Provincial Policing Standards*, B.C. 2 (Feb. 1, 2015), https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/1-3-1-threshold-and-circumstances-of-use.pdf [https://perma.cc/4YWU-CFME].

319. *See* Cyr, *supra* note 311, at 667.

320. *Id.* at 667–68; Yasmeen I. Krameddine & Peter H. Silverstone, *How to Improve Interactions Between Police and the Mentally Ill*, FRONTIERS PSYCHIATRY, Jan. 2015, at 1, 1.

321. Krameddine & Silverstone, *supra* note 320, at 2 (explaining that other initiatives included training to increase empathy and verbal and nonverbal communication).

322. *See, e.g.*, R. v. Nasogaluak, 2010 SCC 6, para. 35, [2010] 1 S.C.R. 206, 228 (Can.) (noting policing is dangerous and mandates quick reactions in emergencies); R. v. Bottrell, 1981 CanLII 339, para. 14 (Can. B.C. C.A.) (cautioning against using hindsight).

323. 1997 CarswellBC 320 (Can. B.C. Sup. Ct.) (WL), *rev'd* 1999 CarswellBC 1197 (Can. B.C. C.A.) (WL).

324. *See id.* para. 108 ("It is one thing to have the time in a trial over several days to reconstruct and examine the events . . . . It is another to be a policeman in the middle of [an emergency].").

situations."[325] While requiring police to use the least force necessary to arrest or otherwise seize suspects may place police and others in unnecessary danger,[326] courts also recognize that inappropriate police action where an officer unreasonably deviates from established training is an important aspect to consider in assessing reasonableness.[327]

In *Puricelli v. Toronto Police Services Board*,[328] the Ontario Superior Court of Justice found that police should "explain why an obvious alternative but less dangerous course of action was not taken."[329] The inclusion of officer conduct that may have provoked later force in the analysis of the circumstances suggests that police should try to avoid creating exigent circumstances by initially utilizing less forceful alternatives.[330]

III. THE THIRD CIRCUIT'S CAUSALLY RELEVANT APPROACH IS TRUEST TO *GRAHAM*'S TOTALITY LANGUAGE

This part proposes that the best approach to assessing the totality of the circumstances in measuring the reasonableness of officer conduct in plaintiffs' § 1983 excessive force claims is the Third Circuit's broad approach, which includes both officers' and plaintiffs' causally relevant preseizure conduct. It further concludes that circuit courts should adopt Canada's emphasis on de-escalation so that officers' adherence to or deviation from de-escalation training will be a causally relevant factor that weighs heavily in the reasonableness analysis.

When courts consider the reasonableness of the use of deadly force, how explicitly should they consider opportunities for using nondeadly force to neutralize or avoid the alleged threat? Incorporating the Third Circuit's causal method, particularly, weighing de-escalation as a significant relevant factor, would allow the circuits to formalize this variable in a tangible way.

Part III.A compares the strengths and weaknesses of the three circuit approaches and discusses why the Third Circuit's approach best assesses the totality of the circumstances in measuring the reasonableness of officer conduct in excessive force claims. Part III.B examines the importance of including de-escalation training as a relevant causal factor and accompanying policy considerations.

325. *See* R. v. Aucoin, 2012 SCC 66, para. 40, [2012] 3 S.C.R. 408, 421 (Can.).

326. *See* Anderson v. Smith, 2000 CarswellBC 1651, para. 51 (Can. B.C. Sup. Ct.) (WL) ("There is no requirement to use the least amount of force because this may expose the officer to unnecessary danger to himself.").

327. *See generally* R. v. Power (2016), 476 Sask. R. 91 (Can. Sask. C.A.) (including in the reasonableness analysis whether the force used by a constable was in accordance with the training provided to police officers); *see also* Cyr, *supra* note 311, at 668.

328. [2014] O.J. No. 5638 (Can. Ont. Super. Ct. J. Div.).

329. *Id.* para. 40 (quoting Chartier v. Greaves, [2001] O.J. No. 634, para. 64 (Can. Ont. Super. Ct. J. Div.)).

330. *See* Cyr, *supra* note 311, at 668.

