The State-Created-Need Theory: Where Constitutional Reasonableness Meets Progressive Fairness in the Analysis of Excessive Force Claims

Shayna Frieden*

I. INTRODUCTION

On March 13, 2020, just after midnight, three plain-clothed officers broke down Breonna Taylor's door with a battering ram to execute a search warrant.[1] Breonna Taylor was in bed with her boyfriend, Kenneth Walker.[2] Believing someone had broken in, Walker fired one shot from his licensed handgun, hitting an officer in the leg.[3] The three officers immediately discharged thirty-two rounds, killing Breonna Taylor with six of those shots.[4]

What should we think about the police's use of deadly force in these circumstances? One may argue that it is reasonable for police to return fire after being fired upon. However, by forcibly breaking into a private home in the middle of the night, the police seem to have created the very conditions that caused the danger confronting them. These are not just abstract considerations. Rather, they inform whether law enforcement behaved "reasonably" under the Fourth Amendment. As a result, these considerations

---

* J.D. Candidate, 2022, Sandra Day O'Connor College of Law, Arizona State University; Note and Comment Editor, Arizona State Law Journal. Thank you to Professor Ben McJunkin for his guidance and for challenging me throughout the writing process. His expertise, feedback, and support were invaluable. Thank you to Nicholas Ansel, Austin Moylan, and the staff members and editors of the Arizona State Law Journal for their comments and outstanding editing.

1. Eric Levenson, *A Timeline of Breonna Taylor's Case Since Police Broke Down Her Door and Shot Her*, CNN (Sept. 24, 2020, 12:15 AM), https://www.cnn.com/2020/09/23/us/breonna-taylor-timeline/index.html [https://perma.cc/ACU4-2HPZ]; Radley Balko, Opinion, *The No-Knock Warrant for Breonna Taylor was Illegal*, WASH. POST (June 3, 2020), https://www.washingtonpost.com/opinions/2020/06/03/no-knock-warrant-breonna-taylor-was-illegal/ [https://perma.cc/7SSY-6BV5].

2. Levenson, *supra* note 1.

3. *Breonna Taylor: What Happened on the Night of Her Death?*, BBC NEWS (Oct. 8, 2020), https://www.bbc.com/news/world-us-canada-54210448 [https://perma.cc/M5YK-6KMF].

4. *Id.*

also control whether Ms. Taylor's family can recover damages from the police officers who killed her.[5]

The Fourth Amendment guarantees individuals the right to be free from unreasonable police seizures.[6] A seizure occurs when an officer restrains one's liberty through physical force.[7] This includes the physical force of a bullet that ends one's life.[8] When the police's use of force is found to be unreasonable in a particular circumstance, an individual can recover civil damages.[9]

Civil suits for excessive police force may be brought in two ways: a *Bivens* action against federal officials or a § 1983 claim against state officials.[10] For § 1983 claims, five federal circuit courts assess Fourth Amendment reasonableness using an at-the-moment approach to the Supreme Court's totality-of-the-circumstances test.[11] These courts evaluate only the moment force was employed, purposefully disregarding the officers' prior conduct.[12] This means that in nearly half of American federal circuit jurisdictions, the police officers' conduct prior to returning fire and killing Ms. Taylor must legally be ignored.

In contrast, a minority of federal circuit jurisdictions take into account the events leading up to the point when force was used.[13] More specifically, the Tenth Circuit's state-created-need theory requires that the excessive force inquiry include whether the officers created the need for their use of force through their reckless or deliberate actions at an earlier point in time.[14]

The Supreme Court has not yet resolved this circuit split. Indeed, in May of 2020, the Fifth Circuit rejected the state-created-need theory and upheld its prevailing at-the-moment approach.[15] Ultimately, by only looking at the immediate moment when force is applied, the rights of those harmed by the wrongful acts of police officers are not protected. And due to the circuit split, citizens across the nation are arbitrarily left without a viable remedy.

---

5. Ms. Taylor's family sued the city of Kentucky, and they reached a $12 million settlement. *Id.*

6. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

7. Terry v. Ohio, 392 U.S. 1, 16 (1968).

8. *See* Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.").

9. *See* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 18 (11th ed. 2021).

10. *Id.*

11. *See infra* notes 47–51 and accompanying text.

12. *See infra* notes 47–51 and accompanying text.

13. *See infra* notes 58–61 and accompanying text.

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

15. Malbrough v. Stelly, 814 F. App'x 798, 802–03 (5th Cir. 2020).

This Comment argues that the Supreme Court should adopt the state-created-need theory to assess claims of excessive force. Part II provides relevant background on Fourth Amendment seizures and the civil remedies available for victims of excessive force. It also chronicles the current circuit split over how reasonableness is assessed in excessive force claims. Part III explains how the state-created-need theory is more faithful to the Supreme Court's prior opinions in this area, more consistent with how Fourth Amendment reasonableness is evaluated in other contexts, and fundamentally fairer than the at-the-moment approach. Part IV then articulates how society and our justice system would benefit from the state-created-need theory's adoption. Significantly, the state-created-need theory would embed into our legal doctrine a more developed understanding of what justice really means and contribute to this nation's movement for racial equality.

II. BACKGROUND

This Part addresses what a seizure is and the remedies available for victims who have been seized in violation of the Constitution. It further describes how a circuit split developed regarding the test for assessing the reasonableness of a seizure. In doing so, this Part begins to reveal that seizures that feel inherently wrong and seizures for which a legal remedy is attainable do not always align.

A. A Seizure Under the Fourth Amendment

The Fourth Amendment to the United States Constitution guarantees every person the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[16] The Supreme Court has long held that a seizure occurs when an officer restrains one's liberty through physical force.[17]

In *California v. Hodari D.*, the Court clarified the point at which one is seized.[18] Hodari D. had fled from an unmarked police car, saw an officer running towards him, and was then tackled by the officer.[19] Although the officer's pursuit qualified as a "show of authority," the Court reasoned that a seizure does not occur until the subject yields.[20] The Court thus held that

16. U.S. CONST. amend. IV.
17. Terry v. Ohio, 392 U.S. 1, 16 (1968).
18. California v. Hodari D., 499 U.S. 621, 624–29 (1991).
19. *Id.* at 622–23.
20. *Id.* at 625–26 (citing *Terry*, 392 U.S. at 19 n.16).

Hodari D. had been "seized" within the meaning of the Fourth Amendment only once he was tackled.[21]

Based on the right to be free from unreasonable seizures, excessive force claims refer to the civil suits that victims can bring when police violate this constitutional protection.[22] Victims of police brutality, both deadly and non-deadly, can pursue a civil remedy through one of two avenues.[23]

A *Bivens* action can be raised against federal officials who violate one's constitutional rights.[24] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court held that the Constitution contains an implied private right of action for Fourth Amendment violations.[25] *Bivens* therefore allows individuals harmed by the violence of federal agents—such as, CBP, DEA, FBI, or ICE—to recover damages for unreasonable seizures.[26]

Section 1983 is a statutory cause of action.[27] It similarly allows individuals to recover damages, but it applies when individuals are harmed by the violence of state officials, including department chiefs, local law enforcement, and municipalities.[28] Section 1983 was originally enacted as part of the Ku Klux Klan Act to resolve the disparity in legal remedies available to victims whose civil rights were violated by state government officials.[29] Since the 1960s, § 1983 claims have often been used to enforce citizens' Fourth Amendment rights against the use of excessive force by

---

21. *Hodari D.*, 499 U.S. at 629.

22. 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE AND FEDERAL COURTS § 3:4 (2021).

23. *Cf.* 59 STACEY HAWS FELKNER, *Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or Bivens Actions Against Law Enforcement Officers*, in AMERICAN JURISPRUDENCE PROOF OF FACTS 291 § 1 (3d ed. 2000) (discussing the application of qualified immunity in actions brought against state and local police officers under 42 U.S.C. § 1983 and federal officers sued under the *Bivens* doctrine).

24. 56 JAMES L. BUCHWALTER, *Cause of Action Under "*Bivens*" Doctrine Against Federal Official for Violation of Constitutional Rights*, *in* CAUSES OF ACTION 593 § 2 (2d ed. 2013).

25. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

26. *Id.*

27. 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .").

28. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION 1–2 (Kris Markarian ed., 3d ed. 2014); SUN S. CHOY & WESLEY C. JACKSON, SECTION 1983: MONELL LIABILITY (2021).

