RACE, POLICING, AND LETHAL FORCE: REMEDYING SHOOTER BIAS WITH MARTIAL ARTS TRAINING

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I
INTRODUCTION

On November 24, 2015, the city of Chicago released dashboard camera video footage of the shooting of a seventeen-year-old Black[1] male teenager named Laquan McDonald by Jason Van Dyke, a police officer with the Chicago Police Department. The video shows McDonald strolling down the street, holding a knife in his right hand by his side.[2] McDonald does not appear to be threatening anyone.[3] In fact, there is no one within his striking distance.[4] Seconds later, we see a small figure to the left of the screen, pointing a gun in McDonald's direction.[5] A shot rings out, and McDonald falls to the ground.[6] Then, the popping sound of several more gunshots—a total of sixteen shots in fifteen seconds—and the sight of McDonald's body twitching as he is shot over and over while lying on the ground.[7] The fatal shooting of Laquan McDonald occurred in October 2014, but the City of Chicago refused requests to release

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1. Like many others who write about race, I purposely capitalize the "B" in "Black" and the "W" in "White" to highlight the fact that Blacks and Whites are commonly perceived in the United States as members of clearly defined racial groups.

2. Mark Guarino, Wesley Lowery & Mark Berman, *Officer Charged in Teen's Death*, WASH. POST, Nov. 25, 2015, at A1 (noting that the video "depicts Jason Van Dyke, a 14-year veteran of the police force, drawing his weapon on Laquan McDonald, an African American teen carrying a knife who appears to be crossing a major thoroughfare" and then shooting at McDonald a total of sixteen times as McDonald was "veer[ing] away from the officers").

3. *See id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

the video for over a year. The video was not made public until November 2015, when a judge ordered its release.[8] The footage sparked outrage and protests[9] as McDonald's fatal shooting was yet another in a string of highly publicized shootings of Black males by police officers, including the August 2014 shooting of 18-year-old Michael Brown in Ferguson, Missouri;[10] the November 2014 shooting of 12-year-old Tamir Rice in Cleveland, Ohio;[11] and the April 2015 shooting of 50-year-old Walter Scott in North Charleston, South Carolina.[12]

Official governmental data on the exact number of fatal police shootings that occur annually in the United States is woefully lacking.[13] Until fairly recently, government data suggested that approximately 420 persons are killed in police encounters each year.[14] Nongovernmental sources, however, indicate

8. *See* Peter Slevin, Mark Guarino & Mark Berman, *Charges Against Policeman Don't Quell Anger in Chicago*, WASH. POST, Nov. 26, 2015, at A1 (noting that Mayor Rahm Emmanuel resisted releasing the video for thirteen months, "asserting that he did not want to prejudice the criminal investigation by the Cook County state's attorney" until a Cook County judge ordered release of the video).

9. *See* Mark Guarino, *Protest of Slaying Blocks Chicago Stores*, WASH. POST, Nov. 29, 2015, at A3 (noting that nearly 1,000 protestors led by the Reverend Jesse Jackson and Representative Bobby Rush blocked traffic and disrupted holiday shopping in downtown Chicago on Black Friday, the Friday after Thanksgiving); Slevin, Guarino & Berman, *supra* note 8, at A1 (noting that the pre-Thanksgiving demonstrations by several hundred Chicago residents following the release of the video were largely peaceful). On the same day the video was released, the State's Attorney of Cook County Office announced that it was filing first-degree murder charges against Officer Van Dyke. *Id.*

10. Eliott C. McLaughlin, *What We Know About Michael Brown's Shooting*, CNN (Aug. 15, 2014, 12:10 AM), http://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know [http://perma.cc/SK6Y-YMZ8].

11. Abby Ohlheiser, *Death of Tamir Rice, 12-year-old Shot by Cleveland Police, Ruled a Homicide*, WASH. POST, Dec. 12, 2014, https://www.washingtonpost.com/news/post-nation/wp/2014/12/12/death-of-tamir-rice-12-year-old-shot-by-cleveland-police-ruled-a-homicide/.

