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Excessive Force: A Feasible Proximate Cause Approach

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EXCESSIVE FORCE: A FEASIBLE PROXIMATE CAUSE APPROACH

"You shot me."
"I don't have a gun. STOP!"
"I can't breathe."
"Officers why do you have your guns out?"[1]

INTRODUCTION

These are the last words of four men whose deaths at the hands of police officers stirred the public and created concern about police use of excessive force and a failure of the justice system to vindicate these civil rights violations. Unfortunately, even in the face of such publicity, excessive force cases continue to surface while the results in the courtroom remain the same.[2] This raises concerns as to both preventing the use of excessive force and ensuring justice is adequately served when such claims arise. There is no question that the substance and enforcement of the law act together to deter unwanted societal behavior. So, why do the laws against excessive force fail to act as deterrents? Many of these concerns stem from the application of the "objective reasonableness" standard used to analyze these types of cases. Some courts use only the moments immediately preceding the use of force to determine if the officer's actions were reasonable, while other courts may choose to look at

1. Joel Thompson, *The Seven Last Words of the Unarmed*, MUSICSPOKE, https://musicspoke.com/downloads/seven-last-words-unarmed/ (quoting Oscar Grant, Michael Brown, Eric Garner, and Kenneth Chamberlain) [https://perma.cc/W38Q-3R2B].

2. "There are about 1,000 on-duty killings by police officers in the United States each year, according to the *Washington Post*. Since 2005, a total of 35 officers in the United States have been convicted of on-duty killings, said Bowling Green State University criminal justice professor Philip Stinson." Jon Collins & Riham Feshir, *The Trial of Ex-cop Mohamed Noor: What You Need To Know*, MPRNEWS (Mar. 30, 2019, 1:00 AM), https://www.mprnews.org/story/2019/03/30/the-trial-of-excop-mohamed-noor-in-shooting-justine-ruszczyk-what-you-need-to-know [https://perma.cc/9PWM-7WAB]; *see also* Janell Ross, *Police Officers Convicted for Fatal Shootings Are the Exception, Not the Rule*, NBC: NBCBLK, (Mar. 13, 2019, 11:56 AM), https://www.nbcnews.com/news/nbcblk/police-officers-convicted-fatal-shootings-are-exception-not-rule-n982741 (noting that since 2005, while ninety-eight law enforcement officers have been arrested in connection with fatal, on-duty shootings, only three have been found guilty of murder) [https://perma.cc/7WTM-MHK3].

actions the officer took leading up to the use of excessive force. This variance in interpretation has led to inconsistent results and a failure to deter.

The Supreme Court provided a potential solution to this issue in its recent decision, *County of Los Angeles v. Mendez*. In the *Mendez* case, the Supreme Court struck down one use of the officer's prior conduct to determine reasonableness while opening the door for an opportunity to use proximate cause to analyze how this behavior may have led to the use of excessive force. This Comment uses the *Mendez* case to propose a framework for using the tort concept of proximate cause in the objective analysis of excessive force cases.

Consider for a moment the following scenarios:

Scenario A. Officers stop a man walking down the street heading to work. The officers are in full uniform and in their police car. They incorrectly identify the male as a suspected robber. As the officers tell the suspect that he is under arrest and attempt to detain the suspect by grabbing his arm, the suspect decides to run. The officers chase the suspect and tackle him, breaking his collarbone in the process.

Scenario B. Plainclothes officers in an unmarked vehicle spot a robbery suspect running down the street. The officers, with their guns drawn, approach the suspect and try to grab the suspect by the arm to arrest him. At the same time that the officers grab the suspect's arm, the officers begin to tell the suspect he is under arrest. Before the officers can complete the arrest, the suspect responds by punching one of the officers. The two engage in a scuffle, and one of the officers shoots the suspect.

Scenario C. It is after midnight, and uniformed officers armed with a search warrant knock on a suspect's door. Unbeknownst to the officers, they are at the wrong house. The homeowner answers the door holding a gun not initially visible to the officers. The homeowner refuses to let the officers in after he surveys the warrant and realizes it is not his address. The officers enter the residence by force and upon seeing that the homeowner has a gun, fatally shoot him.

Scenario D. Undercover officers in an unmarked car, riding through a neighborhood known for drug dealing, see what they believe is a drug sale going on at the door of a home. The officers approach the home, and as they enter the residence, yell "police."

Someone in the home fires at the officers who fire back, wounding a child in the next room. The witnesses in the home later testify that from the front window, they saw two people approaching their home. Per the witnesses, those two people entered the home without knocking, and the homeowner fired shots at the supposed trespassers.

In each of these scenarios, the officers used force in response to the citizen's actions. As discussed through the cases used in this Comment, courts generally apply the excessive force standard without considering whether law enforcements' pre-seizure conduct led to the citizen's response. Because of this failure to consistently use officers' pre-seizure actions in the excessive force evaluation, court decisions throughout the country have been inconsistent and, at times, unfair. This Comment seeks to provide a standard for determining when a citizen's response to police action is reasonable and how that correlates to a finding that law enforcement has used excessive force and proximately caused the citizen's injuries.

Through an analysis of the statutory and case law surrounding the use of excessive force, this Comment will review how differentiating applications of the law have led to varying and sometimes unjust results. Jurisdictions differ regarding what pre-shooting conduct can be considered, what the "objective reasonableness" standard encompasses, and how tort law should impact this analysis. Therefore, this Comment works to provide a framework for the consistent application of the objective reasonableness standard. Part I reviews the proscribed levels of force, noting when the use of force becomes excessive, and discusses the tort concept of proximate cause and how the Ninth Circuit applied proximate cause in an excessive force case that ultimately held that an officer's pre-shooting conduct proximately caused the citizen's injuries. Part II provides a solution for the inconsistent way courts address officers' pre-shooting behavior by including proximate cause as part of the objective reasonableness analysis in determining whether officers' pre-shooting conduct proximately caused the use of the excessive force, leading to the citizen's injuries. The Comment concludes with an application of the suggested standard to the scenarios detailed above.

I. THE ISSUE

A. *Excessive Force*

1. Levels of Force

There is no question that an officer's job can be demanding and dangerous. In the quest to serve and protect, officers often find themselves in situations requiring the use of force. While there is a universal understanding of the need for officers to use force, much debate exists as to the timeliness and extent of force used and under what circumstances force is reasonable. Most police departments evaluate force along a use-of-force continuum.[3] "A use-of-force continuum is a model by which an officer can choose verbal and physical reactions to a subject's behavior from a range of options and adequately stop the subject's hostile behavior and establish command and control of the subject."[4] While these continuums may vary from department to department, they are generally composed of five stages and based on the continuum developed by the Federal Law Enforcement Training Center ("FLETC").[5]

The continuum ranges from a base level of mere presence to a maximum level of deadly force.[6] At level one (mere presence), the use of "body language and gestures" such as the presence of a uniformed officer and/or a marked police car should be used to deter the suspect.[7] Level two includes verbal commands such as "don't move," "you're under arrest," or "stop."[8] Which verbal cues the officer chooses and the intensity with which they are conveyed varies depending on the level of threat the officer perceives; however, the officer should make these choices based on the intent to de-escalate the situation.[9] Level three consists of empty-hand control, which

3. *See* Bailey Jennifer Woolfstead, *Don't Tase Me Bro: A Lack of Jurisdictional Consensus Across Circuit Lines*, 29 T.M. COOLEY L. REV. 285, 289 (2012).

4. Paul W. Brown, *The Continuum of Force in Community Supervision*, 58 FED. PROB. 31, 31 (1994).

5. *See* Woolfstead, *supra* note 3, at 289; Michelle E. McStravick, *The Shocking Truth: Law Enforcement's Use and Abuse of Tasers and the Need for Reform*, 56 VILL. L. REV. 363, 385 (2011).