29. *See, e.g.*, William Heinke, Note, *Deadly Force: Differing Approaches to Arrestee Excessive Force Claims*, 26 S. CAL. REV. L. & SOC. JUST. 155, 170–71 (2017).

police officers.[30] For a citizen to prevail in an excessive force claim, a court must find that use of force to have been unreasonable.[31]

B. Fourth Amendment Reasonableness

There is no bright-line rule to assess the reasonableness of a seizure. Instead, the Supreme Court held in *Tennessee v. Garner* that to determine whether a seizure is reasonable under the Fourth Amendment, the main question is whether it is justified under the totality of the circumstances.[32] The extent of intrusion on the suspect's rights, which is contingent on how the seizure is made and carried out, must be balanced against the government's interest in effective law enforcement.[33]

Four years after *Garner*, the Court definitively ruled in *Graham v. Connor* that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."[34] Citing the totality-of-the-circumstances test from *Garner*,[35] the Court affirmed that the Fourth Amendment reasonableness analysis "is not capable of precise definition or mechanical application."[36] The Court pointed out three factors to consider: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officer or others; and (3) whether the suspect was actively resisting arrest or attempting to evade arrest through flight.[37] The judgment should be made "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[38] The Court went on to explain how the reasonableness of a use of force must be evaluated similar to the reasonableness of an arrest pursuant to probable cause and the execution of a valid search warrant.[39] It said that "the same standard of reasonableness at the moment applies."[40]

---

30. SCHWARTZ, *supra* note 28, at 1–3; IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:11, at F. (2021).

31. Graham v. Connor, 490 U.S. 386, 388 (1989); *see* discussion *infra* Section II.B. The federal circuit split applies specifically to § 1983 claims and how courts assess the reasonableness of a seizure. *See* discussion *infra* Section II.C.

32. 471 U.S. 1, 8–9 (1985).

33. *Id.* at 9.

34. *Graham*, 490 U.S. at 395.

35. *Id.* at 396 (citing *Garner*, 471 U.S. at 8–9).

36. *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 599 (1979)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

C. The Circuit Split

The Supreme Court held in *Graham* that proper application of the Fourth Amendment reasonableness test "requires careful attention to the facts and circumstances of each particular case."[41] However, the Court has never specified whether pre-seizure police conduct should be included in the excessive force analysis.[42] This has led to a considerable circuit split.[43] Nearly half of the federal circuit courts limit the reasonableness analysis to the moment the officer applied force, while the others more accurately account for the facts relating to the execution of the seizure.[44] Namely, the Tenth Circuit's state-created-need theory[45] is a more precise form of the totality-of-the-circumstances test. It expressly requires the trier of fact to consider whether an officer recklessly or deliberately created his or her need to use force.[46] This Part discusses these differing approaches, as well as where each circuit, and the Supreme Court, currently stands.

---

41. *Id.*

42. *See* discussion *infra* Section II.C.4; *see also* Paul David Stern, *Tort Justice Reform*, 52 U. MICH. J.L. REFORM 649, 687 (2019) (describing how the Court's choice in *Graham* "merely to highlight the split-second judgments officers often face without grappling with the question of whether the conduct preceding such judgments should factor into the analysis" has created significant debate).

43. *See* discussion *infra* Section II.C.1.

44. *See* discussion *infra* Section II.C.1. The D.C. Circuit applies *Graham*'s "objective reasonableness" standard, paying careful attention to the facts of the particular case, but it has not reviewed a case where officers recklessly or deliberately created the situation causing their need to use force. *See, e.g.*, Hall v. District of Columbia, 867 F.3d 138, 157 (D.C. Cir. 2017) ("We analyze a section 1983 claim of excessive force in violation of the Fourth Amendment under the constitutional 'objective reasonableness' standard. . . . 'An officer's act of violence violates the Fourth Amendment's prohibition against unreasonable seizures if it furthers no governmental interest, such as apprehending a suspect or protecting an officer or the public.'" (citations omitted)).

45. *See, e.g.*, Medina v. Cram, 252 F.3d 1124, 1132 (10th Cir. 2001).

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

1. At-the-Moment vs. Totality-of-the-Circumstances

The Second,[47] Fourth,[48] Fifth,[49] Sixth,[50] and Eighth[51] Circuits each apply the at-the-moment approach to determine the reasonableness of an officer's use of force. Under this approach, the analysis is limited to only the exact moment that police employed force, requiring courts to disregard any and all relevant conduct of the officers prior to their use of force.[52] This means that even if an officer created or exacerbated the dangerous situation leading to his or her use of force, such conduct is not factored into the determination of whether the seizure was reasonable.

How did this approach develop from the totality-of-the-circumstances standard prescribed by the Supreme Court? Recall the cases of *Graham* and *Hodari D.* The "reasonableness at the moment" phrase in *Graham* initiated the practice of courts disregarding police conduct prior to the moment of the technical seizure.[53] And although *Hodari D.* did not address the reasonableness of a seizure, the Court's restricted definition of when a seizure occurs reinforced the misguided focus on officers' actions solely in the moment force was applied.[54] Justice Stevens contested the narrow rule the

47. *See, e.g.*, Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996) ("Officer Proulx's actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force.").

48. *See, e.g.*, Gandy v. Robey, No. 11-2248, 2013 WL 1339771, at *7 (4th Cir. Sept. 27, 2013) ("A police officer's pre-seizure conduct, regardless of whether it was ill-advised or violative of law enforcement protocol, is generally not relevant for purposes of an excessive force claim under the Fourth Amendment which looks only to the moment force is used."); Elliott v. Leavitt, 99 F.3d 640, 643 (4th Cir. 1996) ("*Graham* requires us to focus on the moment force was used; conduct prior to that moment is not relevant in determining whether an officer used reasonable force.").

49. *See, e.g.*, Rockwell v. Brown, 664 F.3d 985, 991–93 (5th Cir. 2011) ("The excessive force inquiry is confined to whether the [officer or another person] was in danger *at the moment of the threat* that resulted in the [officer's use of deadly force]." (citations omitted)).

50. The Sixth Circuit calls its analysis a "segmented approach." *See, e.g.*, Greathouse v. Couch, No. 09-6011, 2011 WL 2989069, at *2 (6th Cir. July 22, 2011) ("[W]e '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."). I am categorizing this under the at-the-moment approach because the analysis is the same. In *Greathouse*, the court rejected the argument that the officer's entry into the victim's home without knocking and announcing himself should be considered. *Id.* Because the victim fired "warning shots," the officer was justified in responding with deadly force. *Id.* at *2–3.

51. *See, e.g.*, Cole v. Bone, 993 F. 2d 1328, 1333 (8th Cir. 1993) ("[W]e scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment.").

52. *See supra* notes 47–51.

53. *See supra* notes 47–51 and discussion *infra* Section III.A.

54. *See supra* notes 47–51; California v. Hodari D., 499 U.S. 621, 625 (1991) ("A seizure is a single act, and not a continuous fact.") (quoting Thompson v. Whitman, 85 U.S. 457, 471 (1873)).

Hodari D. majority created for "show of force" arrests in which a seizure does not occur until the officer "exercises control over the citizen."[55] He warned that *Hodari D.*'s holding may allow coercive and intimidating behavior by police to go unchecked.[56] Perhaps he was right.[57]

On the other side of the split, the First,[58] Third,[59] Ninth,[60] and Tenth Circuits[61] apply more of a true totality-of-the-circumstances test. Under this test, the events leading up to the particular seizure are included in the reasonableness analysis, and other factors relating to the execution of the seizure are considered.[62] For example, courts have evaluated where an officer chose to position himself when confronting an individual,[63] whether an officer's pursuit was measured or frantic,[64] and the sufficiency of the lighting

55. *Hodari D.*, 499 U.S. at 642–43 (Stevens, J., dissenting).

56. *Id.* at 645.

57. *See* Ryan Hartzell C. Balisacan, *Incorporating Police Provocation into the Fourth Amendment "Reasonableness" Calculus: A Proposed Post-Mendez Agenda*, 54 HARV. C.R.-C.L. L. REV. 327, 334 n.34 (2019) ("While only 270 federal civil rights actions were filed in 1961 . . . today between 40,000 and 50,000 [§] 1983 actions are commenced in federal court each year." (quoting MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 17–18 (4th ed. 2018)); *Police Officers and Civil Liability*, PRIV. FOR COPS (Apr. 26, 2017), https://www.privacyforcops.org/blog/2017/04/26/police-officers-and-personal-civil-liability/ [https://perma.cc/Y3JJ-MBLU] (citing cases of alleged use of excessive force as among the most common examples of section 1983 claims).

58. *See, e.g.*, Young v. City of Providence *ex rel.* Napolitano, 404 F.3d 4, 22 (1st Cir. 2005) (describing its approach as the "most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances"' (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985))); St. Hilaire v. City of Laconia, 71 F.3d 20, 26 (1st Cir. 1995) (holding that once a seizure has been found to have occurred, "the court should examine the actions of the government officials leading up to the seizure").