A. Preseizure Conduct: Vital to Assessing Reasonableness

As reflected in the Third Circuit's broad approach, understanding a suspect's and officer's preseizure actions may be critical to decide the reasonableness of the use of force. The Second Circuit's narrow approach does not fully encompass *Graham*'s notion of totality in assessing the situation where an officer employed deadly or nondeadly force to seize.[331] Limiting factors only to the precise moment of seizure separates facts from the rest of the story.[332] If the Second Circuit in *Salim* had considered that the five people surrounding the officer were children and that the officer wore plain clothes when chasing young Reyes and fired a shot before pinning Reyes to the ground, violating police protocol, the court might have found the shooting unreasonable under the circumstances as a whole.[333]

In another case, the Second Circuit disregarded that the suspect threatened to shoot police minutes before they seized him.[334] The police believed the suspect concealed something behind his back when they entered the premises.[335] Thus, applying the "exact moment of seizure" method would exclude context that may be important to determine the reasonableness of conduct at the moment police employed force.

In *Scott v. Harris*,[336] the Supreme Court questioned whether preseizure conduct that influences the need for force is irrelevant for the reasonableness analysis.[337] In *Scott*, the suspect created a need for increased force by leading police on a high-speed chase through a crowded town.[338] The Court found the deputy's use of force, pushing his vehicle's bumper into the suspect's car to end the dangerous chase, reasonable.[339] In its reasonableness analysis, the Court stated that the parties' "[c]ulpability is relevant."[340] While *Scott* does not overrule *Salim*, its ruling does suggest that because a suspect's preseizure conduct is relevant, this reasoning may similarly be extended to officers' preseizure conduct.[341]

Further, the causation method of analyzing particular circumstances, including preseizure actions, may be applied more evenly for both parties, without unduly favoring one over the other.[342] In contrast, the segmented

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331. *See* Avery, *supra* note 66, at 280–83.

332. *See* Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994) (noting that the defendant emphasized the plaintiff's resistance as important context for analyzing the officer's force).

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

334. O'Bert *ex rel.* Est. of O'Bert v. Vargo, 331 F.3d 29, 39–40 (2d Cir. 2003).

335. *Id.* at 34.

336. 550 U.S. 372 (2007).

337. *Id.* at 383–84.

338. *Id.* at 372.

339. *Id.* at 384.

340. *Id.* at 384 n.10.

341. *See* Fortunati v. Campagne, 681 F. Supp. 2d 528, 543 n.13 (D. Vt. 2009) (stating that, as the Court in *Scott* considered the suspect's culpable conduct creating the need for force, courts could also consider whether "police created the need for force" and that *Scott* at least questions the scope of *Salim*'s holding), *aff'd sub nom.*, Fortunati v. Vermont, 503 F. App'x 78 (2d Cir. 2012).

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

approach selectively considers certain preseizure conduct but disregards police provocation.[343] The Seventh Circuit looks more at the plaintiff's preseizure conduct than the defendant's, which may favor defendants and result in courts applying the segmented approach unevenly among the parties.[344] Some may argue that considering antecedent conduct allows for impermissible second-guessing of officers' discretion using hindsight. However, as proponents of the causation method emphasize, what officers did or did not do before employing force is relevant to the totality of the circumstances, and fact finders considering plaintiffs' preseizure conduct should consider officers' conduct as well.[345]

Ignoring police actions before nondeadly or deadly force in the totality of the circumstances context ignores the balance of interests *Garner* requires.[346] Not all police encounters are split-second decisions.[347] While police provocation of force through noncompliance with procedure may establish negligence and not a constitutional violation, *Garner* and *Graham* did not preclude arguably unreasonable preseizure conduct from being part of the totality of the circumstances.[348] Therefore, analyses like the Second Circuit's framework, which only examines the immediate moment officers shoot or use force, interpret totality of the circumstances too narrowly.[349]

Similarly, *Plakas* demonstrated one difficulty of applying its segmented method: separating Deputy Drinski's knowledge of Plakas and the situation in earlier stages from the final deadly stage.[350] It may be challenging to choose exactly at which moments to divide the time frame, which may create inconsistencies or even lead litigants to raise questions concerning arbitrariness.[351]

For example, *Deering v. Reich*[352] deviated from the *Plakas* approach by employing a more expansive time frame.[353] In *Deering*, at 12:45 a.m., three deputies went to arrest Reinhold Deering, an elderly person who had been formerly committed to a psychiatric hospital, for failing to appear in court for a misdemeanor property damage charge stemming from backing his vehicle into a parked motorcycle.[354] After police knocked, Deering fired a