6. Ashley Tizeno, *Law Enforcement: The Cognitive Ability Required To Protect and Serve, and the Appropriate Use of Force During Conflict*, 41 T. MARSHALL L. REV. ONLINE 115, 125–30 (2016).

7. Tizeno, *supra* note 6, at 126; Woolfstead, *supra* note 3, at 290.

8. *See* Tizeno, *supra* note 6, at 126.

9. *Id.* at 126–27.

involves hand-to-hand combat.[10] Level four details the use of "more extreme, but non-deadly measures" to get the suspect under control and can include the use of tasers, pepper spray, and the baton.[11] Level five is the use of less-lethal devices such as "tear gas, . . . vehicle-stopping technology, and distractions."[12] The final level—level six—is labeled deadly force, which is "force which a reasonable person would consider likely to cause death or serious bodily harm."[13] While the continuum appears to provide bright-lined rules, it allows for fluidity such that officers may move between levels as a suspect's response escalates.[14]

2. When Is Force Excessive?

Generally, an officer has the option to use the amount of force necessary to bring the suspect into submission. Just because an officer uses deadly force does not necessarily mean that the officer has used excessive force. As such, the use of force does not become a legal issue until it violates a citizen's constitutional right. Plaintiffs may establish that an officer violated their constitutional rights by showing the officer acted under the color of law and "depriv[ed] [the plaintiff] of any rights, privileges, or immunities secured by the Constitution"[15] to be free from unreasonable searches and seizures.[16] Title 42 U.S.C. § 1983 provides the remedy for this violation. The rest of this section looks at how courts have applied § 1983, specifically focusing on the legal foundation for analyzing excessive force cases that arise in an arrest per *Graham v. Connor*.

It is long established that excessive force claims that arise "in the course of an arrest, investigatory stop, or other 'seizure' of a

10. *Id.* Empty-hand control can be broken down into soft and hard empty-hand techniques: soft empty-hand techniques involve using the bare hands to "guide, hold, and restrain," which has a minimal chance of resulting in injury, and hard empty-hand techniques which include the use of striking techniques, that have a "moderate chance of injury." *Id.* at 127–28.

11. *Id.* at 128. In some use of force continuums, this includes the taser, while in others the taser is considered a level five device. *Id.*

12. *Id.* at 129.

13. 10 C.F.R. § 1047.7 (1997).

14. Tizeno, *supra* note 6, at 125.

15. 42 U.S.C. § 1983 (2012).

16. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389, 391 (1971).

free citizen" are evaluated under the "objective reasonableness" totality of the circumstances structure laid out by the Supreme Court in *Graham v. Connor*.[17] "The application of physical force by an officer constitutes a seizure,"[18] and according to *Graham*, all claims of excessive force by law enforcement should be evaluated under the Fourth Amendment which protects against "unreasonable searches and seizures."[19]

There are a number of factors to consider while determining the reasonableness of a search. *Graham* calls for a totality of the circumstances evaluation, focusing on the objective-reasonable balancing of the nature and quality of the intrusion on the suspect with countervailing government interests.[20] The Court provides three factors to consider when evaluating the totality of the circumstances: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."[21]

Although *Graham* considers reasonableness under the totality of the circumstances, the analysis focuses on the "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[22] The test is therefore "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them," excluding the officers' subjective intent.[23] Courts will also consider *how* the seizure was made. "To determine the constitutionality of a seizure, '[the courts] must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'"[24] The Court further developed this concept in *Tennessee v. Garner*.

17. 490 U.S. 386, 388, 395 (1989). *Graham* rejected the idea that all excessive force claims brought under § 1983 should be evaluated under the *Johnson v. Glick* four-part "substantive due process" test. *Id.* at 393.

18. Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 223 (2017); *see also* Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person.").

19. U.S. CONST. amend. IV; *Graham*, 490 U.S. at 388, 395.

20. *Graham*, 490 U.S. at 396 (citing *Garner*, 471 U.S. at 8 (1985)).

21. *Id.*

22. *Id.*

23. *Id.* at 397.

24. *Garner*, 471 U.S. at 8 (citing United States v. Place, 462 U.S. 696, 703 (1983)).

In *Garner*, a Tennessee police officer shot and killed an unarmed black teenager who was fleeing the scene of a suspected burglary.[25] The officer argued that his use of deadly force was constitutional because he acted in accordance with Tennessee's statute that provided, if "after notice of the intention to arrest the defendant, he either flee[s] or forcibly resist[s]," the officer may "use all the necessary means to effect the arrest."[26] The Court found the Tennessee statute unconstitutional, holding that "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[27] Here, *Garner* paved the way for the use of the proportionality doctrine in excessive force.[28]

Courts have since held force to be excessive where an officer's force is unreasonable and not proportionate to the threat. To illustrate, the Ninth Circuit held that an officer used excessive force when he used a taser (considered to be intermediate force) on Carl Bryan, who was pulled over for failing to wear a seatbelt.[29] Bryan was facing away from the officer, unarmed, and not attempting to flee the scene when the officer tased him without warning.[30] Likewise, in *Marsall v. City of Portland*, officers shot Daman Lowery, who took hallucinogenic mushrooms and then either jumped or fell out of a second-story window, with four or five "less lethal shots" and "emptied their entire canisters of pepper spray in his face" before he could get up off of the ground.[31] The Oregon District Court found that the officers used excessive force, "given that Lowery was severely injured, unarmed, emotionally or mentally disturbed, and had not attacked or even verbally threatened [the] defendants."[32]

In contrast, when civilians employ force to which officers respond with proportional force, courts typically do not find that the officers employed excessive force. For example, the court in *Estate of Williams v. Indiana State Police Department* found that the officer's use of deadly force did not constitute excessive force when

25. *Id.* at 3–4.

26. *Id.* at 4–5 (citing TENN. CODE ANN. § 40-7-108 (1982)).

27. *Id.* at 11.

28. *See, e.g.*, Alicea v. Thomas, 815 F.3d 283, 288 (7th Cir. 2016) (noting that an officer's "force is only reasonable when it is proportional to the threat posed").

29. Bryan v. McPherson, 590 F.3d 767, 770–71, 774 (9th Cir. 2009).

30. *Id.* at 775–76.

31. No. CV-01-1014-ST, 2004 U.S. Dist. LEXIS 8764, at *2, *16 (D. Or. May 7, 2004).

32. *Id.* at *4.

the decedent approached the officer with a raised knife.[33] Similarly, in *Williams v. Deal*, the officer did not use excessive force by pushing the decedent back into the car when he disobeyed a command by attempting to exit the vehicle.[34] Neither did that same officer use excessive force when he shot and killed the suspect, who attempted to take his gun and advanced toward him.[35]

In all of the preceding cases providing the historical context for analyzing excessive force claims, none of the courts applied a proximate cause approach. Before addressing how proximate cause plays into the excessive force context, the next section provides an explanation of proximate cause and how proximate cause has been sparingly used in excessive force cases historically. It begins with an analysis of proximate cause generally and moves on to discuss the lack of proximate cause analysis in excessive force cases.

B. *The Intersection of Excessive Force and Tort Law*

1. Proximate Cause

Tort liability holds individuals responsible for the natural consequences of their actions. This analysis encompasses finding cause in fact and proximate cause. Cause in fact (or the "but for" test) requires a showing that but for the plaintiff's act or omission, the defendant would not have sustained damages.[36] The but for test functions to exclude those damages unrelated to the act or omission in question.[37] If it can be shown that "the damage would not have occurred but for the defendant's act, the defendant's act is a cause in fact of the plaintiff's damage."[38] Cause in fact is generally not at issue in excessive force cases. It is generally obvious if an officer shoots and injures or fatally wounds a citizen, that the shooting is the cause in fact of the citizen's damages. However, analyzing proximate cause is not quite so straightforward.