59. *See, e.g.*, Abraham v. Raso, 183 F.3d 279, 291 (3d Cir. 1999) (questioning how "a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished" could conform to the Supreme Court's requirement that the "totality of the circumstances" be examined). "'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force." *Id.*

60. *See, e.g.*, Nehad v. Browder, 929 F.3d 1125, 1135 (9th Cir. 2019) ("Reasonable triers of fact can, taking the totality of the circumstances into account, conclude that an officer's poor judgment or lack of preparedness caused him or her to act unreasonably."); Torres v. City of Madera, 648 F.3d 1119, 1126–27 (9th Cir. 2011) (explaining how a reasonable officer may have acted differently such as to not "unnecessarily creat[e] her own sense of emergency"); s*ee infra* Section II.C.4 (discussing the Ninth Circuit's now-overruled provocation rule).

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

62. *See supra* notes 58–60.

63. *Young*, 404 F.3d at 14 (acknowledging that the officer's decision to leave his covered position and walk into a more open and vulnerable area "made it more likely that deadly force would have to be used by [the officers] in order to defend [him]") (alteration in original).

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

in allowing the officer to see if a suspect was carrying a weapon (or merely a pen).[65]

The Seventh and Eleventh Circuits do not clearly stand on either side of the split. Over time, the Seventh Circuit's opinions have wavered.[66] The Seventh Circuit explicitly referenced this in 2015,[67] before maintaining that "[t]he sequence of events leading up to the seizure is relevant because the reasonableness of the seizure is evaluated in light of the totality of the circumstances."[68] In 2020, the court held that the Fourth Amendment is not violated just because an officer makes a mistake that provokes a suspect's violent resistance.[69]

The Eleventh Circuit also gives deference to officers' actions at the time of the seizure,[70] yet some of its analyses have referenced how officers behaved prior to applying force.[71] Following *Graham*'s objective reasonableness standard under the totality of the circumstances, the Eleventh

---

65. *Nehad*, 929 F.3d at 1135 ("The lighting was sufficient to allow an observer to identify the color of a pen at a distance of seventeen feet.").

66. *Compare* Marion v. City of Corydon, 559 F.3d 700, 705 (7th Cir. 2009*)* ("Pre-seizure police conduct cannot serve as a basis for liability under the Fourth Amendment; we limit our analysis to force used when a seizure occurs."), *with* Sledd v. Lindsay, 102 F.3d 282, 288 (7th Cir. 1996) ("The act of entering a private residence late at night with no indication of identity was enough to show that the officer had unreasonably created the encounter that led to the use of force."), *and* Deering v. Reich, 183 F.3d 645, 649 (7th Cir. 1999) ("The totality of the circumstances cannot be limited to the precise moment when [the officer] discharged his weapon.").

67. Estate of Williams v. Ind. State Police Dep't, 797 F.3d 468, 482–84 (7th Cir. 2015) ("Our caselaw is far from clear as to the relevance of pre-seizure conduct, or even as to a determination as to what conduct falls within the designation 'pre-seizure,' although the majority of cases hold that it may not form the basis for a Fourth Amendment claim.").

68. *Id.* at 483. Most recently, the Seventh Circuit affirmed in August 2021 that "the totality of the circumstances to justify a seizure includes the period of time just before" the shooting, as it is relevant to the determination of the objective reasonableness of such use of force. Smith v. Finkley, 10 F.4th 725, 793 (7th Cir. 2021) (citing *Williams*, 797 F.3d at 483).

69. Est. of Biegert v. Molitor, 968 F.3d 693, 698 (7th Cir. 2020). The court did acknowledge, though, that there are narrow circumstances in which officers' actions have been found unreasonable because they created a situation "where deadly force became essentially inevitable." *Id.*

70. Menuel v. City of Atlanta, 25 F.3d 990, 997 (11th Cir. 1994) ("Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred." (quoting Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir. 1994))).

71. *Id.* at 996 ("The officers proceeded slowly, cautiously, and precisely, resorting to deadly force only when assaulted with deadly force."); *see also* Garczynski v. Bradshaw, 573 F.3d 1158, 1168 (11th Cir. 2009) (noting that the officers, who had identified themselves, did not fire until after Garczynski repeatedly refused to show his hands and then swung his gun towards them).

Circuit specifically considers *Graham*'s three factors,[72] along with "(4) the need for force to be applied; (5) the amount of force applied in light of the nature of the need; and (6) the severity of the injury."[73]

2. The State-Created-Need Theory

In *Allen v. Muskogee*, the Tenth Circuit articulated the state-created-need theory: "The reasonableness of [the officers' use of force] depends both on whether the officers were in danger at the precise moment that they used force and on whether [their] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force."[74]

On the morning of February 20, 1994, Terry Allen had an altercation with his wife and children.[75] Allen left their home, taking ammunition and several guns with him, and eventually parked in front of his sister's residence.[76] After a 911 call had been made stating that Allen was threatening suicide, Lt. Smith arrived to Allen sitting in the driver's seat with one foot outside the car.[77] He had a gun in his right hand, resting on the middle console.[78] As Lt. Smith continuously told Allen to drop his gun, two more officers arrived.[79] Simultaneously, Lt. Smith reached into the vehicle to try to grab the gun, Officer McDonald held Allen's left arm, and Officer Farmer tried to open the passenger side door.[80] In response, Allen pointed the gun at Officer Farmer, who ducked behind the car, then swung it toward Lt. Smith and Officer McDonald.[81] Shots were subsequently exchanged.[82] Out of the twelve rounds that Lt. Smith and Officer McDonald fired, Allen was hit four times.[83] From Lt. Smith's arrival to when Allen was killed, only ninety seconds had elapsed.[84]

---

72. *See, e.g.*, Patel v. City of Madison, 959 F.3d 1330, 1339 (11th Cir. 2020) ("(1) the severity of the crime; (2) whether the individual 'pose[d] an immediate threat to the safety of the officers or others'; and (3) whether the individual 'actively resist[ed] arrest or attempt[ed] to evade arrest by flight" (quoting Graham v. Connor, 490 U.S. 386, 396 (1989))).

73. *Id.* (citations omitted).

74. Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir.1997) (quoting Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995)). *Sevier* observed that negligent actions by law enforcement would not be actionable under § 1983. 60 F.3d at 699 n.7.

75. *Allen*, 119 F.3d at 839.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

The court maintained that "[t]he excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force."[85] This is so as long as the officers' actions were "immediately connected" to the threat of force.[86] The court noted that the use of force is still judged from the perspective of a reasonable officer "on the scene," who must often make "split-second judgments" about the amount of force that is necessary.[87] Nevertheless, the court held that a reasonable jury could conclude that the officers acted recklessly and precipitated the need to use deadly force.[88]

The Tenth Circuit has repeatedly acknowledged that the state-created-need theory is "simply a specific application of the 'totality of the circumstances' approach inherent in the Fourth Amendment's reasonableness standard."[89] The court's later analysis in *Hastings v. Barnes* reflects the inconsistency of the at-the-moment approach.[90] Todd Hastings had called an emergency line expressing suicidal thoughts.[91] Four police officers arrived at his house, forced their way inside, and cornered him in a bedroom.[92] Hastings then picked up a twenty-inch Samurai sword and stood in a defensive manner.[93] As he lowered the sword and grabbed a phone to call for help, an officer pepper-sprayed him in the face.[94] In response, Hastings began moving

85. *Id.* at 840 (citing Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995)).

86. *Id.* (internal citations omitted); *see also Sevier*, 60 F.3d at 699 n.8 ("[P]receding events . . . attenuated by time or intervening events . . . are not to be considered in an excessive force case."); Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990) ("The requisite causal connection is satisfied if the defendant[s] set in motion a series of events that the defendant[s] knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights." (quoting Conner v. Reinhard, 847 F.2d 384, 397 (7th Cir. 1988))).

87. *Allen*, 119 F.3d at 840 (citing Graham v. Connor*,* 490 U.S. 386, 396–97 (1989)).

88. *Id.* at 841 (pointing, additionally, to deposition testimony that Lt. Smith ran up screaming and "immediately began shouting at Mr. Allen to get out of his car").

89. Thomson v. Salt Lake County, 584 F.3d 1304, 1320 (10th Cir. 2009) (quoting Medina v. Cram, 252 F.3d 1124, 1132 (10th Cir. 2001)); *see also* Abraham v. Raso, 183 F.3d 279, 292 (3d Cir. 1999) ("Some events may have too attenuated a connection to the officer's use of force. But what makes these prior events of no consequence are ordinary ideas of causation, not doctrine about when the seizure occurred.").