12. Mark Berman & Wesley Lowery, *Former South Carolina Police Officer Who Fatally Shot Walter Scott Indicted on Federal Civil Rights Violation*, WASH. POST (May 11, 2016, 3:25 PM), https://www.washingtonpost.com/news/post-nation/wp/2016/05/11/former-north-charleston-officer-who-shot-walter-scott-indicted-on-federal-civil-rights-violation/. These and other police shootings invigorated the U.S. Department of Justice to investigate and sign agreements with several jurisdictions to reform police practices and reduce bias in policing. *See* Sunita Patel, *Towards Radical Democratic Police Reform: "Community Engagement" in DOJ Police Consent Decrees*, 51 WAKE FOREST L. REV. __ (forthcoming 2016) (manuscript on file with author).

13. Even though the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §§ 13701–14223 (2012), mandated the collection and publication of data about excessive force by police, the Department of Justice has not been able to carry out this mandate because of insufficient funding. OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 19 (2015). Both President Barack Obama and former U.S. Attorney General Eric Holder have called for better data on the number of persons killed each year by police. *See, e.g.*, Remarks Following a Meeting with the President's Task Force on 21st Century Policing and an Exchange with Reporters, 2015 DAILY COMP. PRES. DOC. 143 (Mar. 2, 2015), https://www.whitehouse.gov/the-press-office/2015/03/02/remarks-president-after-meeting-task-force-21st-century-policing; *Attorney General Holder Delivers Remarks Honoring the Life and Legacy of Dr. Martin Luther King Jr.*, DEP'T OF JUST.: JUST. NEWS (Jan. 15, 2015), https://www.justice.gov/opa/speech/attorney-general-holder-delivers-remarks-honoring-life-and-legacy-dr-martin-luther-king. The FBI plans to replace its current system for tracking fatal police shootings with a new system, but these changes will not be in place until 2017. Kimberly Kindy, *FBI to Expand Tracking of Fatal Police Shootings*, WASH. POST, Dec. 9, 2015, at A1.

14. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: JUSTIFIABLE HOMICIDE BY

that the actual number of persons killed each year by police is probably double that figure. For example, multiple sources report that over 1,000 individuals were killed by police in the United States in 2015.[15] Other sources suggest more than one thousand individuals were killed by police in the United States in 2014 as well.[16]

The Black Lives Matter movement has been instrumental in calling the nation's attention to the fact that many of those shot and killed by police officers are Black.[17] Approximately one-quarter of the individuals killed by police in 2015 were Black, even though Blacks constitute only thirteen percent of the total population in the United States.[18] In 2014, Black individuals in

WEAPON, LAW ENFORCEMENT 2009-2013 (2013), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expandedhomicide/expanded_homicide_ data_table_14_justifiable_homicide_by_weapon_law_enforcement_2009-2013.xls (reporting an annual average of 420 killings of felons by law enforcement officers in the line of duty between 2009 and 2013). Perhaps in response to criticism about the lack of accurate government data, the Bureau of Justice Statistics released a report in March 2015 estimating annual police homicides at 928 per year. BUREAU OF JUSTICE STATS., ARREST-RELATED DEATHS PROGRAM ASSESSMENT 13 (2015), http://www.bjs.gov/content/pub/pdf/ardpatr.pdf. Even this number, however, is not completely accurate. The Bureau of Justice notes that its report accounts for only about 72% of all police homicides in the U.S. *Id.* at 33.