33. 26 F. Supp. 3d 824, 835–36, 856 (S.D. Ind. 2014).

34. 659 F. App'x 580, 581 (11th Cir. 2016).

35. *Id.*

36. Charles E. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CAL. L. REV. 396, 396 (1932).

37. *See id.*

38. *Id.* at 397.

Proximate cause requires a "direct relation between the injury asserted and the injurious conduct alleged."[39] Proximate cause focuses on issues regarding the scope of the risk and foreseeability.[40] Scope of the risk confines the defendant's liability to the kinds of harms expected from the defendant's predicate conduct.[41] For example, P causes a car accident and injures X; X's injury from the accident requires surgery. X undergoes surgery, and surgeon Y operates on the wrong part of X's body. P cannot be held liable for surgeon Y's negligent operation because the actions fall outside of the scope of the risk of P negligently causing the accident.

Proximate cause also requires an injury to be foreseeable.[42] Liability flows from the defendant's ability to foresee a risk of harm to the plaintiff.[43] It is not fair from a policy or legal perspective to hold someone liable for damages he could not reasonably see occurring from his behavior.[44] For example, in *Ross v. Nut*, a passerby stole a vehicle (it was alleged that the owner left the keys in the car) and later caused an accident, injuring the plaintiffs.[45] The plaintiffs sued the owner of the vehicle for negligence.[46] The Supreme Court of Ohio determined that to be liable, the owner would have to have reasonably foreseen not only the theft of his vehicle, but also the reckless driving of the thief and the injuries to the plaintiffs.[47] The court held that such a series of events was not reasonably foreseeable; and therefore, the owner was not liable.[48]

When an injury is foreseeable but the causal link between the predicate act and the damages is either attenuated or broken by a superseding event, proximate cause is not present.[49] On the other

39. Paroline v. United States, 572 U.S. 434, 444 (2014).

40. *Id.* at 445.

41. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. LAW INST. 2010).

42. *Id.*

43. *Id.*

44. *See* Jim Gash, *At the Intersection of Proximate Cause and Terrorism: A Contextual Analysis of the (Proposed) Restatement Third of Torts' Approach to Intervening and Superseding Causes*, 91 KY. L.J. 523, 600 (2003) (claiming that the *Restatement Third* approach to intervening cause is more precise and fair).

45. 203 N.E.2d 118, 119 (Ohio 1964).

46. *Id.*

47. *Id.* at 120.

48. *Id.*

49. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 34 (AM. LAW INST. 2010).

hand, if the defendant negligently creates the risk and another person or incident negligently triggers the risk, then both actors are liable.[50] It is only when the interceding cause is so unforeseeable that it is outside the scope of the risk originally created by the first that the interceding cause becomes a superseding cause and the original actor is not liable.[51] Consider, for example, the vehicle owner at issue in the *Ross* case who left his keys in the car. In this case, the thief's reckless driving acted as a superseding cause,[52] breaking the chain of events and thus absolving the vehicle owner of liability to the plaintiffs.

2. Proximate Cause in Excessive Force Claims

Precedent shows that tort principles are applicable to constitutional violations and to § 1983 claims specifically.[53] Unfortunately, due to the *Graham* Court's failure to explain what should be considered under the "totality of the circumstances," neither reasonable care nor pre-shooting behavior has played a substantial role in the excessive force evaluation or been consistently applied. Most applications of the test focus only on the moments immediately preceding the shooting, leaving out the officers' actions prior to the use of force.[54] This section reviews how different jurisdictions have applied the test, concluding with a case analysis of *Mendez* and how that case pushed the proximate cause concept to the forefront of the excessive force debate.

a. Jurisdictional Application of Pre-Seizure Conduct Under *Graham*

The *Graham* Court provided that "hindsight" should not be used in analyzing excessive force claims but failed to provide context for ruling out hindsight. As a result, courts employ various methods when applying the objective reasonableness standard. The applications generally fall into one of three categories identified by Cara

50. *Id.* at § 27.

51. *Id.* at § 34 cmt. g.

52. Superseding cause and its relation to excessive force is discussed later in this Comment. *See infra* Part II.

53. Heck v. Humphrey, 512 U.S. 477, 483 (1994) (stating tort law defines the elements of damages under § 1983 claims).

54. *See* Garrett & Stoughton, *supra* note 18, at 215–17 (discussing this application, otherwise known as the "split-second" theory of policing).

McClellan: (1) courts that exclude all pre-seizure conduct, (2) courts that apply a segmented approach, (3) and courts that consider pre-seizure conduct.[55]

Courts that exclude all pre-seizure conduct give a narrow reading to *Graham* and confine the totality of the circumstances to the application of force alone.[56] This very restrictive view typically leads to the kind of unexpected results we have seen in cases like that of Philando Castile, in which the officer was found not guilty for shooting a legally armed citizen.[57] Courts that apply the segmented approach divide the *entire* event, including the pre-seizure actions, into temporal segments and from there determine which events are relevant to the use of force.[58] Specifically, these courts "'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."[59] Because no set structure exists to break the events surrounding the use of force into segments, the results vary.[60] The final approach involves the use of the pre-seizure conduct to evaluate the reasonableness aspect of the officer's use of force.[61] These courts interpret *Graham*'s totality of the circumstances more broadly and consider *Graham*'s "at the moment" language as "prohibit[ing] judges from imposing their own perspective, and not from considering any pre-seizure police conduct."[62]

b. The "Provocation Doctrine"

Prior to the Supreme Court striking down the principle, the Ninth Circuit applied a pre-seizure conduct approach called the

55. Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1, 9–17 (2017).

56. *Id.* at 9–10; *see also* Jack Zouhary, *A Jedi Approach to Excessive Force Claims: May the Reasonable Force Be with You*, 50 TOL. L. REV. 1, 2 (2018). This approach is applied by the Second, Eighth, and Eleventh Circuits. *Id.*

57. Ralph Ellis & Bill Kirkos, *Officer Who Shot Philando Castille Found Not Guilty on All Counts*, CNN (June 16, 2017, 9:22 PM ET), https://www.cnn.com/2017/06/16/us/philando-castile-trial-verdict/index.html [https://perma.cc/F9R6-XEKM].

58. McClellan, *supra* note 55, at 10. Circuits that apply this approach include the Fourth, Fifth, Sixth, and Seventh Circuits. *Id.*

59. *Id.* at 11 (citing Greathouse v. Couch, 433 F. App'x 370, 372 (6th Cir. 2011)).

60. *Id.* at 12, 15.

61. *Id.* at 17. The First, Third, and Tenth Circuits apply this approach. *Id.* at 16–17.