90. Hastings v. Barnes, 252 F. App'x 197 (10th Cir. 2007); *cf.* Jack Zouhary, *A Jedi Approach to Excessive Force Claims: May the Reasonable Force Be with You*, 50 U. TOL. L. REV. 1, 14–15 (2018) (discussing the case in relation to the Sixth Circuit's segmented, at-the-moment approach).

91. *Hastings*, 252 F. App'x at 198.

92. *Id.* at 198–200.

93. *Id.*

94. *Id.* at 200.

towards the officers.[95] Too crowded in the doorway to retreat, the officers fatally shot Hastings four times.[96]

The Tenth Circuit recognized that at the time of the shooting, Hastings was advancing towards the officers with a sword.[97] Hence, at the moment force was employed, the officers "were acting in self-defense and, viewed in isolation, the shooting was objectively reasonable under the Fourth Amendment."[98] For circuits that follow the at-the-moment approach, the officers would be held completely unaccountable. In contrast, the Tenth Circuit affirmed that "[a] reasonable jury could find that . . . [the officers'] actions unreasonably escalated the situation to the point deadly force was required."[99]

The state-created-need theory reflects that a seizure is a sequence of connected events culminating in the singular moment when a person is seized. *Pauly v. White* is another telling illustration.[100] On a rainy night, several officers approached Samuel Pauly's residence while searching for his brother, Daniel Pauly.[101] The officers furtively surrounded the home and refused to identify themselves when the brothers called for identification into the night.[102] Fearful of an assault, Samuel retrieved guns for himself and his brother and held his gun out the front window.[103] Because it was pointed in an officer's direction, the officers fired and killed Samuel.[104] The Tenth Circuit found that the officers were aware that the Pauly brothers might have believed the officers were intruders, and that it could reasonably be foreseen that the brothers would arm themselves in an attempt to defend their home in response to the officer's actions.[105] The court held that the officers had no established right to use deadly force under these circumstances.[106]

---

95. *Id.*
96. *Id.*
97. *Id.* at 203.
98. *Id.*
99. *Id.*
100. Pauly v. White, 814 F.3d 1060 (10th Cir. 2016), *judgment vacated*, 137 S. Ct. 548 (2017).
101. *Id.* at 1065–66.
102. *Id.* at 1066.
103. *Id.* at 1066–67.
104. *Id.*
105. *Id.* at 1073. This inquiry is analogous to the one the Supreme Court established in the context of police interrogations, as well. The Court held that a suspect is subject to interrogation when the police *should have known* that their words or actions are "reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 301 (1980).
106. *Pauly*, 814 F.3d at 1083.

3. The Fifth Circuit Recently Rejected the State-Created-Need Theory

The Fifth Circuit's outright rejection of the state-created-need theory in May 2020 underlined the clear divide in the circuits' approaches.[107]

In *Malbrough v. Stelly*, state and local police went to the home of Anthony Campbell to execute a search warrant.[108] Campbell was sitting in his car with two of his friends.[109] After police surrounded the vehicle and shouted for them all to exit the car, the front-seat passenger complied.[110] Campbell, however, reversed his vehicle, hit the police car parked behind him, and struck an officer while turning to drive away.[111] As Campbell continued on, the officers fired.[112] At the time of trial, a bullet remained lodged in Campbell's brain, leaving him disabled for life.[113]

To decide whether the officers used excessive force to affect Campbell's arrest, the Fifth Circuit referred to the factors laid out in *Graham*.[114] The court emphasized that the crucial aspect of a reasonableness determination is allowing for the "split-second judgments" officers must make in uncertain and rapidly evolving situations about the amount of force that is necessary.[115]

Citing *Allen v. Muskogee*, Malbrough, on behalf of his son, argued that the inquiry must include "whether the officers 'created the need to use such force' through their own 'reckless or deliberate conduct.'"[116] Malbrough claimed that the officers were reckless in approaching Campbell armed, unannounced, out of uniform, and in mostly unmarked cars.[117] This caused Campbell to think that he was being robbed and consequently created the officers' need to use deadly force.[118]

Rejecting this argument, the court declared that "the law of the Fifth Circuit—not the Tenth—applies."[119] Regardless of whether an officer has "manufactured the circumstances that gave rise to the fatal shooting," the Fifth Circuit's excessive force inquiry focuses on whether officers or others

---

107. Malbrough v. Stelly, 814 F. App'x 798, 803 (5th Cir. 2020).
108. *Id.* at 800.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 799.
114. *Id.* at 803 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).
115. *Id.* (quoting *Graham*, 490 U.S. at 396–97).
116. *Id.* (quoting Allen v. Muskogee, 119 F.3d 837, 840 (10th Cir.1997)).
117. *Id.*
118. *Id.* Note, Malbrough's claim was based on Campbell's testimony. There was contrasting evidence that the court weighed, yet discussion of it is not relevant for the purposes of this Comment. *See id.* at 803–04.
119. *Id.* at 803.

were "in danger *at the moment of the threat* that resulted in the officer's use of deadly force."[120] The court thus affirmed summary judgment for the officers.[121]

4. The Supreme Court's Input

The Supreme Court has had two main opportunities to address the role of pre-seizure police conduct in an excessive force claim. Yet in both cases, the Court declined to reach the issue.

First, in 2007 in *Scott v. Harris*, the Supreme Court granted summary judgment to Officer Scott.[122] Officer Scott pursued Victor Harris in a high-speed chase, and he ended it by ramming his vehicle into the back of Harris's, rendering Harris a quadriplegic.[123] The Court held that the officer's use of excessive force to eliminate the "substantial and immediate risk of serious physical injury to" the public was reasonable.[124] Suggesting that the officer may have created the need to use excessive force, Justice Ginsburg expressed during oral argument that "if the police weren't after [Harris], there is no indication that he would have been speeding."[125] In the end, the Court declined to establish a rule that would require police to let fleeing suspects get away when their reckless driving endangers other people's lives.[126]

Notably, it does appear that the Court took into consideration the officer's conduct prior to his use of force. Throughout its discussion of how to balance Harris's and the government's interests, the Court considered the "relative culpability" of the parties.[127] The Court found that it was Harris who initiated the reckless, high-speed flight "that ultimately produced the choice between two evils that Scott confronted."[128] However, because the Court did not directly endorse or reject the idea that an officer may unreasonably create the

120. *Id.* (first quoting *Fraire v. City of Arlington*, 957 F.2d 1268, 1275 (5th Cir. 1992); and then quoting *Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014)).

121. *Id.* at 807.

122. Scott v. Harris, 550 U.S. 372, 386 (2007), *rev'g* Harris v. Coweta County, 433 F.3d 807 (11th Cir. 2005).

123. *Id.* at 374.

124. *Id.* at 386.

125. Transcript of Oral Argument at 8, Scott v. Harris, 550 U.S. 372 (2007) (No. 05-1631), 2007 WL 601927.

126. *Scott*, 550 U.S. at 385–86.

127. *Id.* at 384–86.

128. *Id.* at 384.

need to use force, its role in the reasonableness analysis remained open to debate.[129]

Second, in 2017, the Supreme Court reviewed *County of Los Angeles v. Mendez*.[130] For around fifteen years, the Ninth Circuit applied the "provocation rule," which required consideration of whether the police officer provoked the violent confrontation.[131] If that provocation was an independent Fourth Amendment violation, the officer's actions, regardless of whether they were defensive, may be held unreasonable.[132] In *Mendez*, the occupants of a wooden shack, Angel Mendez and Jennifer Lynn Garcia, were napping when two deputies failed to knock and announce their presence and engaged in a warrantless entry.[133] Mendez stood up from the bed holding a BB gun meant to kill pests.[134] One deputy yelled, "Gun!" and the officers immediately fired, striking Mendez and Garcia numerous times.[135] Based on the provocation rule, the Ninth Circuit affirmed that the officers' failure to knock and announce made their subsequent use of force unreasonable.[136] The Supreme Court reversed and rejected the provocation rule.[137] It held that "[w]hen an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim."[138] The existence of a different independent violation before the use of force should be analyzed separately.[139]

The Court pointed to *Graham* as setting out the framework for assessing whether a seizure violates the Fourth Amendment.[140] It affirmed that the main question in excessive force cases is "whether the totality of the circumstances justifie[s] a particular sort of search or seizure."[141] Critically, the Court also made clear that it did not grant certiorari on the question of whether the "totality of the circumstances" includes "taking into account unreasonable

---

129. *See, e.g.*, Jeremy R. Lacks, *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, 430 (2008).

130. 137 S. Ct. 1539 (2017).

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

132. *Id.* at 1189 ("[W]here 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.") (emphasis added).