343. *See* Zouhary, *supra* note 246, at 15–17.
344. *See id.*
345. *See id.*; *see also* Lee, *supra* note 159, at 686.
346. Tennessee v. Garner, 471 U.S. 1, 2 (1985).
347. *See* Zouhary, *supra* note 246, at 10.
348. *See Garner*, 471 U.S. at 8 ("[R]easonableness depends on not only when a seizure is made, but also how it is carried out."); *see also* Graham v. Connor, 490 U.S. 386, 396 (1989).
349. *See, e.g.*, Abraham v. Raso, 183 F.3d 279, 291 (3d Cir. 1999); *see also* Kimber, *supra* note 157, at 665.
350. *See* Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994).
351. *See Abraham*, 183 F.3d at 291–92 (stating that with the segmented framework, courts have no "principled way of explaining when 'pre-seizure' events start and, consequently, will not have any defensible justification for why conduct prior to that chosen moment should be excluded"); *see also* Zouhary, *supra* note 246, at 17.
352. 183 F.3d 645 (7th Cir. 1999).
353. *See id.* at 650.
354. *See id.* at 648.

shotgun at the officers.[355] After repeatedly ordering Deering to lower the weapon, an officer shot and killed Deering.[356] In analyzing the reasonableness of the officer's conduct, the court considered not just moments immediately before and during the seizure but also the crime, the warrant and its service, the officer's perception of danger, and what the officer knew about the suspect.[357] Despite the defendant's argument that the court should not consider preseizure conduct—such as Deering's mental state and age, the late time, and Deering's living on an isolated farm—the court found such information relevant.[358]

This different application of the segmented approach shows the challenge of deciding when relevant factors begin when deconstructing the time line.[359] Courts may find it difficult to draw temporal lines in situations that may span from one or two minutes to multiple hours.[360] This dissection can be arbitrary. In contrast, the Third Circuit recognizes all factors bearing on officers' uses of force and weighs the importance of each based on causation, rather than when the seizure occurred; by not having to cherry-pick which parts of the preforce time line are relevant, the Third Circuit's approach avoids the appearance of arbitrariness.[361]

In addition, the Seventh Circuit's approach does not consider when officers' actions contributed to the need for force.[362] The *Plakas* court held the Fourth Amendment does not prohibit "creating unreasonably dangerous circumstances" when arresting or otherwise seizing suspects.[363]

Further, the court recognized that all time frames begin with police deciding to assist, arrest, question, and so on.[364] The court reasoned, "In a sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause."[365] The court acknowledged that defendant-officers in excessive force claims are often the only living witnesses because they have killed the person most likely to contradict their views of the relevant facts.[366] Yet, the *Plakas* court found that officers at the scene were sufficient witnesses to corroborate the defendant's version of the circumstances, despite the plaintiff's arguments that a photograph suggested the clearing provided ample room for Deputy Drinski to move safely away

355. *See id.*
356. *See id.*
357. *See id.* at 652.
358. *See id.* at 650.
359. *See* Zouhary, *supra* note 246, at 17 (stating that the segmented approach presents a practical problem where courts have difficulty deciding which events to consider).
360. *See id.* at 23.
361. *See* McClellan, *supra* note 164, at 22–23 ("While courts that apply the segmented approach struggle to analyze the relationship between a series of events, principles of proximate causation provide workable rules for interpreting how to impose liability when a series of events interact to produce a result.").
362. *See* Zouhary, *supra* note 246, at 11.
363. Plakas v. Drinski, 19 F.3d 1143, 1149 (7th Cir. 1994) (quoting Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992)).
364. *Id.* at 1150.
365. *Id.*
366. *Id.* at 1147.

from Plakas's poker.[367] Thus, the segmented approach is too rigid because it excludes causal and contextual factors that may have impacted the seizure.

Plaintiffs in excessive force claims often do not argue unjustified police use of force at the moment seizure occurred but that police conduct—violating department policy or not using less violent alternatives—increased the need for force and, therefore, was unreasonable and excessive.[368] William Blackstone explained that reasonable deadly force constitutes an act of "unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence . . . . But the law must *require* it, otherwise it is not justifiable."[369] A standard most true to "unavoidable necessity," also emphasized in Canada's Criminal Code and case law,[370] must use officers' preseizure conduct as a key factor, especially in excessive force claims involving deadly force. In the causally relevant test analyzing reasonableness, courts should consider whether officers tried nonlethal alternatives.