62. *Id.* at 17.

provocation doctrine.[63] According to the provocation doctrine, "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."[64] The officer's provocation "render[s] the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law."[65]

For example, in *Alexander v. City & County of San Francisco*, the police shot and killed Henry Quade after entering his home with an inspection warrant.[66] As officers entered the home, Quade fired a shot at them from the stairwell.[67] The officers fired back, killing Quade.[68] Although all parties agreed that the officers' return fire was not excessive, the decedent's estate argued that because the officers entered the house with the "intent to arrest" Quade beyond their authority to simply inspect the premises per the inspection warrant, the entry violated Quade's Fourth Amendment right.[69] The court shaped the issue as "whether the [officers] did something wrong that resulted in Quade's death" and then determined that the wrongful entry and Fourth Amendment violation caused Quade to take escalating action.[70] Therefore, under the provocation doctrine, the wrongful entry could be the basis of an excessive force claim against the officers.[71] In the 2017 case *County of Los Angeles v. Mendez*, the Supreme Court struck down the provocation doctrine while opening the door for a consistent use of proximate cause to analyze officers' pre-seizure conduct.[72]

c. *Mendez* Clears the Way for a Proximate Cause Analysis

In *Mendez*, the Los Angeles County Sheriff's Department received notice that someone saw parolee-at-large Ronnie O'Dell on

63. Cty. of L.A. v. Mendez, 137 S. Ct. 1539, 1545–46 (2017); McClellan, *supra* note 55, at 23–24. For discussion of the overturning of this doctrine, see *infra* Section I.C.

64. Billington v. Smith, 292 F.3d 1177, 1189–90 (9th Cir. 2002).

65. *Id.* at 1190–91.

66. 29 F.3d 1355, 1358 (9th Cir. 1994).

67. *Id.*

68. *Id.*

69. *Id.* at 1366.

70. *Id.* at 1365.

71. *Id.*

72. 137 S. Ct. 1539, 1543–44 (2017).

a bicycle at a home.[73] While reviewing the plan to search the residence for the suspect, the officers were advised that Angel Mendez and Jennifer Garcia lived in the backyard of the suspect's home.[74] Mendez and Garcia lived inside of a one-room shack in the back of the property.[75] While three officers approached the front door, Deputies Conley and Pederson proceeded to search the rear of the property with their guns drawn.[76] The deputies entered the shack without either a search warrant or knocking and announcing.[77] At the time, Mendez and Garcia were in their home napping.[78] As the officers entered, Mendez picked up a BB gun beside his futon to help him stand up.[79] Seeing the gun, the deputies opened fire, shooting Mendez and Garcia several times.[80]

Among other claims, the victims filed an excessive force claim under § 1983.[81] The district court held a bench trial and found the use of force reasonable under *Graham* but found the deputies liable for excessive force through the provocation doctrine.[82] The Ninth Circuit determined that qualified immunity applied to the knock and announce claim but upheld the excessive force application of the provocation doctrine and confirmed the officers' liability "on the theory that they had intentionally and recklessly brought about the shooting by entering the shack without a warrant in violation of clearly established law."[83] The appeals court also determined that the officers would be liable even if the provocation doctrine did not apply because under "basic notions of proximate cause," it is reasonably foreseeable that when officers enter a home without announcing, the homeowner could have a gun with the intent to protect himself.[84]

The Supreme Court found the provocation doctrine incompatible with the Fourth Amendment, noting that "[a] different Fourth Amendment violation cannot transform a later, reasonable use of

73. *Id.* at 1544.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 1544–45.
80. *Id.* at 1545.
81. *Id.*
82. *Id.*
83. *Id.* at 1545–46.
84. *Id.* at 1546.

force into an unreasonable seizure."[85] The Court also vacated the proximate cause decision because the Ninth Circuit "did not identify the foreseeable risks associated with the *relevant* constitutional violation (the warrantless entry); nor did it explain how, on these facts, respondents' injuries were proximately caused by the warrantless entry."[86] The Court determined that the Ninth Circuit muddied the proximate cause analysis with the provocation doctrine and remanded the case.

The *Mendez* case ruled out the provocation doctrine, solidifying the use of proximate cause analysis in excessive force cases. While the provocation doctrine used a prior constitutional violation to make an otherwise reasonable use of force excessive, proximate cause evaluates the officers' actions in terms of an objective standard of reasonable care, with the goal of determining if the officers' prior actions made the use of force foreseeable.

On remand, the Ninth Circuit held that the deputies' warrantless entrance into the residence without consent or exigent circumstances proximately caused the shooting and Mendez's injuries.[87] Per the court, from the failure to secure a warrant arose the duty to not enter the home.[88] Regardless of whether the officers knocked and announced, the shooting would not have occurred if they had not entered the home.[89] This case was again appealed, and the Supreme Court refused to grant certiorari.[90]

In addition to using proximate cause to find that the officers' preseizure conduct led to the use of force, the Ninth Circuit also indirectly considered the well-established principle that officers are liable for the "natural consequences of [their] actions."[91] In this respect, the "natural consequences" are determined using the "reasonable care" standard of negligence, which would be the care of a reasonable police officer, as opposed to the more *limited* reasonableness *Graham* standard normally applied in excessive force cases.[92] In *A Tactical Fourth Amendment*, Professors Brandon Garrett and Seth Stoughton argue that under the Fourth Amendment

85. *Id*. at 1543–44.
86. *Id*. at 1549.
87. Mendez v. Cty. of L.A., 897 F.3d 1067, 1076 (9th Cir. 2018).
88. *Id.*
89. *Id.* at 1076, 1078.
90. *Id.*, 897 F.3d 1067, *cert. denied*, 139 S. Ct. 1291 (2019).
91. Monroe v. Pape, 365 U.S. 167, 187 (1961); *see Mendez*, 897 F.3d at 1073, 1078.
92. Hayes v. Cty. of San Diego, 305 P.3d 252, 257–58; *see also supra* notes 17–24 and

inquiry, officers should be evaluated from the perspective of a "reasonably trained" police officer and not as the "hypothetical 'reasonable man,' a civilian but for the uniform, untrained in tactics and the use of force."[93] A proximate cause analysis automatically applies the "reasonable man" rule, and the evaluation immediately becomes a "reasonable officer" with consideration of all of their training and experience.[94] From this, it would reasonably follow that if the use of force is a natural consequence of the officer's actions from the perspective of a "reasonable officer" of like quality, skill, and training, whether those actions are *immediately* before the seizure or *minutes* before the seizure, then that action is the proximate cause of the use of force and the officer should be held liable. The Ninth Circuit made just this decision in the *Mendez* case on remand.[95]

The next Part uses the Supreme Court decision with the Ninth Circuit's application to provide a solution for applying proximate cause to excessive force cases moving forward.

II. THE SOLUTION

Although the *Mendez* case provided the basis for using proximate cause in excessive force cases, the Supreme Court's analysis failed to explicitly detail how proximate cause should apply in these types of situations, and while the Ninth Circuit applied the doctrine on remand, it failed to provide insight as to the weight of proximate cause in analyzing an excessive force claim. Therefore, the question remains: should pre-shooting conduct matter; and if so, how much? This Part recommends a standard to fill these gaps and appropriately employ proximate cause to analyze pre-shooting conduct.

As previously stated, excessive force cases generally do not turn on a cause in fact analysis; the issue typically lies in determining

accompanying text.

93. Garrett & Stoughton, *supra* note 18, at 293.

94. *See* DAN B. DOBBS ET AL., LAW OF TORTS § 132 (2d ed. 2011). Per Dobbs, the reasonable man standard is based on the belief that "a reasonable person will act in light of (a) knowledge shared by the community generally and also (b) information, knowledge and skill that he himself has that is not generally known and that reasonable people would not ordinarily have." *Id*. This "superior knowledge rule" means that a professional will be expected to use the same care as someone in that profession with the same knowledge, skills, and abilities. *Id*.

95. *Mendez*, 897 F.3d at 1075–77.

whether an act was foreseeable. This Comment argues that when a citizen responds to an officer's actions with reasonable defensive measures, which then lead to the officer employing force against the citizen, the officer proximately causes the citizen's injuries. Within officers' duty to act reasonably lies an obligation to not engage in conduct that will precipitate reasonable defensive measures requiring the use of force.[96] Thus, when officers breach this duty, they should be held liable for excessive force.