133. *Mendez*, 137 S. Ct. at 1544.

134. *Id.*

135. *Id.* at 1545.

136. *Id.* at 1545–46.

137. *Id.* at 1547.

138. *Id.*

139. *Id.*

140. *Id.* at 1546 (citing Graham v. Connor, 490 U.S. 386, 395 (1989)).

141. *Id.* (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

police conduct prior to the use of force that foreseeably created the need to use it."[142] In declining to address this question, the Court concluded that "[a]ll we hold today is that *once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation."[143]

Absent a Supreme Court ruling on the role of law enforcement's pre-seizure conduct, inequities will persist in the remedies afforded to victims, and officers will often be held unaccountable.

III. A BETTER APPROACH TO ANALYZING FOURTH AMENDMENT REASONABLENESS IN EXCESSIVE FORCE CLAIMS

Due to the circuit split, victims of police violence receive unequal relief, if any at all, based solely on where they happen to live.[144] This is generally unfair and precisely what § 1983 was meant to avoid.[145] Not only does the circuit split need to be resolved, but it needs to be resolved correctly. This Part explains how the state-created-need theory more accurately interprets *Graham*, follows the way Fourth Amendment reasonableness is ordinarily assessed, and is fundamentally fairer than the at-the-moment approach.

A. The State-Created-Need Theory Correctly Interprets Graham

In *Graham v. Connor*, the Supreme Court declared that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."[146] Because the petitioner in *Tennessee v. Garner* alleged Fourth Amendment and Due Process violations, the Court in *Graham* primarily sought to "make explicit what was implicit in *Garner*'s analysis"—that the Fourth Amendment's

142. *Id.* at 1547 n.1.

143. *Id.*

144. Heinke, *supra* note 29, at 170 ("[C]itizens are more likely to prevail in a federal excessive force lawsuit, if they were shot by a police officer in Colorado, rather than if they were shot in Virginia, assuming identical fact patterns."). Colorado is in the Tenth Circuit, and Virginia is in the Fourth Circuit. *About Federal Courts: Court Website Links*, U.S. CTS, https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links [https://perma.cc/W3YK-9UCB].

145. Heinke, *supra* note 29, at 170 ("One of the goals of the legislation that created [42] U.S.C. § 1983 was to bring uniformity to the legal remedies available to victims of civil rights violations perpetrated by the Ku Klux Klan.").

146. 490 U.S. 386, 395 (1989).

reasonableness standard should be used to evaluate claims of excessive force when one has been seized.[147] By further articulating "the course of an arrest," instead of merely the particular seizure, the Court unambiguously stated that the reasonableness analysis is not limited to the moment of the seizure.[148] This makes more sense when a seizure is understood as encompassing a series of actions that lead to and result in the actual restraint of a person.[149]

The Court's confirmation that "reasonableness" should not be evaluated "with the 20/20 vision of hindsight" does not limit the inquiry to the moment that force is applied.[150] The Court explained how the reasonableness of a particular use of force must be judged similar to an arrest based on probable cause or a search pursuant to a valid warrant.[151] Even if the wrong person is arrested or the search warrant is mistakenly executed on the wrong premises, the Fourth Amendment is not violated.[152] Why? Because the officer still acted reasonably in the moment.[153] Likewise, for uses of force, "the same standard of reasonableness *at the moment* applies."[154]

Courts who apply the at-the-moment approach latched on to this single phrase from *Graham* and have taken it completely out of context, undermining the Court's "foundational 'totality of the circumstances'

147. *Id.* (citing Tennessee v. Garner, 471 U.S. 1, 5 (1985)).

148. *See also Garner*, 471 U.S. at 8 (highlighting that the extent of intrusion upon one's rights depends "on not only when a seizure [was] made, but also how it [was] carried out").

149. *See* Bella v. Chamberlain, 24 F.3d 1251, 1256 n.7 (10th Cir. 1994) ("Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable.").

150. *Graham*, 490 U.S. at 396; *see* St. Hilaire v. City of Laconia, 71 F.3d 20, 29 n.4 (1st Cir. 1995) ("[T]he question [in *Hodari D.*] was not whether the seizure was *reasonable*, which requires an examination of the totality of the circumstances, but whether there had been a seizure at all. We do not read this case as forbidding courts from examining circumstances leading up to a seizure, *once it is established that there has been a seizure*." (citing California v. Hodari D., 499 U.S. 621 (1991))); Lacks, *supra* note 129, at 429 ("[T]he Court mentioned the phrase 'at the moment' . . . to 'distinguish between judging an officer's actions from his perspective at the time of the incident and judging them later on the basis of '20/20 hindsight.'" This distinction constitutes one of the key holdings in *Graham*, whereas the role of an officer's pre-seizure conduct is not discussed.").

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

152. *Id.*; *see* Hill v. California, 401 U.S. 797 (1971); Maryland v. Garrison, 480 U.S. 79 (1987).

153. *See Hill*, 401 U.S. at 804–05 (explaining that the arrest and subsequent search were valid under the Fourth Amendment because "there was probable cause to arrest Hill and the police arrested Miller in Hill's apartment, reasonably believing him to be Hill"); *Garrison*, 480 U.S. at 88 ("[T]he validity of the search of respondent's apartment pursuant to a warrant . . . depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. Here it unquestionably was.").

154. *Graham*, 490 U.S. at 396 (emphasis added).

approach."[155] As the ACLU has identified, the totality-of-the-circumstances test requires judges to consider things—the severity of the crime, for example—that occurred outside of the moment when the seizure was executed.[156] Officers' conduct prior and immediately connected to their use of force provides greater context for assessing the reasonableness of a seizure.[157]

The more accurate interpretation of the "at the moment" language is that the Court was aiming to prevent judges from assessing reasonableness in retrospect.[158] Scholars have persuasively advanced this understanding, emphasizing the counterintuitive nature of the at-the-moment approach and the Court's real intention to distinguish the officer's perspective at the time of the seizure from a completely outside point of view.[159]

B. The State-Created-Need Theory Is More Consistent with Fourth Amendment Reasonableness

By (1) requiring consideration of officer conduct immediately connected to the technical seizure and (2) allowing for consideration of police department policy and training, the state-created-need theory harmonizes excessive force "reasonableness" with "reasonableness" found elsewhere in Fourth Amendment jurisprudence.

---

155. Brief Amici Curiae of the ACLU and the ACLU of Southern California, in Support of Respondents at 2, County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017) (No. 16-369), 2017 WL 894892 at *2 [hereinafter Brief Amici Curiae of the ACLU]; *see also* 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, 280 (2003) ("The emphasis of the Fourth and Eighth Circuits on the 'at the moment' language appears misplaced. . . . At no point in *Graham* did the Court have occasion to discuss an officer's conduct leading up to a use of force.").

156. Brief Amici Curiae of the ACLU, *supra* note 155, at 1–2; *see also* Ryan Hartzell C. Balisacan, Note, *Incorporating Police Provocation into the Fourth Amendment "Reasonableness" Calculus: A Proposed Post*-Mendez *Agenda*, 54 HARV. C.R.-C.L. L. REV. 327, 337 (2019) (referencing the *Graham* factors and concluding that the "Court prescribes a reasonableness test that accounts for the circumstances surrounding the seizure").

157. *See also* Avery, *supra* note 155, at 287 ("[T]he efforts of other courts to draw fine lines around the moment of a seizure, and to exclude as irrelevant other factors, break down in the absence of any principled justification for where the lines ought to be drawn.").

158. *See* Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1, 17 (2017) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . . violates the Fourth Amendment." (quoting *Graham*, 490 U.S. at 396)).

159. *See, e.g.*, Heinke, *supra* note 29, at 167 (contemplating that if the only relevant consideration is whether an officer's use of force was reasonable at the moment it was used, "[s]uch an interpretation of *Graham* begs the question why 'totality of the circumstances' was mentioned at all").

1. Pre-Seizure Conduct

Factoring the police officer's conduct before the technical seizure into the totality-of- the-circumstances analysis is consistent with how courts normally assess reasonableness.[160] Many courts, including those that apply the at-the-moment-approach, recognize that a civilian's attempt to comply with an officer's order does not justify the use of force, nor does a civilian's immediate reaction to an officer's use of force justify the use of additional force.[161]

The Supreme Court has even recognized that police conduct before a search may be relevant to the Fourth Amendment reasonableness inquiry. In *Kentucky v. King*, the Court reviewed when the police can invoke exigent circumstances to conduct a warrantless search of a residence.[162] The Court held that this exception is only available "when the conduct of the police preceding the exigency is reasonable" and "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment."[163] *King* therefore suggests that the state-created-need theory is viable. First, where officers act recklessly or deliberately to create a situation in which they feel their safety or the safety of others is threatened, that behavior should make the subsequent seizure unreasonable. Second, where officers threaten to use force that would violate the Fourth Amendment, the seizure resulting from the civilian's reaction to the threat should, too, be found unreasonable.