In *Brower v. County of Inyo*,[371] the Supreme Court found that a roadblock the suspect fatally crashed into constituted a seizure and remanded the case for the lower court to determine whether police unreasonably constructed and designed that roadblock.[372] This holding supports the use of preseizure conduct when analyzing reasonableness.[373] In *St. Hilaire v. City of Laconia*,[374] the First Circuit interpreted *Brower* as holding that once courts find seizure occurred, they should examine officers' actions leading up to the seizure.[375] The Third Circuit agreed with this interpretation.[376] While *Brower* does not designate where to begin the time line and which preseizure actions are most significant,[377] the Third Circuit's causation test does.

The Third Circuit's method would also help resolve issues with discrepancies between parties' versions of events. How courts determine whose version to credit when conducting the reasonableness calculus is important. In excessive force cases, there is often only one side of the story available because the witness for the other side is dead.[378] In *Murrietta-Golding v. City of Fresno*,[379] Isiah Murrietta Golding's mother asserted that

367. *Id.*
368. *See* Kimber, *supra* note 157, at 653–54.
369. 2 BLACKSTONE, *supra* note 39, at *132.
370. *See* Canada Criminal Code, R.S.C. 1985, c C-46, § 25(4).
371. 489 U.S. 593 (1989).
372. *See id.* at 599–600.
373. *See* Kimber, *supra* note 157, at 653–54.
374. 71 F.3d 20 (1st Cir. 1995).
375. *Id.* at 26.
376. Abraham v. Raso, 183 F.3d 279, 292 (3d Cir. 1999) ("[I]f 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 pre-seizure planning and conduct.").
377. *See Brower*, 489 U.S. at 598–600.
378. *See* Plakas v. Drinski, 19 F.3d 1143, 1147 (7th Cir. 1994) ("[A] defendant knows that the only person likely to contradict him or her is beyond reach.").
379. No. 18-CV-0314, 2020 WL 6075757 (E.D. Cal. Oct. 15, 2020); *see also* Complaint for Damages, Injunctive and Declaratory Relief, and Demand for Jury Trial, *supra* note 2, at 2.

Isiah portrayed no violent behavior throughout the pursuit, and the officers had no reason to believe Isiah was armed.[380] According to Isiah's mother, the defendants stated they saw Isiah touch his waistband several times while running.[381] The Fresno County District Attorney's Office, Fresno's Office of Independent Review, and the Fresno Police Department's Internal Affairs Bureau determined that the officers acted within policy because they saw Isiah do so.[382] The plaintiff alleged that, being small, Isiah was simply trying to hold up his pants.[383] The causal approach with a de-escalation factor would mitigate differences in litigants' views by including preseizure choices and training.

B. Using Police Training and De-escalation to Evaluate Officers' Preseizure Conduct

In recent years, U.S. police departments have tightened their rules on using nondeadly and deadly force.[384] Some authorize deadly force only as a last resort.[385] Many departments prohibit officers from shooting at moving vehicles unless the vehicle is being used as a deadly weapon.[386] Chicago Police Department data show that changes in its use of force rules and training that emphasized de-escalation and nonlethal alternatives reduced officer-involved shootings from sixty-three in 2016 to forty-five in 2017.[387]

Many U.S. police departments have adopted more detailed use-of-force policies and training beyond the constitutional minimum.[388] More departments are adopting policies emphasizing de-escalation measures, and such policies in Canada effectively decreased civilian deaths by police.[389]

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380. Complaint for Damages, Injunctive and Declaratory Relief, and Demand for Jury Trial, *supra* note 2, at 7.

381. *See id.* at 8.

382. *See* Lam, *supra* note 1.

383. Complaint for Damages, Injunctive and Declaratory Relief, and Demand for Jury Trial, *supra* note 2, at 7.

384. *See* McClellan, *supra* note 164, at 30–31.

385. *See, e.g.*, *General Order G03-02: Use of Force*, CHI. POLICE DEP'T DIRECTIVES SYS. 3 (Feb. 29, 2020), http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-44306f3da7b28a19.pdf?hl=true [https://perma.cc/Z6Q5-W687]; *General Order 5.01: Use of Force*, S.F. POLICE DEP'T 11 (Dec. 21, 2016), https://www.sanfranciscopolice.org/sites/default/files/2018-11/DGO%205.01.pdf [https://perma.cc/6VEY-LQC9]; *General Order 906.00—Dallas Police Department Use of Deadly Force Policy*, DAL. POLICE DEP'T, https://www.dallaspolice.net/reports/Shared%20Documents/General-Order-906.pdf [https://perma.cc/U8GR-E92Q] (last visited Nov. 3, 2020).