Whether a citizen has used reasonable defensive measures should arguably depend on (1) whether officers are reasonably identifiable as such and (2) the nature of the officers' actions. Each of these elements, when standing alone, could potentially create liability for the officer, but this Comment contends that every time an unidentified officer behaves in a manner that triggers a reasonable response from the citizen in an excessive force case, the officer's actions will be the proximate cause of the citizen's injuries.

A. *Reasonably Identifiable Officer*

Law enforcement authority results in part from the respect that citizens give them simply due to their roles as officers. This premise is reflected in the mere presence (Level 1) aspect of the use-of-force continuum as well as the common law right to resist an unlawful arrest. At common law, citizens have a foundational right to resist an unlawful arrest. Most states have modified this rule to prohibit the use of the force to resist a peaceful arrest by someone who knows or has reason to know the individuals are law enforcement officers engaged in their duty, regardless of the legality of the arrest.[97] However, when an officer cannot reasonably be identified as such, the likelihood of a citizen acquiescing to his demands goes down significantly.

It is essential to understand what is meant by "reasonably identifiable." As used in this Comment, the public can reasonably identify officers as law enforcement when an ordinarily reasonable person would perceive them as such. Typically, officers are identified

96. *See id*. at 1076–77.

97. Miller v. State, 462 P.2d 421, 422–23, 426–27 (Alaska 1969) (affirming the conviction of a defendant who stabbed an officer he believed was unlawfully arresting him); People v. Cannedy, 76 Cal. Rptr. 24, 25, 27 (Cal. Ct. App. 1969) (finding defendant guilty of "battery against a peace officer known to be engaged in the performance of his duties").

by their uniform, vehicle, or both. Behind the wheel of an unmarked car, officers are harder to identify, as is likely their intent; however, when their lights are turned on or they exit the vehicle in uniform, officers are then reasonably identifiable as law enforcement. An issue with excessive force arises when the officers are not reasonably identified as such. The rest of this section focuses on the foreseeability of the use of force when an officer is not reasonably identifiable.

Consider, for example, *Mendez*, where the officers were not reasonably identifiable even though they were in uniform.[98] They failed to knock and announce and did not present a warrant to enter the shack. Mendez and Garcia were asleep and unaware of the armed officers searching the backyard. Mendez indicated that he thought the officers were the homeowner.[99] It is not farfetched to think that Mendez's response to the officers would have been different if Mendez had known they were law enforcement. If this were the case, it is likely he would not have reached for the BB gun to help him get up, specifically to avoid the situation that then occurred.

As stated above, officers' uniforms and vehicles are their primary sources of identification. In *Mendez*, the officers were in uniform but other circumstances made them unidentifiable. When officers are not in uniform and marked vehicles, violent interactions are foreseeable. *Robinson v. Rankin* provides an example of a case in which the officers were in plainclothes in an unmarked vehicle when a fatal shooting resulted. Calvin Jr. rode as a passenger in Brown's vehicle when Brown drove up "driver to driver" with another vehicle and made a "hand-to-hand" drug exchange.[100] Lieutenant Rankin and Officer Easterwood observed the alleged exchange while riding in "an unmarked silver Chevrolet Malibu equipped with blue lights and sirens" and dressed in plainclothes.[101] Perceiving this exchange to be a drug deal, the officers blocked Brown at an intersection and exited their Malibu with weapons drawn without announcing that they were police officers.[102] Brown described his response:

98. *See supra* Section I.B.2.c and accompanying text.

99. Cty. of L.A. v. Mendez, 137 S. Ct. 1539, 1544 (2017).

100. Robinson v. Rankin, No. 2:14-cv-01886-MHH, 2018 U.S. Dist. LEXIS 164826, at *5–6 (N.D. Ala. Sept. 26, 2018).

101. *Id.* at *5.

102. *Id.* at *7–8.

> All I seen was two—it was two white boys jumped out both of them got pistols out and everything. The one on the driver's side was running to my car. . . . First thing in my mind was, "Oh, Lord, we are fixing to get robbed" or something like that. . . . [A]nd my first thought was "go, go, go." . . . So my first—mind, is smashed [sic] the gas and go.[103]

As Brown began to go, Officer Easterwood believed Brown was trying to hit him with the car.[104] Feeling threatened, he fired six shots at the car, injuring Brown and killing Calvin Jr.[105] Analyzing the case under *Graham*'s totality of the circumstances without any consideration for proximate causation, the court held that all six shots fired "were constitutionally permissible."[106] Had the court applied a proximate cause approach to determine if the citizen's response was reasonable, a different result could have been very likely.[107] Unlike the provocation doctrine, which looks for a prior constitutional violation, proximate cause would evaluate the officers' pre-seizure actions, such as jumping out of an unmarked vehicle in plainclothes, to determine whether the officers could foresee that their actions would lead to the citizen's reasonable response, proximately causing the officers to use excessive force.

The officers' failure to identify themselves proximately caused the use of force that resulted in Calvin Jr.'s death and Brown's injury. One can reasonably foresee that a driver who sees an individual running at the vehicle with a gun would take some type of defensive measure, such as attempting to flee the scene or even attempting to hit the person with the gun. These actions become even more likely in the case of a drug dealer, who is apt to think exactly what Brown thought—that someone was trying to rob him. In fact, the level of force used to flee would likely increase in circumstances that implicate illegal activity, such as drug dealing. Importantly, both officers in the *Rankin* case were assigned to the United Narcotics Investigation Task Force and were in the area "following up on drug-related complaints."[108] As such, a reasonable officer with their training and skill would foresee that an alleged

103. *Id.* at *8.
104. *Id.* at *9.
105. *Id.* at *9–12.
106. *Id.* at *15–16, *29.
107. This does not consider the applicability of qualified immunity to the officers' actions.
108. *Id.* at *4–5.

drug dealer who sees two people running towards him with guns would fear that he was being robbed.

No one can say for certain that Brown's response would have been different if the officers were in uniform or turned the lights and sirens on when they cut off Brown's vehicle. Still, the chances of the civilian's response differing increases if the officers are easily identifiable as law enforcement. In this situation, the officers breached their duty not to engage in conduct that would precipitate reasonable defensive measures requiring the use of force.

Although the *Rankin* case involved officers not reasonably identifiable by their clothes or their vehicle, the circumstances could be the same if just one of those elements were present: plainclothes officers or officers in unmarked vehicle without lights and sirens who never exit the vehicle before the use of force begins. Take, for example, the case of *King v. United States*, in which FBI agents were looking for Aaron Davison, a home invasion suspect.[109] They had previously received information that Davison visited a certain gas station between 2:00 p.m. and 4:00 p.m. every day.[110] Around 2:30 p.m., the agents spotted King walking down the street near, but several blocks from, the gas station.[111] Believing that King was the suspect, the agents exited an unmarked vehicle and proceeded to walk toward him.[112] The agents dressed in plainclothes but wore lanyards displaying their badges.[113]

The agents asked King for his name and his identification, to which King complied but explained he did not have identification.[114] The agents told King to "put his hands on his head and to face their vehicle."[115] King later testified that he complied because the agents "had small badges around their chest, and [he] assumed [they had] some sort of authority."[116] Upon discovering that King was carrying a pocketknife, one of the agents removed the knife, and in the process, "commented on the size of [King's] wallet," removing it from King's pocket as well.[117] After asking if the officers

109. 917 F.3d 409, 416 (6th Cir. 2019).
110. *Id.*
111. *Id.* at 416–17, 424.
112. *Id.* at 416–17.
113. *Id.* at 416.
114. *Id.* at 417.
115. *Id.*
116. *Id.*
117. *Id.*

were mugging him, King attempted to run.[118] The agents gave chase, and a fight ensued.[119] Throughout the process, King screamed for help and "begged passersby to call the police."[120]