Although the determination of whether an officer acted deliberately necessarily requires an examination of the officer's subjective intent, the Supreme Court has also recognized a few situations in which a subjective test is constitutionally permitted. For instance, to determine if police violated one's Sixth Amendment right to counsel, the question is whether government agents deliberately elicited incriminating statements from the defendant after indictment and in the absence of retained counsel.[164] Comparably, if an officer deliberately provoked an individual and such behavior is immediately connected to the officer's use of force, the seizure should be held unreasonable, and the officer should be held liable for excessive force.

160. *See, e.g.*, McClellan, *supra* note 158, at 17–18.
161. *Id.* at 22 n.98.
162. 563 U.S. 452, 455 (2011).
163. *Id.* at 462.
164. Massiah v. United States, 377 U.S. 201, 206 (1964).

2. Department Policy and Training

Unlike the at-the-moment approach, the state-created-need theory allows for consideration of department policy and officer training in determining the reasonableness of an officer's use of force.

In our everyday lives, it is common knowledge that violation of a law or work policy typically results in consequences. As a matter of public and law enforcement safety, special importance should be placed on police protocol.[165] Citizens can, in fact, sue local governments under § 1983 for a failure to adequately train officers when the failure is due to a "deliberate indifference to the injuries that may be caused."[166] So when individual officers disobey procedures established to ensure that encounters do not turn into bloodshed, and a situation then escalates into violence, the reasonableness of their conduct should at least come into question.[167]

Department policy and training can be directly pointed to as both putting officers on notice of what actions are appropriate in different situations and as evidence of officers' awareness of risk in acting defiantly. Because officers are trained on specific tactics to apply in the field, consideration of these policies "would be manifestly relevant to the reasonableness of [their] use of force."[168] The Ninth Circuit recently endorsed this analysis in *Watson v. City of San Jose*.[169] It upheld evidence of the officers' training and experience as "part of the trial court's obligation to pay 'careful attention to the facts and circumstances of [the] particular case'" under the totality of circumstances.[170]

Neglecting to consider these factors could arguably be justified according to existing Fourth Amendment jurisprudence. Most notably, the Court held in *Whren v. United States* that officers had acted reasonably under the Fourth Amendment despite the fact that their traffic stop violated state regulations.[171] The Court reasoned that the Fourth Amendment's protections cannot turn

165. *See* Zouhary, *supra* note 90, at 23 (recognizing that policies are adopted and trainings are taught "to protect both officers and the public").

166. ANNE H. TURNER, SECTION 1983: OVERVIEW § 6 (2021), Westlaw W-001-8382 (first citing Bryson v. City of Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010); and then citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978)). *See generally* CHOY & JACKSON, *supra* note 28 (detailing the various § 1983 municipal liability claims deriving from *Monell*).

167. *See* Balisacan, *supra* note 156, at 344 ("Certain procedures are adopted precisely to ensure that encounters do not escalate to violence. If police officers instigated a violent confrontation by flouting the rules, it could more likely than not speak to the reasonableness of their conduct.").

168. Avery, *supra* note 155, at 289 (alteration in original).

169. 765 F. App'x 248 (9th Cir. 2019).

170. *Id.* at 251 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

171. Whren v. United States, 517 U.S. 806, 815–19 (1996).

upon local law enforcement practices, which "vary from place to place and from time to time."[172]

However, the Supreme Court has consistently pointed to officer training and experience when evaluating the reasonableness of officers' actions.[173] For example, in deciding if a good-faith exception applied to the suppression of evidence, the Court asked whether a "*reasonably well trained police officer* could have believed that there existed probable cause to search."[174] For reasonable-suspicion determinations, the Court explained that a totality-of-the-circumstances examination "allows officers to draw on *their own experience and specialized training* to make inferences from" all of the available information.[175] Even in *Tennessee v. Garner*, to determine whether the officer's use of deadly force was excessive, the Court reviewed various jurisdictional rules and police department policies on the use of deadly force.[176] Therefore, while some actions may always be reasonable, such as a stop and search based on probable cause, the reasonableness of other behavior may just as well be informed by department policy and training.

Breach of department policy or training techniques would not be a per se violation of the Fourth Amendment, and lack of a violation should not mean that the officer absolutely acted reasonably either. The key is simply that the existence of department policy and training are additional evidence of what conduct is reasonable under the circumstances. Not only does such an approach still give deference to an equal and invariable application of the Fourth Amendment, but it also better supports a totality-of-the-circumstances analysis.

C. The State-Created-Need Theory Is Fundamentally Fairer

Intuitively, it seems wrong that police officers can act recklessly, deliberately, or "freely engage in provocative conduct," and then avoid

---

172. *Id.* at 815.

173. *See e.g.*, United States v. Leon, 468 U.S. 897 (1984).

174. *Id.* at 926 (emphasis added). Additionally, while discussing the objective reasonableness of a warrant application, the Court said that the question is "whether a *reasonably well-trained officer* in petitioner's position would have known that his affidavit failed to establish probable cause." Malley v. Briggs, 475 U.S. 335, 345 (1986) (emphasis added).

175. United States v. Arvizu, 534 U.S. 266, 273 (2002) (emphasis added) (citing United States v. Cortez, 449 U.S. 411, 418 (1981) ("[A] trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.")).

176. Tennessee v. Garner, 471 U.S. 1, 15–19 (1985).

liability.[177] This is contrary to the Fourth Amendment benchmark of "reasonableness"[178] and is not typically allowed in other areas of the law.

For example, use of deadly force necessary to protect oneself from death or serious bodily harm is commonly a valid self-defense claim.[179] However, as stated in the Model Penal Code (MPC), use of deadly force in self-protection is not justifiable if "the actor, with the purpose of causing death or serious bodily injury, *provoked* the use of force against himself in the same encounter."[180] The only specified exception for law enforcement is that "a public officer *justified in using force* in the performance of his duties . . . is not obliged to desist from efforts to perform such duty, effect such arrest[,] or prevent such escape because of resistance or threatened resistance."[181] Accordingly, when an officer deliberately creates a situation that results in the need to use force, that use of force should not be deemed justified. And if an officer can only continue to use force when it is originally warranted, the seizure resulting from the unjustified use of force should be unreasonable.

The MPC also recognizes a defense for otherwise unlawful conduct believed to be necessary to avoid harm to oneself or another person.[182] Yet this defense is unavailable where the actor recklessly brought "about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct."[183] Comparatively, although officers can use force to effect an arrest,[184] it should be found unreasonable if the officer recklessly created the need to use such force.

These logical limitations to claims of self-defense (no defense when a person intentionally provokes the altercation) and necessity (no defense when a person recklessly creates the situation so that he must violate the law to protect himself) bolster the innately sensible rationale of the state-created-need theory. Police officers are officers of the law, not above the law. They should not be held to such a lower standard than every other citizen where inherently wrong behavior is constitutionally supported. The justification for

177. Balisacan, *supra* note 156, at 331.

178. *Id.* (internal citations omitted); *see also* Zouhary, *supra* note 90, at 22 ("The 'big picture' question in excessive force cases is whether the officer behaved reasonably—and reckless conduct, by definition, is not reasonable.").

179. MODEL PENAL CODE § 3.04(2)(b) (AM. L. INST. 2019).

180. *Id.* § 3.04(2)(b)(i) (emphasis added).

181. *Id.* § 3.04(2)(b)(ii)(B) (emphasis added).

182. *Id.* § 3.02(1).

183. *Id.* § 3.02(2).

184. Graham v. Connor, 490 U.S. 386, 396 (1989) ("Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.") (citing Terry v. Ohio, 392 U.S. 1, 22–27 (1968)).

an officer's use of force to effect an arrest should not extend to situations where their own reckless or deliberate actions created the immediately threatening situation.[185] This conduct does not serve to protect the public safety or the government's interest in effective law enforcement.[186] Considering officers' actions immediately connected to their use of force thus allows courts and juries to better evaluate whether a seizure was truly reasonable. It is intuitively fairer than disregarding instigating conduct, and it upholds each party's accountability far more proportionally.

IV. ADOPTING THE STATE-CREATED-NEED THEORY WILL BENEFIT SOCIETY

Holding officers accountable for harmful or provocative actions that result in excessive force is an important part of the equation when addressing police brutality. Not only would recognition of whether an officer acted in accordance with his or her training better reflect a reasonableness analysis under the totality of the circumstances, but it would lead to many improved outcomes. The Supreme Court's adoption of the state-created-need theory would cause police departments to implement safer policies and better training, and the increase in officer accountability would deter misconduct and help restore the legitimacy of our legal system. Progress in these areas would have an even greater impact on contributing to racial equality and creating a more just society.