15. *See, e.g.,* Jon Swaine, et al., *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, THE GUARDIAN (Dec. 31, 2015, 3:00 PM) (finding that 1,134 individuals were killed by police in the United States in 2015), http://www.theguardian.com/us-news/series/counted-us-police-killings. According to the Fatal Encounters Database, police "caused or played a role in 1126 deaths in 2015, up from 1072 deaths in 2014." Paul Hirschfield, *Not a Single U.S. State Has Laws Defining When Police Should Avoid Deadly Force*, HUFFINGTON POST (Jan. 19, 2016, 10:47 PM), http://www.huffingtonpost.com/entry/police-deadly-force-laws_us_569e86bde4b00f3e986310a9. In a year-long study of fatal police shootings, the Washington Post found that 965 civilians were killed by police across the nation in 2015. *See* Kimberly Kindy & Marc Fisher, *Officers Fatally Shoot 965*, WASH. POST, Dec. 27, 2015, at A1.

16. The Mapping Police Violence project estimates at least 1,149 people were killed by police in 2014, and according to Killed by Police, a nongovernmental organization that documents the occurrence of deaths involving law enforcement, 1,100 individuals were killed in 2014. AMNESTY INT'L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 9 (2015)*; see also 2014 Police Killings,* KILLED BY POLICE, https://killed-by-police.silk.co/page/2014-Police-Killings. For 2015 numbers, see *2015 Police Violence Report*, MAPPING POLICE VIOLENCE, http://mappingpoliceviolence.org/2015/ (reporting that at least 1,152 persons were killed by police in 2015).

17. For commentary about the Black Lives Matter movement, see Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352 (2015) (providing an accounting of the Black Lives Matter movement, laying out the challenges that it presents to law, and suggesting ways to integrate the teachings of the movement into the classroom); Petula Dvorak, *The 'Black' Adds Meaning to 'Lives Matter,'* WASH. POST, Aug. 7, 2015, at B1 (arguing that cutting out the "Black" from "Black Lives Matter" and saying "All Lives Matter" is "like defacing 'Support Our Troops' stickers to read 'Support Our People' and wondering why military families would be offended"); Ronald S. Sullivan Jr., *Black Lives Matter Occupies an Important Space*, BOS. GLOBE (Sept. 1, 2015), https://www.bostonglobe.com/opinion/2015/09/01/the-message-black-lives-matter/EPjIfUd95BeSHyXGthJ9KM/story.html ("'All Lives Matter' is yet another effort to undermine legitimate calls to end anti-black police practices that characterize far too many interactions between police and citizens of color."); *see also* Michael A. Fletcher, *Calls for 'Stronger Outrage' on Crime,* WASH. POST, Dec. 13, 2015, at A1 (noting that some community leaders are concerned that the Black Lives Matter movement has focused solely on protesting police shootings, while its response to gun violence by civilians is "often muted, fragmented and brief").

18. Jon Swaine, Oliver Laughland & Jamiles Lartey, *Black Americans Killed by Police Twice as*

general were at least three times more likely than White individuals to be killed by a police officer.[19] In 2015, young Black men between the ages of fifteen and thirty-four were at least nine times more likely than other Americans to be killed by police officers.[20]

The vast majority of the individuals shot and killed by police are armed.[21] In many of these cases, especially those involving suspects pointing a gun, replica

Likely to be Unarmed as White People, THE GUARDIAN (June 1, 2015, 8:38 AM), http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis; *The Counted: People Killed by Police in the US,* THE GUARDIAN, http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database (noting that 304, or 26%, of the 1,145 individuals killed by police in 2015 were Black); *see also* AMNESTY INT'L, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES 4 (2015), http://www.amnestyusa.org/pdfs/AIUSA_DeadlyForceExecutiveSummaryJune2015.pdf (finding that Blacks made up 27.6% of the victims of homicides by police officers between 1999 and 2013 despite representing 13.2% of the U.S. population); U.S. CENSUS BUREAU, QUICK FACTS: RACE AND HISPANIC ORIGIN 1 (2014), https://www.census.gov/quickfacts/ (reporting that Blacks made up 13.2% of the U.S. population in 2014). These numbers could be even higher depending on the jurisdiction. In an analysis of 259 officer-involved shootings that occurred in Chicago between 2006 and 2014, Nirej Sekhon found that 81% of the victims of officer-involved shootings during this time period were Black. Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. __ (forthcoming 2016) (manuscript at 12) (on file with author). Sekhon reports that Blacks also constituted nearly 80% of the officer-involved shooting victims in New York and Pennsylvania during this same time period. *Id.* at 13. Sekhon cautions, however, that comparing the percentage of Blacks who are shooting victims to the number of Blacks in the general population may be an inappropriate comparison given the fact that most police shooting victims are armed when shot. *Id.* at 21–22. He uses a hypothetical involving doctors to illustrate this point.