386. *Seattle Police Department Manual: 8.100—De-Escalation*, SEATTLE.GOV (Sept. 15, 2019), http://www.seattle.gov/police-manual/title-8---use-of-force/8100---de-escalation [https://perma.cc/Z74X-XA79]; *see also Model Use of Force Policy*, CAMPAIGN ZERO, https://static1.squarespace.com/static/55ad38b1e4b0185f0285195f/t/5deffeb7e827c13873eaf07c/1576009400070/Campaign+Zero+Model+Use+of+Force+Policy.pdf [https://perma.cc/389D-RW6W] (last visited Nov. 3, 2020).

387. *See* James, *supra* note 258.

388. POLICE EXEC. RSCH. F., GUIDING PRINCIPLES ON USE OF FORCE 36 (2016), https://www.policeforum.org/assets/30%20guiding%20principles.pdf [https://perma.cc/SW7N-U3JH].

389. *See, e.g.*, *Policy 1115: Use of Force*, BALT. POLICE DEP'T 6 (Nov. 24, 2019), https://www.baltimorepolice.org/1115-use-force [https://perma.cc/8Z94-XQYJ] (identifying

De-escalation is a central issue in use-of-force policies.[390] One study found many departments have adopted detailed de-escalation tactics to minimize the need for force, some through Department of Justice (DOJ) 42 U.S.C. § 14141 consent decrees, which delineate effective policing tactics.[391] Consent decrees are court-ordered agreements between DOJ and law enforcement agencies after a DOJ investigation to correct long-standing patterns of misconduct within police departments.[392] Consequently, federal courts' standards for assessing reasonableness in excessive force claims should include a focus on de-escalation. If officers significantly deviated from department de-escalation procedures in their actions leading up to a seizure, those choices should weigh more heavily toward unreasonableness. This Note defines de-escalation as the same tactic defined by the 2017 National Consensus Policy on Use of Force, which defined de-escalation as acting or communicating "to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the force necessary."[393] The policy further stated that de-escalation may include the use of certain techniques, such as "command presence, advisements, warnings, verbal persuasion, and tactical repositioning."[394]

Many of the policies adopted by police departments have been advocated by groups such as Campaign Zero, which advocates more restrictive use-of-force policies to reduce injury or loss of life for both civilians and police.[395] Campaign Zero has studied different police departments to see which policies reduced the need for force.[396] The study found that police departments with

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de-escalation as a core principle and directing that "[m]embers shall, unless it is not possible to do so, avoid the Use of Force by using De-Escalation Techniques"); NATIONAL CONSENSUS POLICY ON USE OF FORCE 3 (2017), https://www.nccpsafety.org/assets/files/library/National_Consensus_Policy_on_Use_of_Force.pdf [https://perma.cc/CL5S-QK37] (advocating that officers "shall use de-escalation techniques and other alternatives . . . whenever possible and appropriate before resorting to force and to reduce the need for force").

390. *See* POLICE EXEC. RSCH. F., *supra* note 388, at 40; *see also* POLICE EXEC. RSCH. F., CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 14 (2013), https://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf [https://perma.cc/9TLA-B6D7].

391. *See* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 286–88 (2017).

392. *See id.* at 299–300. For more information regarding consent decrees resulting from 42 U.S.C. § 14141 and the U.S. attorney general's power under § 14141 to reform local law enforcement agencies engaged in misconduct or a pattern of unconstitutional behavior, see generally Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014).

393. *See* NATIONAL CONSENSUS POLICY ON USE OF FORCE, *supra* note 389, at 2. The 2017 National Consensus Policy on Use of Force recommended policing policies that were drafted by eleven of the most prominent law enforcement and labor organizations, such as the National Organization of Black Law Enforcement Executives and the International Association of Chiefs of Police. *Id.*

394. *Id.*

395. *See generally Model Use of Force Policy*, *supra* note 386.

396. *See* DERAY MCKESSON ET AL., CAMPAIGN ZERO, POLICE USE OF FORCE POLICY ANALYSIS 1 (2016), https://static1.squarespace.com/static/56996151cbced68b170389f4/t/

more restrictive policies killed fewer people and police were less likely to be assaulted or killed in the line of duty.[397] The most effective policies included requiring comprehensive reporting and requiring officers to exhaust all other alternatives before shooting, which decreased civilian deaths by 25 percent.[398] Requiring de-escalation reduced killings by 15 percent, and requiring a warning before shooting reduced deaths by 5 percent.[399] Yet, only thirty-four of the ninety-one police departments studied required de-escalation techniques when possible before using force and thirty-one called for officers to exhaust all other reasonable alternatives before utilizing nondeadly or deadly force.[400]