Even though a debate exists as to whether the agents were reasonably identifiable in this case more so than in *Rankin*, the issue still revolves around King's lack of knowledge as to the identity of the officers.[121] King immediately cooperated when he thought he was dealing with law enforcement of some type. However, when the officer took King's wallet, leading him to suspect these individuals were imposters, King then began to defend himself against what he believed to be a mugging.[122]

In addition, this case raises the concern regarding whether a lanyard is enough to make officers reasonably identifiable as such. Standing alone, a lanyard is potentially not enough, especially considering lanyards are worn by officers who wish to not be identified. A lanyard may not be visible immediately to the citizen or to a good Samaritan who decides to help a person he perceives as being assaulted by another citizen. Not only did King question whether these were cops, but so did a bystander who called 9-1-1 and stated, "I understand they have badges on, but I don't see no undercover police cars, no other—backup, no nothing."[123] As evidenced by the bystander's comment that there were no undercover police cars or backup, a lanyard is not the standard item civilians look for when trying to identify a police officer.

Sometimes lanyards are not even enough for other officers to identify each other. In 2011, when a plainclothes Baltimore police officer was accidentally shot and killed by officers of the same district, the police spokesperson confirmed that there needs to be some way for officers to identify other plainclothes officers in the area, and "[i]t has to be something more than a badge hanging from a neck."[124] Maybe a lanyard and a verbal statement that the person

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 416–17, 431.
122. King's response to the officer in terms of reasonableness is discussed *infra* Part II.C.
123. *King*, 917 F.3d at 417.
124. Peter Hermann & Justin Fenton, *Mayor Promises Outside Review of Police Shooting*, BALT. SUN (Jan. 12, 2011) https://www.baltimoresun.com/news/maryland/politics/bs-xpm-2011-01-12-bs-md-police-plainclothes-ban-20110112-story.html [https://perma.cc/726Z-S68N].

is law enforcement will suffice, but a lanyard alone creates at least enough of an issue for this to be a jury question.

While this may not always be the case, the fact that the officer *is* reasonably identifiable makes it more likely that a citizen will not only comply with the officer's demands but also respond reasonably.

B. *Nature of Officer's Action*

As persons of authority and peace officers, law enforcement is expected to behave in a way that does not escalate a situation to the point that a citizen will engage in a *reasonable* defensive measure. It is understood that officers cannot control another person's behavior, but officers *can* control their behavior in performing their duties. In doing so, they owe an obligation to the public to do so in a manner consistent with police policies and the law.[125] There are a number of behaviors an officer can engage in that will create a situation in which the officer can reasonably foresee a defensive measure from the citizen. The behaviors reviewed are not meant to be exhaustive, only illustrative, as there are a number of actions officers can engage in that can illicit reasonable defensive measures.

Because officers face situations that can be extremely stressful and require immediate response, most police departments establish policies that dictate the appropriate officer response in these types of situations and that over time become industry standards. Many of these policies stem from constitutional requirements established in case law. Currently, when analyzing excessive force

125. Many states require law enforcement officers to make an oath or affirmation demonstrating their commitment to the public welfare and the laws of their state. *See, e.g.*, *Law Enforcement Code of Ethics*, COMMISSION ON PEACE OFFICERS STANDARDS & TRAINING, https://post.ca.gov/commission-procedure-C-3-law-enforcement-code-of-ethics ("As a law enforcement office, my fundamental duty is to serve mankind; . . . and to respect the Constitutional rights of all men . . . .") [https://perma.cc/YG4L-NMSP]; *Troopers Oath of Office*, MISS. DEP'T PUB. SAFETY, https://www.dps.state.ms.us/highway-patrol/troopers-oath-of-office/ ("I do solemnly swear or affirm that I will faithfully support the Constitution of the United States and the Constitution of the State of Mississippi . . . .") [https://perma.cc/N436-X4ZV]; *Trooper's Pledge*, VA. STATE POLICE, https://www.vsp.virginia.gov/Trooper_Pledge.shtm ("I shall obey the laws of the United States of America and of the Commonwealth of Virginia, and shall support and defend their constitutions . . . .") [https://perma.cc/9T54-G8ZR].

cases, courts pay little, if any, attention to whether or not the officer's behavior violates departmental policy.[126] While all violations of policy do not reasonably lead to reasonable defensive measures from the citizen, those that do should be considered in the excessive force analysis.

In *Mendez*, the officers were briefed and advised that there was a couple residing in a shack in the rear of the property. Standard policy requires officers to first obtain a warrant before entering the residence unless there are exigent circumstances.[127] The officers failed to secure a warrant for the shack and entered the premises in violation of departmental policy, facilitating the need for the use of force. A reasonable officer would have considered the shack a different residence and obtained a warrant for entry as it is foreseeable that a person in a home could be armed and ready to defend himself against a perceived intruder.

Blatant violations of the department's use-of-force continuum should always be contemplated. Consider *Raiche v. Pietroski*, in which the court specifically looked at the officer's training on the use-of-force continuum.[128] In *Raiche*, Officer Pietroski, accompanied by another officer, attempted to conduct a traffic stop on Raiche for riding his motorcycle without a helmet.[129] Per the officers, Raiche did not stop, which required them to give chase until Raiche's "motorcycle got stuck between a parked vehicle and the curb of the sidewalk."[130] At that time, Officer Pietroski exited the cruiser and within seconds, "'physically lift[ed] [Raiche] off his bike and tr[ied] to pull him as far away from that bike' as possible."[131] Raiche's motorcycle handlebars were damaged beyond repair, and Raiche, entangled with his motorcycle, struck his forehead on the sidewalk.[132] Officer Pietroski continued to try to handcuff Raiche, temporarily dislocating his shoulder.[133]

126. Garrett & Stoughton, *supra* note 18, at 234 (noting a trend of courts failing to examine departmental policies, exemplified by "[t]he *Harris* decision [which] was notable in the way that it ignored the subject of police policy and practice"); *see also* Scott v. Harris, 550 U.S. 372 (2007).

127. Payton v. New York, 445 U.S. 573, 590 (1980) ("Absent exigent circumstances, [the home's] threshold may not reasonably be crossed without a warrant.").

128. 623 F.3d 30, 37 (1st Cir. 2010).

129. *Id.* at 33.

130. *Id.* at 33–34.

131. *Id.* at 34 (alterations in original).

132. *Id.*

133. *Id.*

The court determined that Pietroski's behavior was unreasonable "even under the Boston Police Department's own standards."[134] By considering the department's use-of-force continuum and Pietroski's relevant training, the court determined that

> [a] reasonable officer with training on the Use of Force Continuum would not have needed prior case law on point to recognize that it is unconstitutional to tackle a person who has already stopped in response to the officer's command to stop and who presents no indications of dangerousness. Such conduct is a major departure from reasonable behavior under both the *Graham* factors and the officer's training. Indeed, Pietroski jumped immediately to the extreme end of the "open-hand" force category on the Use of Force Continuum,[135] tackling rather than otherwise subduing Raiche, slamming his head to the pavement, and destroying his motorcycle.[136]

Because the use-of-force continuum provides officers with guidance as to the appropriate level of force to use in each situation, upward violations of this policy are more likely to lead to the use of *excessive* force rather than a *restrained* use of force.