> For example, a plaintiff suing a medical employer for racial discrimination in hiring of doctors could not point to the employer's having hired fewer minorities than their share of the general population. The relevant comparison group would be the segment of the general population with medical training and who were available for hire by the employer. That group's demographic profile might be quite different than [that] of the general population. If the relevant comparison group is homogenously white, a given employer might be forgiven for hiring only White doctors.

Id. at 21.

19. *Why Do U.S. Police Keep Killing Unarmed Black Men?*, BBC, May 26, 2015, http://www.bbc.com/news/world-us-canada-32740523. Other sources suggest that young Black men are twenty-one times as likely as their White peers to be killed by police. *See*, *e.g.*, Ryan Gabrielson, Ryann Grochowski Jones & Eric Sagara, *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), http://www.propublica.org/article/deadly-force-in-black-and-white. This is not to suggest that police officers intentionally discriminate against Black individuals. Indeed, studies discussed in this article suggest that racial disparity in the decision to shoot is likely due to implicit bias rather than conscious discrimination. *See infra* text accompanying notes 47–105.

20. Jon Swaine, et al., *Young Black Men Killed by US Police at Highest Rate in year of 1,134 deaths*, THE GUARDIAN (Dec. 31, 2015, 3:00 PM), http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men ("Young black men were nine times more likely than other Americans to be killed by police officers in 2015, according to the findings of a Guardian study that recorded a final tally of 1,134 deaths at the hands of law enforcement officers this year."). According to other sources, Black teenagers were times as likely as White teenagers to be shot and killed by police between 2010 and 2012. Leah Donnella, *Must-Read Reactions to Grand Jury Decision in Tamir Rice Case*, NATIONAL PUBLIC RADIO (Dec. 28, 2015 4:59 PM), http://www.npr.org/sections/codeswitch/2015/12/28/460590173/no-charges-for-cop-who-killed-tamir-rice-some-must-read-reactions.

21. Of the 1,149 individuals killed by police in 2014, a little over 100 were unarmed. *Why Do U.S. Police Keep Killing Unarmed Black Men?*, *supra* note 19.

gun, or toy gun that looks like a real gun at an officer or another person, or refusing to drop a weapon after a police directive to do so,[22] courts consider the officer's use of deadly force to be justified.[23]

When an individual is unarmed, there is usually less justification for using deadly force. Of course, an unarmed individual can pose a threat of death or serious bodily injury to a police officer or others. For example, an unarmed individual high on Phencyclidine, or PCP, can kill or seriously wound an officer, even without a weapon. An unarmed individual in close proximity to an officer can grab the officer's gun and use it against the officer. Nonetheless, when a police officer shoots an *unarmed* suspect or a suspect armed with a knife rather than a gun, the shooting is more likely to raise questions about necessity and proportionality than when an officer shoots an *armed* suspect.

Disturbingly, a disproportionate number of the unarmed individuals who are shot and killed by police are Black. In 2015, Black men accounted for approximately forty percent of the total number of unarmed individuals shot and killed by police even though they constituted just six percent of the population.[24] In 2015, unarmed Black men were seven times more likely than unarmed White men to die by police gunfire[25] and "an unarmed black man was fatally shot by police about once every nine days."[26]

When an officer shoots an unarmed individual under the mistaken belief that the person is armed, the shooting suggests threat perception failure.[27] "Threat perception failure" is a term of art used to describe a situation when an officer thinks a suspect is armed when in fact the suspect is not armed.[28] Associate Professor of Criminology Lorie Fridell explains that threat perception failure is more likely to occur when a police–citizen encounter