Campaign Zero proposed a model use-of-force policy that recommends training similar to Canada's and the Seattle Police Department's policy highlighting tactics to gain a suspect's submission through nonlethal methods.[401] The proposed procedures include: de-escalation, communication from safe positions, calming agitated subjects, calling officers with nonlethal tools, and avoiding physical conflict unless "immediately necessary" to prevent harm to officers and bystanders.[402]

In an article analyzing how to measure the totality of the circumstances of police seizures of mentally disabled individuals, Professor Michael Avery highlighted the importance of training in nonlethal tactics and concluded courts should follow the Third Circuit's approach to include officers' preseizure choices that influenced the necessity of resorting to such force.[403] Professor Avery recommended courts consider police training and emphasized that effective training minimizes split-second decision-making.[404] Similarly, the Court in *Garner* found it relevant to examine department policies throughout the nation to consider the constitutionality of using deadly force to stop fleeing felons.[405]

Recent state-law developments demonstrate the importance of a uniform circuit approach that includes preseizure conduct and de-escalation in the totality of the circumstances. Maryland House Bill 166, introduced in January of 2020, would expand the time frame of the relevant circumstances and allow fact finders to consider whether officers attempted to de-escalate

57e1b5cc2994ca4ac1d97700/1474409936835/Police+Use+of+Force+Report.pdf [https://perma.cc/YBP7-LKMH].

397. *See id.* at 9–10.

398. *See id.* at 8.

399. *See id.*

400. *See id.* at 4–6. An article assessing police department use-of-force policies in the seventy-five largest cities in the United States found that de-escalation appeared in 52 percent of policies and the use of de-escalation proactively limited excessive force. *See* Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1301–08 (2019).

401. *See Model Use of Force Policy*, *supra* note 386, at 2.

402. *Id.*

403. *See* Avery, *supra* note 66, at 267.

404. *See id.* at 266–67.

405. Tennessee v. Garner, 471 U.S. 1, 18–19 (1985).

the situation before using deadly force.[406] The bill adds three factors fact finders must consider as part of the totality of the circumstances: (1) whether the suspect possessed or appeared to possess a deadly weapon and refused to comply with officers' orders reasonably related to public safety, such as to drop the weapon; (2) whether officers used de-escalation measures, such as using nonlethal alternatives, before using deadly force; and (3) whether officers' preseizure conduct increased the risk of subsequent use of deadly force.[407]

Adding de-escalation to the totality of the circumstances expands the force of law to department policies that already integrate de-escalation training.[408] Including de-escalation as a factor in assessing reasonableness would encourage officers to de-escalate a situation before using force, while still recognizing that officers often make quick decisions in rapidly changing situations that may not always be correct.[409]

The effectiveness of more stringent policies adopted by U.S. police departments and Canadian police training with a focus on de-escalation indicate that applying the Third Circuit's framework, in which de-escalation constitutes a significant factor, would provide a consistent and more practicable method for evaluating the reasonableness of police conduct in light of the totality of the circumstances. The totality of the circumstances should include preseizure conduct and the availability of alternatives.

CONCLUSION

The Third Circuit's causal approach and emphasis on de-escalation provide tangible benefits. Through familiar causation analysis, courts may analyze relevant interactions between officers and individuals before and at the moment of seizure as part of the totality of the circumstances. A causation framework that considers both parties' relevant preseizure conduct, with an emphasis on de-escalation, provides an objective rule for courts to measure the reasonableness of officers' force.

This framework would avoid favoring one party over another and would decrease the disproportionate risk of the police's use of force on young people of color and people with mental disabilities. Adding whether officers employed de-escalation measures as a factor does not create an overly burdensome requirement, as illustrated by the Canadian courts' approach. Rather, it would guide judicial analysis in light of established policies and procedures adopted by police departments throughout the United States. Incorporating preseizure conduct and de-escalation truly evaluates the totality of the circumstances to advance both officers' and civilians' safety.

406. H.D. 166, 2020 Leg., 441st Sess. (Md. 2020).

407. *Id.*

408. *Act Concerning Criminal Procedure—Law Enforcement Procedures—Use of Force: Hearing on H.D. 166 Before the H. Judiciary Comm.*, 2020 Leg., 441st Sess. (Md. 2020) (statement of Cynthia Lee, Edward F. Howrey Professor of Law, George Washington University Law School).

409. *Id.*