A. Safer Police Department Policies and Improved Officer Training

The Supreme Court's acknowledgement of the relevance of officers' conduct preceding their use of force would pave the way for police departments to establish safer policies and provide more comprehensive officer training.

Professors Brandon Garrett and Seth Stoughton's empirical analysis of the United States' fifty largest policing agencies revealed just how much the Supreme Court's Fourth Amendment doctrine affects police use of force

185. *See also* Latasha M. James, *Excessive Force: A Feasible Proximate Cause Approach*, 54 U. RICH. L. REV. 605, 625 (2020) ("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.").

186. *See* Tennessee v. Garner, 471 U.S. 1, 7–12 (1985) (determining whether a seizure is reasonable under the Fourth Amendment requires balancing the governmental interests in effective law enforcement with the extent of intrusion on the suspect's rights).

policies.[187] They found that policies often say that reasonableness is determined "based on the 'totality of the circumstances' known to the officer, who must make a split-second decision."[188] Yet further additional factors are only included by departments that have adopted a minimization or de-escalation approach.[189] This suggests that police training may not focus on avoidance or minimization of use of force, either.[190] Some use-of-force instructors advocated against detailed policies because it would conflict with *Graham*'s affirmation that Fourth Amendment reasonableness is incapable of "precise definition or mechanical application."[191] Implementing more detailed policies and training would be a legal impossibility.[192]

Adoption of the state-created-need theory would negate this reasoning. Unequivocal acknowledgment by the Supreme Court that an officer's behavior before the execution of a seizure impacts the reasonableness of that use of force would subsequently cause police departments to focus more on pre-seizure conduct.

Moreover, as a result of the publicization of tragic encounters involving law enforcement in recent years, legislators are already focusing greater attention on state and department policies,[193] and support for de-escalation techniques is prevailing throughout the country.[194] In July of 2020, eleven of the nation's leading law enforcement leadership and labor organizations published a revised *National Consensus Policy on Use of Force* (Consensus

187. Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 212, 285 (2017) ("About half of the policies relied upon language from *Graham* and the Supreme Court's Fourth Amendment cases when setting out their general requirements for the use of force.").

188. *Id.* at 285.

189. *Id.*

190. *Id.*

191. *Id.* at 285–86 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).

192. Garrett & Stoughton, *supra* note 187, at 286.

193. *See generally Law Enforcement Overview*, NAT'L CONF. OF STATE LEGISLATORS (Aug. 3, 2020), https://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx [https://perma.cc/VV2F-B667] (reviewing current and improved training requirements, policing tactics, and state laws throughout the nation regarding use of force).

194. For example, OFF. OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 20, 56–57 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/57UD-HMMM], maintains that "[l]aw enforcement agency policies for training on use of force should emphasize de-escalation" and that basic officer training should include lessons on "critical thinking, social intelligence, implicit bias, fair and impartial policing, historical trauma, and other topics that address capacity to build trust and legitimacy in diverse communities and offer better skills for gaining compliance without the use of physical force."

Policy) to direct officers on the use of less-lethal and deadly force.[195] The Consensus Policy is meant to be consistent with Supreme Court precedent. It begins by citing *Graham* to explain how "the decision to use force 'requires careful attention to the facts and circumstances of each particular case,'" and is assessed based on "the totality of the circumstances."[196] With this as a guide, the Consensus Policy instructs officers to use de-escalation techniques before resorting to force, which would also reduce the need to use force.[197]

Therefore, by following the state-created-need theory and holding officers accountable when their reckless actions unreasonably created the need to use force, police departments will likely feel increasing pressure to enforce protocol and invest in better training.[198] Both society and the government will benefit because people will be more protected by better trained officers and that will lead to a decrease in excessive force lawsuits.[199]

B. Deter Misconduct and Increase the Legitimacy of Our Judicial System

Beyond the response of police departments, the Supreme Court's adoption of the state-created-need theory would change perceptions within society. Establishing an adequate avenue towards relief for victims of police brutality and holding officers accountable for their wrongful behavior would have the

---

195. INT'L ASS'N OF CHIEFS OF POLICE, NATIONAL CONSENSUS POLICY AND DISCUSSION PAPER ON USE OF FORCE 2 (2020), https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf [https://perma.cc/WL6Q-LY8T].

196. *Id.* (citing *Graham*, 490 U.S. at 396 (1989)).

197. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 195, at 3 ("An officer shall use de-escalation techniques and other alternatives to higher levels of force consistent with his or her training whenever possible and appropriate before resorting to force and to reduce the need for force."). De-escalation is defined as taking action, including verbal and non-verbal communication, "during a potential force encounter in an attempt 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." *Id.* at 2.

198. E. Bryan MacDonald, Graham v. Connor*: A Reasonable Approach to Excessive Force Claims Against Police Officers*, 22 PAC. L.J. 157, 181 (1990) ("[P]olice departments and cities faced with increasing liability will be forced to put more emphasis on training their officers in the proper use of force."); *see also* Lacks, *supra* note 129, at 432 ("[B]y expanding the temporal sequence of events available for consideration in the reasonableness inquiry to include pre-seizure conduct, it is plausible that courts can bring about changes that, to date, police departments have been reluctant to implement.").

199. *See* MacDonald, *supra* note 198.

dual benefit of deterring police misconduct and restoring the legitimacy of our legal system.[200]

The Supreme Court has played an active role in deterring police misconduct when it comes to Fourth Amendment searches and seizures of property. For decades, it has held evidence seized in violation of the Constitution inadmissible in state and federal courts.[201] The Court explained that "the purpose of [this] exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"[202] In order to deter excessive police force and compel respect for the constitutional guaranty against unreasonable seizures, any incentive officers may have to use excessive force must be removed. While officers may not be incentivized to act recklessly or deliberately so as to create a situation where they need to use force, a reasonableness analysis that does not account for their pre-seizure conduct surely does not deter this behavior.

Besides, if public officials can violate the Constitution with no penalty, what does the Constitution really protect? This concern is not foreign to the Supreme Court.[203] As the *Mapp* Court discerned, allowing a constitutional right "to remain an empty promise" diminishes judicial integrity—a necessary ingredient "in the true administration of justice."[204] Knowing that police departments base their policies on Supreme Court precedent,[205] adoption of the state-created-need theory seems to be the most practical

---

200. *See* David Cole, *No Equal Justice*, 1 CONN. PUB. INT. L.J. 19, 29–30 (2001), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=1347&context=facpub [https://perma.cc/HX23-GR29] (explaining how, in regards to racial and class disparities, "[t]he perception and reality of double standards" contributes to "eroding the legitimacy of the criminal law"); Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 221 (2012) ("Almost certainly, the police lose perceived legitimacy when they intentionally or willfully (or even recklessly or negligently) employ excessive force.").

201. *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961) ("To hold otherwise is to grant the right [against unreasonable seizures] but in reality to withhold its privilege and enjoyment.").

202. *Id.* (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

203. *See* Terry v. Ohio, 392 U.S. 1, 12–13 (1968) (noting that the exclusionary rule "has been recognized as a principal mode of discouraging lawless police conduct" and is imperative to upholding judicial integrity); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting) ("Wise observers have long understood that the appearance of justice is as important as its reality.").

204. *Mapp*, 367 U.S. at 660.

205. *See supra* Section IV.A.

deterrence method.[206] And increasing police accountability under the law would thereby "help to restore faith in the public eye that reckless and deliberate police misconduct will not be ignored."[207]

C. Address Racial Inequality

The rampant civil rights violations committed by members of the Klu Klux Klan, and the refusal by officials' to prosecute these crimes, led to the enactment of § 1983 in 1871.[208] The Supreme Court eventually recognized § 1983 as an avenue for redress against state officials' abuse of power in *Monroe v. Pape*[209] in 1961, the middle of the Civil Rights Movement.[210] In *Monroe*, the Court reaffirmed that an independent federal remedy was necessary because, "by reason of prejudice, passion, neglect, intolerance or otherwise," state courts and laws could not be relied upon to uphold the equal protection of one's constitutional rights.[211]

To this day, not enough has changed. The use of excessive force by law enforcement is as apparent as ever in its instigation of the Black Lives Matter movement and exacerbation of the need for social justice.[212] Neglecting to consider pre-seizure police conduct contributes to systemic racism by condoning officer behavior that is easily influenced by racial prejudice.[213] In contrast, because the state-created-need theory encourages greater preparation and adherence to training,[214] its adoption would reduce the negative consequences of racial biases.[215] The most appropriate time for the Supreme Court to adopt the state-created-need theory and publicly support the movement for equality is now.