22. For example, on November 22, 2014, twelve-year-old Tamir Rice was shot and killed by a police officer responding to a 911 call about a "guy in the park with a pistol, pointing it at people." Kimberly A. Crawford, *Review of Deadly Force Incident: Tamir Rice,* CUYAHOGA COUNTY OFFICE OF THE PROSECUTOR 1 (2015), http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Tamir%20Rice%20Investigation/Crawford-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf (reviewing use of deadly force by Cleveland Division of Police Officer Timothy Loehmann against Tamir Rice and concluding "Officer Loehmann's use of deadly force falls within the realm of reasonableness under the dictates of the Fourth Amendment"). Rice was in possession of an "'airsoft gun' with the orange markings of a toy removed." *Id.*

23. One can be armed with a knife, however, and not pose an imminent threat of death or serious bodily injury to anyone if, for example, one is simply walking with a knife and not threatening anyone with it.

24. Kindy & Fisher, *supra* note 15, at A1; Sandhya Somashekhar, Wesley Lowery & Keith L. Alexander, *Black and Unarmed*, WASH. POST, Aug. 9, 2015, at A1.

25. Somashekhar, Lowery & Alexander, *supra* note 24, at A1.

26. DeNeen L. Brown, *For Black Men, Fear After Clips of Cop Violence*, WASH. POST, May 9, 2016, at B1.

27. *Why Do U.S. Police Keep Killing Unarmed Black Men?*, *supra* note 19.

28. Lois James, Stephen M. James & Bryan J. Vila, *The Reverse Racism Effect: Are Cops More Hesitant to Shoot Black Than White Suspects?*, 15 CRIMINOLOGY & PUB. POL'Y 457, 458 (2016) (defining threat perception failure as akin to a mistake of fact situation when, for example, the officer mistakes a cellphone for a gun or thinks the suspect is reaching for a weapon when the suspect was reaching for his wallet).

involves a Black suspect than when it involves a White suspect because of deeply rooted stereotypes linking Blacks with crime.[29] In many cases, police officers have shot and killed Black individuals because they mistakenly believed those persons had a gun.[30] These shootings were not necessarily the result of conscious racism.[31] Deeply rooted stereotypes that link Blacks with violence, danger, and criminality may have influenced these officers to perceive a weapon or threat to life where none actually existed.

In a previous paper, I documented numerous cases in which police officers, mistakenly thinking the individual was armed and dangerous, shot and killed unarmed Black men and women.[32] In this article, I explore the social science research on race and the decision to shoot. By and large, this research demonstrates that most individuals are quicker to see a weapon when dealing with a Black suspect than when dealing with a White suspect. Interestingly, several shooter bias studies have found that police officers are better than civilians at deciding when to shoot, suggesting that training and experience can improve accuracy and reduce racial bias in the decision to shoot. In light of this research, I offer two modest proposals for reform aimed at improving the training requirements for police officers.

First, I propose that police departments implement training aimed at improving accuracy and reducing bias in the use of deadly force. Fortunately, the social science research suggests that police officers can be trained to both reduce racial bias and increase accuracy in decisions to shoot. As discussed within, studies have shown that repeated exposure to Black and White suspects when race is not a diagnostic cue as to whether the suspect is holding a gun results in less biased and more accurate decisions about when to shoot.

Second, I propose that police departments mandate ongoing traditional martial arts training for all officers. Such training would be beneficial for many reasons. Regular training in the martial arts[33] would give officers more

29. *Why Do U.S. Police Keep Killing Unarmed Black Men?, supra* note 19.