Another violation of departmental policy that risks foreseeable injury arises when officers use detainment methods for which they have not receivied the adequate training. This was precisely the situation in *Harris v. Coweta County*.[137] In that case, Officer Scott requested permission to end a high-speed chase by conducting a Precision Intervention Technique ("PIT") maneuver.[138] A PIT maneuver

> requires approaching the fleeing vehicle diagonally from behind. The pursuing officer must match the speed of the fleeing vehicle as closely as possible. With a slight impact, the officer maneuvers the vehicle to gently push the suspect's rear bumper, with the intent of sending it into a spin. The officer's vehicle continues forward as the suspect's vehicle is disabled.[139]

After determining that he could not perform a PIT maneuver at the speed he was traveling, Officer Scott rammed his police cruiser into the suspect's vehicle, resulting in the citizen losing control and

134. *Id.* at 37.

135. This was level three on the Boston Police Department's use-of-force continuum. *Id.*

136. *Id.* at 39.

137. 406 F.3d 1307 (11th Cir. 2005).

138. *Id.* at 1312.

139. Melissa Mann, *The Limitations of the PIT Maneuver in Police Pursuits*, PURSUIT RESPONSE, https://www.pursuitresponse.org/limitations-pit-maneuver-police-pursuits/ [https://perma.cc/9RXN-D3MP].

crashing.[140] The citizen suffered injuries that left him a quadriplegic.[141] At the time, national law enforcement standards disallowed officers who lacked the requisite training from engaging in the application of deadly force.[142] Officer Scott did not undergo this training.[143]

As this case shows, the use of a vehicle as a deadly weapon, whether performing the PIT maneuver or any other endeavor, can be dangerous for the officer and the suspect. Because of this, it is foreseeable that using a vehicle as a deadly weapon against a suspect could lead not only to a citizen taking defensive measures, but also to an officer using force not proportional to the threat, and even the potential for more force than the officer anticipated. If Officer Scott followed departmental policy, he would not have engaged the suspect with his vehicle and this set of circumstances would most likely not have occurred.

Relatedly, Eric Garner was killed during a police encounter in which the officer violated departmental policy by employing a proscribed method of detainment.[144] Garner's death received massive public outrage as videos surfaced of Officer Pantaleo using a department-banned chokehold to detain Garner for illegally selling cigarettes.[145] Comparable to the danger that can result from a PIT maneuver, a chokehold risks cutting off the citizen's air supply and can result in death, especially if not used properly.[146] Injury is therefore reasonably foreseeable where a citizen begins to reasonably resist a chokehold maneuver by an officer, and the officer responds by applying increasing pressure, ultimately resulting in injury or death to the citizen.

Outside of policy violations, other officer behaviors can also trigger reasonable defensive responses from citizens. Officers' failure

140. *Harris*, 406 F.3d at 1313.

141. *Id.* at 1312.

142. *Id.* at 1311.

143. *Id.*

144. *See, e.g.*, Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html [https://perma.cc/3TG9-BN7N].

145. Adam Shrier et al., *Cop Who Caused the Chokehold Death of Eric Garner Hit with NYPD Charges*, DAILY NEWS (July 20, 2018, 10:00 PM), https://www.nydailynews.com/newyork/ny-metro-daniel-pantaleo-eric-garner-chokehold-departmental-charges-20180720-story.html [https://perma.cc/J98L-GE6U].

146. *See, e.g.*, *id.*

to knock and announce when entering a residence without a warrant or exigent circumstances, and particularly, where the residents have no reason to expect officers to enter, could elicit a defensive response from a homeowner and ultimately result in the use of force.[147] However, in a case where the facts clearly establish the duty to knock and announce, there would be little question that a reasonable person could foresee the homeowner attempting to defend himself in some form or fashion.[148] As a matter of fact, the *Mendez* court found that both the failure to knock and announce and the warrantless entry were proximate causes of the use of force. Even the United States as amicus curiae on behalf of the officers contended that the failure to knock and announce was the proximate cause of the shooting.[149]

Threatening behavior on behalf of police officers, such as plainclothes officers jumping out of a vehicle with guns drawn,[150] will also elicit reasonable defensive measures from the citizen.[151] Going back to the *Rankin* case, the officers exited the vehicle with guns drawn and began running towards Brown's car.[152] While Brown was probably concerned, to some extent, when the vehicle cut

147. While this was exactly the case in *Mendez*, there the court did not find the officers liable for the plaintiff's knock and announce claim because the officers were entitled to qualified immunity. Mendez v. Cty. of L.A., 897 F.3d 1067, 1073 (9th Cir. 2018) (citing Mendez v. Cty. of L.A., 815 F.3d 1178, 1191 (9th Cir. 2016)). Despite recognizing that the officers' failure to knock and announce was a proximate cause of the Mendez's injuries, the court found that the duty to knock and announce "had not been clearly established with regard to the specific facts of [that] case." *Mendez*, 897 F.3d at 1073, 1078. The issue was that the officers knocked and announced on the front door of the main house on the property, but did not knock and announce before entering the shed on the same property that was occupied by the plaintiffs. *Mendez*, 815 F.3d at 1192. The officers argued that they had no constitutional duty to knock and announce at all, but the court disagreed, holding that they did have such a duty. *Mendez*, 897 F.3d at 1073, 1079 (citing *Mendez*, 815 F.3d at 1191). However, because there was no "clearly established law" about whether the officers were required to knock and announce a second time before entering the shed, the officers were still entitled to qualified immunity. *Mendez*, 815 F.3d at 1191–93. Qualified immunity and its bearing on punishing officers for excessive use of force is beyond the scope of this Comment.

148. In fact, the *Mendez* court agrees that "an act or omission can be a breach of duty in one context, but not a breach of duty in another." 897 F.3d at 1076.

149. Brief for the United States as Amicus Curiae Supporting Petitioners at 7, Cty. of L.A. v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369).

150. *See, e.g.*, Grudt v. City of L.A., 468 P.2d 825, 826–27 (Cal. 1970) (detailing an instance when a driver drove his car at officers after a plainclothed officer jumped out of the car with a double-barreled shotgun).

151. *Mendez* makes a similar claim stating, "Especially where officers are armed and on alert, violent confrontations *are* foreseeable consequences of unlawful entries." 897 F.3d at 1078.

152. Robinson v. Rankin, No.: 2:14-cv-01886-MHH, 2018 U.S. Dist. LEXIS 164826, at *7–8 (N.D. Ala. Sept. 26, 2018).

Brown off at the intersection, it was reasonably foreseeable that the concern would rise to a level of fear when Brown saw two men jump out of the car with guns, and as a result, Brown would take some defensive measure.

C. *Was the Defendant's Response Reasonable?*

Even if an officer is not reasonably identifiable and has taken actions that could elicit defensive measures from a civilian, the measures taken by the civilian need to be reasonable. Under common law, a person has a right to resist an illegal arrest, but the resistance must be reasonable and must use only the force necessary to resist the arrest.[153] When the citizen's response is not reasonable, one has to evaluate whether the citizen's response acted as a superseding cause such that the proximate cause of the use of force is the citizen and *not* the officer's behavior. This Comment argues that *only* when the citizen's behavior is excessive or unreasonable does his response become a superseding cause such that the citizen, and not the officer, is the proximate cause of the use of force.