---

206. The key to a deterrence effect is to alter the behavior of officers and department policies. *See, e.g.*, United States v. Leon, 468 U.S. 897, 918 (1984) ("If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments.").

207. Heinke, *supra* note 29, at 171; *see also* Brandon Vaidyanathan, *Systemic Racial Bias in the Criminal Justice System Is Not a Myth*, PUB. DISCOURSE (June 29, 2020), https://www.thepublicdiscourse.com/2020/06/65585/ [https://perma.cc/3RLR-9C4P] ("Fatal police shootings also weaken a community's trust in and perceived legitimacy of the police.").

208. *See, e.g.*, Heinke, *supra* note 29, at 170; Monroe v. Pape, 365 U.S. 167, 180 (1961).

209. *Monroe*, 365 U.S. at 180.

210. SCHWARTZ, *supra* note 28, at 1.

211. 365 U.S. at 180.

212. *See, e.g.*, *6 Years Strong*, BLACK LIVES MATTER, https://www.shopfrank.net/six-years-strong/ [https://perma.cc/JS59-J8SF].

213. *See infra* pp. 533–34.

214. *See supra* Section IV.A.

215. *See infra* note 222.

African Americans are three times more likely to be killed by police than white people.[216] Of those killed, African Americans are 1.3 times more likely to be unarmed and less likely to be threatening someone.[217] In fact, in 2020, over half of those who were unarmed and killed by police were people of color, especially African American and Hispanic.[218] Additionally, force is disproportionately used depending on the suspect's race,[219] and minority communities are more often subjected to unrestrained police presence.[220] As a result, it is dangerously likely that focusing only on the precise moment force is employed and warranting the split-second decisions officers must make will legitimize "as 'reasonable' police officers' use of force that is influenced by racial stereotypes."[221]

Research shows that people are more susceptible to acting in accordance with their subconscious biases when making automatic or impulsive decisions.[222] Implicit bias studies reveal that the presence of an African American man can prompt thoughts that he is violent and a criminal.[223] Just

---

216. *Police Violence Map*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/ [https://perma.cc/62VC-6P2X] (Nov. 7, 2021); *2020 Police Violence Report*, MAPPING POLICE VIOLENCE, https://policeviolencereport.org/ [https://perma.cc/Y96M-SWKJ].

217. *Id.*

218. *Id.*

219. German Lopez, *There Are Huge Racial Disparities in How US Police Use Force*, VOX (Nov. 14, 2018, 4:12 PM), https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities [https://perma.cc/5TLK-UD6P]; *cf.* Erin Schumaker, *What the Latest Research Tells Us About Racial Bias in Policing*, ABC NEWS (June 5, 2020, 2:04 AM), https://abcnews.go.com/US/latest-research-tells-us-racial-bias-policing/story?id=70994421 [https://perma.cc/8C8D-CLNU] (referencing data that police disproportionately shoot and kill Black Americans, as well as noting the immense under-reporting of nonfatal use of force). *But cf.* Ronald G. Fryer Jr., *What the Data Say About Police*, WALL ST. J.: OP. (June 22, 2020, 1:12 PM), https://www.wsj.com/articles/what-the-data-say-about-police-11592845959 [https://perma.cc/79GD-VY2P] (finding racial differences in the use of nonlethal force, but not in officer-involved shootings).

220. *See* Justin M. Feldman et al., *Police-Related Deaths and Neighborhood Economic and Racial/Ethnic Polarization, United States, 2015-2016*, 109 AM. J. PUB. HEALTH 458 (2019), https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304851 [https://perma.cc/E8UU-K3N7]; Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245 *passim* (2010); *see also* Vaidyanathan, *supra* note 207 ("Even officers with no prior racist inclinations, merely by regular exposure to this environment, can develop heightened anxieties and apprehensions when encountering minority civilians. The regularity with which such conditions obtain is enough to produce encounters that may lead to systemic racial biases in police killings of civilians.").

221. Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1804 (2016) (citing Brief of the NAACP Legal Defense & Educational Fund, Inc., as Amicus Curiae in Support of Petitioner at 24–25, Tolan v. Cotton, 572 U.S. 650 (2014) (No. 13-551), 2013 WL 6843336).

222. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–28 (2011).

223. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 876 (2004).

thinking about crime can generate thoughts of African Americans.[224] Threat perception and fear are also more often detected when white participants are subliminally shown African American versus white faces.[225] And a study of video game participants found that players were more likely to shoot unarmed African Americans than unarmed whites.[226] Consequently, only analyzing the moment force is used without considering whether the officers unreasonably created the need to use such force "may foster and excuse racially biased police brutality."[227]

Consideration of whether officers' reckless actions created the dangerous situation is not meant to bring their subjective motivations into the analysis of excessive force claims. Officers' conduct would still be evaluated objectively, according to the standard of a reasonable officer. However, imposing liability for such conduct would reduce the possible negative effects of officers' subjective intentions. Holding officers accountable for reckless actions that unreasonably create the need to use force would aid in deterring this conduct by encouraging greater preparation and forethought. This would lessen the number of situations where inner biases are more controlling in officers' decisions, such as when officers must quickly respond to the threat they recklessly contributed to causing.

Racial injustice and the use of excessive force are intimately connected. Adoption of the state-created-need theory can help to resolve both. Judicial acknowledgment of wrongful police conduct would further repair the public perception that seemingly excessive use of force by law enforcement against people of color will not be tolerated.[228]

---

224. *Id.*

225. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1510–11 (2005).

226. Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCH. 399, 399, 403 (2003) (finding that "subjects had greater difficulty distinguishing weapons from harmless objects when the weapons were in the hands of simulated Blacks than Whites and . . . were response-biased in the sense of giving the weapon-appropriate response more readily to Black than to White targets").

227. Cover, *supra* note 221, at 1804–05 ("A fair excessive force standard, on the other hand, would require that courts not simply accept the 'snap-judgment' truism but assess the facts before them, including to what extent the use of force was a product of police initiative and deliberation.").

228. *Cf.* Clarence Edwards, *Race and the Police*, NAT'L POLICE FOUND. (Feb. 18, 2016), https://www.policefoundation.org/onpolicing/race-and-the-police/ [https://perma.cc/HL2G-ZJZ7] (describing the impact of race on law enforcement's treatment of African Americans and other racial minorities, which contributes to the "[n]egative minority community perceptions" and distrust of police by these groups).

V. CONCLUSION

Law enforcement is a difficult and dangerous profession. It is understandable that officers may have to use force to restrain an individual or effect an arrest, and it is lawful to do so. However, when officers recklessly or deliberately create a threatening situation, the resulting need to use force no longer seems intuitively fair.

The Fourth Amendment is supposed to guarantee the people freedom from unreasonable seizures. Declining to hold officers accountable for such harmful or instigating behavior does not uphold this constitutional protection. Because nearly half of the circuit courts do not consider officers' pre-technical-seizure conduct, victims of police brutality are left without a remedy. This exacerbates the public and law enforcement's fractured relationship and negatively reflects on the legitimacy of our judicial system.

The state-created-need theory represents a true test under the totality of the circumstances to assessing Fourth Amendment reasonableness. It recognizes that the police's behavior immediately connected to the moment they used force is relevant to the determination of whether that use of force was reasonable. While the seizure itself is a single act, how it is carried out is entirely dependent on the events leading up to it. Therefore, whether an officer recklessly or deliberately created the need to use force should unquestionably be considered in the reasonableness determination. Especially during this time of social unrest and movement for racial equality, the Supreme Court should adopt the state-created-need theory to assess claims of excessive force.

The times where officers unreasonably create the need to use force are a small subset of excessive force cases and an even narrower subset within the scope of Fourth Amendment violations. Yet the big picture reflects the imperativeness of addressing America's police use-of-force epidemic. There were only 18 days in 2020 and 12 days in 2021 where police did not kill someone.[229] Police killed 1,127 people in 2020 and 960 people in 2021.[230] And despite being only 13% of the population**,** African Americans accounted for 28% of those killed in 2020 and 27% of those killed in 2021.[231] No step in the right direction is too small.

---

229. Jeff Craig, *Excessive Force: Causes, Solutions, and Victims' Rights*, DC L.: TEX. INJ. LAWS. (June 10, 2010), https://www.texasjustice.com/excessive-force/ [https://perma.cc/WC22-XB9C]; *Police Violence Map*, *supra* note 216.

230. *Police Violence Map*, *supra* note 216.

231. *Id.*