In *Mendez*, the defendants argued that Mendez's pointing the gun at the officers was a superseding cause and therefore the proximate cause of the shooting.[154] The court rejected this argument, distinguishing this case from the hypothetical situation provided by the court in *Bodine*, in which a suspect's decision to intentionally try to harm officers knowing they are such makes the suspect's behavior a superseding cause, in that Mendez did not know that these were police officers entering his residence, and his intention was to use the gun to help himself up and not to aim it at the officers.[155] Applying the principle outlined in the *Restatement (Second) of Torts* that "[a] victim's behavior is not a superseding cause where

153. *See, e.g.*, Graves v. Thomas, 450 F.3d 1215, 1224 (10th Cir. 2006) (limiting a citizen's right to resist an illegal arrest to force that is absolutely necessary); Boatright v. State, 761 S.E.2d 176, 178 (Ga. Ct. App. 2014) (detailing a citizen's right to use the force necessary to resist when an officer is not legally authorized to take the citizen into custody); State v. Sims, 851 So. 2d 1039, 1045 (La. 2003) (holding that a person has the right to use the force necessary to resist an unlawful arrest if no probable cause exists); State v. Wiegmann, 714 A.2d 841, 854 (Md. 1998) (confirming that even when an arrest is illegal and warrantless, the citizen may not use excessive or unreasonable resistance); State v. Kolesnik, 192 P.3d 937, 947–48 (Wash. Ct. App. 2001) (iterating a citizen's right to resist an unlawful arrest by using the reasonable and proportional force necessary).

154. 897 F.3d at 1081.

155. *Id.* at 1072 (citing Bodine v. Warwick, 72 F.3d 393, 400 (3d Cir. 1995)).

the tortfeasor's actions are unlawful precisely because the victim foreseeably and innocently might act that way," the court reasoned that it is foreseeable that an officer could misperceive a homeowner's actions as a threat.[156] Therefore, because a reasonable officer could foresee that a homeowner would point a gun at someone entering his home unannounced (even though Mendez was not actually pointing the gun at the officers), the homeowner's actions were not a superseding cause but the natural consequence of entering a home unidentified.

This was also the situation in the *Rankin* and *King* cases discussed previously. In *Rankin*, Brown did not know that the people pointing guns and running toward him were officers. Because he thought they were robbing him, Brown's thoughts were to "go, go, go."[157] Brown looked for a way out of the situation and realized that he was blocked in. Seeing his only exit as to the left, Brown accelerated to go to the left to get away.[158] Mistaking Brown's acceleration to get away as an attempt to hit him with the vehicle, Officer Easterwood fired at the vehicle.[159]

Just as in *Mendez*, Brown's actions were also not a superseding cause, arguably even if Brown *was* driving his vehicle at Officer Easterwood. According to *Mendez*, the actions of the citizen would need to be "abnormal or extraordinary" in that the officer would not have been able to foresee that response in order to be superseding.[160] Brown's actions were neither abnormal nor extraordinary. It is reasonably foreseeable that a citizen in a similar situation, whether they are engaged in illegal activity or not, would respond exactly as Brown did. When faced with threats, the natural response is fight or flight. Brown saw the pointed guns as a threat and attempted to flee by accelerating towards an opening, which is not only foreseeable, but reasonable.

In *King*, James King's initial response was to run, and when the officers caught up to him, King fought back.[161] The officers did not misperceive King's response; he was certainly trying to get away

156. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 449 (AM. LAW INST. 1981)).

157. *Rankin*, 2018 U.S. Dist. LEXIS 164826, at *8.

158. *Id.* at *9.

159. *Id.* at *9–10.

160. 897 F.3d at 1082 (citing RESTATEMENT (SECOND) OF TORTS § 443 cmt. a–b (AM. LAW INST. 1981)).

161. King v. United States, 917 F.3d 409, 417 (6th Cir. 2019).

from them, but his response was arguably still not abnormal or extraordinary. King no longer believed they were law enforcement officers but thought they were trying to rob him. The court noted that "if a jury determines that Plaintiff reasonably believed he was being mugged rather than being detained by police officers, then extending the detention after Plaintiff attempted to flee was just as unreasonable as detaining Plaintiff in the first instance."[162] If giving chase to King when he believes he is being mugged is unreasonable, then the Court implies that King's act of running would, under those circumstances, be reasonable.

III. APPLYING THE STANDARD

This Comment contends that where an officer is unidentifiable and engages in behavior that elicits a reasonable defensive response from the citizen to which the officer uses force, then the officer's behavior proximately caused the use of force, and the officer should be guilty of excessive force. Part I provided four scenarios to consider through the course of this Comment. The following analysis details the application of the proximate cause approach to the former scenarios.

In Scenario A, the citizen responded by running away from the officers. The officers chased the suspect and tackled him, breaking the suspect's collarbone. Using the standard provided previously, we can determine that the officers did not use excessive force because the citizen did not respond reasonably. The suspect could reasonably identify the officers as such because they were in full uniform exiting a marked police vehicle. The nature of the officers' actions would not reasonably elicit defensive measures. A significant part of the officer's job is to make an arrest. A reasonable citizen would acquiesce, not run. Even though the male was not the suspect, and he suffered a fractured collarbone during the interaction, the officers did not employ excessive force by tackling the fleeing suspect under these circumstances.

In Scenario B, plainclothes officers approached a robbery suspect. The officers exited an unmarked vehicle with their guns drawn. The suspect responded by punching one of the officers, initiating a scuffle that resulted in the suspect being shot. Under a narrow reading of *Mendez*, a court reviewing this scenario through only the moments immediately preceding the shooting could rule

162. *Id.* at 429.

that the officer did not use excessive force. Using the standard provided in this Comment, we can overwhelmingly agree that the suspect's response is reasonable. It is irrelevant that the suspect is actually the robber. The analysis would consider that the officers are unidentifiable as law enforcement because they are in plainclothes and exiting an unmarked vehicle. The threatening action of the officers—approaching the suspect with guns drawn—is of the nature that a reasonable person would take defensive measures. As such, the officers' actions are the proximate cause of the suspect's injuries.

In Scenario C, the officers are reasonably identifiable by their uniform and the produced warrant. The issue lies in the nature of the officers' actions. The officers entered the home unaware that they had the wrong address. Is it reasonable for a homeowner to answer the door after midnight with a gun? Most people would say yes; but, is it reasonable for him to not allow the officers into his home when the address on the warrant is not his? An analysis could go either way. Where reasonable persons could disagree on the reasonableness of the homeowner's action, the decision should be left to the jury.

Scenario D, in which plainclothes officers entered a house without knocking but announcing their presence, is not as close of a call. The officers were neither reasonably identifiable nor did they knock and announce. The officers entered and then in the process tried to announce their presence. By this time, the homeowner saw the individuals approaching and could not identify them as law enforcement. The officers were not reasonably identifiable, and they violated departmental policy by failing to "knock and announce." Based on these facts, the homeowner's actions under this standard were reasonable.

CONCLUSION

Evidenced by the cases discussed in this Comment, courts continue to struggle with excessive force claims. Law enforcement officers put their lives on the line every day in an effort to serve and protect the citizens of this nation. They want to make it home to their family, as do the citizens that these officers interact with. With the authority that comes with being in this position also comes accountability. To date, this accountability has varied across the country based on how jurisdictions have applied the standard.

Prior to *Mendez*, courts' interpretation of how to apply officers' pre-seizure conduct to the *Graham* standard varied dramatically, with some courts totally ignoring pre-seizure conduct and others using the provocation doctrine to use pre-seizure constitutional violations to declare reasonable uses of force unreasonable. The *Mendez* case took the provocation doctrine off the table in excessive force cases while pushing proximate cause to the forefront. It confirmed that officers' pre-seizure conduct can be used to determine if the officer proximately caused the use of excessive force. Using proximate cause to analyze officers' pre-seizure actions will hopefully provide consistency in the application of officers' pre-seizure conduct in the application of *Graham*'s totality of the circumstances evaluation. This Comment proposed a method for applying proximate cause in the excessive force context, suggesting that where officers are unidentifiable and engage in actions that elicit reasonable defensive responses from the citizen, the officers are the proximate cause of the citizen's injuries, resulting in a valid claim of excessive use of force.

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