30. *See generally* Cynthia Lee, "*But I Thought He Had a Gun" Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L. J. 1 (2004) (discussing numerous cases in which a police officer shot and killed an unarmed Black person, thinking the person was armed). In a recent study of officer-involved shootings in Chicago, however, Nirej Sekhon found that in most cases where the officer thought there was a gun threat, a gun was found on the victim's person or near the scene. Sekhon, *supra* note 18, at 19. No firearm was found in only 14% of cases involving a perceived firearm threat. *Id.* Of course, the study could not account for the possibility of an officer planting a gun to justify the shooting and it is unclear whether these findings are generalizable to police shootings across the nation.

31. *See* Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014, 6:00 AM), ("An impressive body of psychological research suggests that the men who killed [Michael] Brown and [Trayvon] Martin need not have been conscious, overt racists to do what they did . . ."), http://www.motherjones.com/politics/2014/11/science-of-racism-prejudice.

32. Lee, *supra* note 30.

33. Use of the term "martial arts" in this article should be understood as referring to traditional martial arts, such as Shotokan karate, Tae Kwon Do, and Kung Fu, as opposed to mixed martial arts (also known as MMA). As Stephen Michael Ian Kumen explains, "Students instructed in traditional martial arts are generally instructed to follow certain philosophical principles, including respecting the

confidence in their ability to handle volatile situations without immediately resorting to the gun. Such training would also provide officers with a healthy way to relieve stress. Regular martial arts training would also promote mental and emotional stability.

II
THE BLACK-AS-CRIMINAL STEREOTYPE

It is well documented that despite the fact that most Americans today believe it is wrong to discriminate on the basis of race, they also either consciously or subconsciously associate Blacks with danger and criminality.[34] Americans are more likely to perceive behavior by a Black person as hostile and threatening when they would perceive same behavior by a White person as nonthreatening.[35] Individuals are often unable to help the fact that they view Blacks more negatively than Whites.[36] Research on implicit social cognition has repeatedly shown that even the most egalitarian-minded individuals are quicker to associate Black faces with negative words and White faces with positive words.[37] Most individuals are also quicker to associate Blacks with crime than Whites. This is because of deeply rooted stereotypes linking Blacks with violence, dangerousness, and crime.[38]

opponent, using skills responsibly, and avoiding confrontations whenever possible." Stephen Michael Ian Kumen, *Superhuman in the Octagon, Imperfect in the Courtroom: Assessing the Culpability of Martial Artists Who Kill During Street Fights*, 60 EMORY L.J. 1389, 1411–12 (2011). In contrast, MMA "lacks a guiding philosophy" and "is simply a combination of skills from several traditional martial arts that has evolved around sport competition." *Id.* at 1414. Promoters of MMA do not ascribe to the principle of using as little force as possible to defeat the attacker, but instead advocate a no rules and a no holds bar philosophy, which is totally contrary to traditional martial arts philosophy. *Id.* at 1416.

34. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (noting that the stereotype that links Blacks with violence, dangerousness, and criminality has been documented by social psychologists for over half a century).

35. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); *see also* Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595 (1976) (finding that 75% of individuals observing a Black person shoving a White person thought the shove constituted "violent" behavior while only 17% of individuals observing a White person shoving a Black person characterized the shove as "violent" and 42% characterized the shove as "playing around"); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1980) (finding that both Black and White children saw relatively innocuous behavior by Blacks as more threatening than similar behavior by Whites).

36. Richardson, *supra* note 35, at 2042.

37. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE 47 (2013); *see also* Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1475 (1998). For an excellent examination of how implicit racial bias manifests itself in different areas of the law and society, see IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

38. *See* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 138–146 (NYU Press 2003) (discussing the tendency to associate Blacks with crime); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of*

In a 2004 study, Jennifer Eberhardt demonstrated the strength of the association people tend to make between Black individuals and crime.[39] Eberhardt subliminally primed unknowing participants with Black male faces, White male faces, or no faces at all.[40] Participants were then presented with objects on a computer screen that started off fuzzy and progressively came into focus.[41] Participants were told to indicate the moment they could tell what the object was.[42] Some of the objects shown to participants were related to crime, such as guns and knives, while other objects, such as cameras and books, were not related to crime.[43]

Eberhardt found that participants primed with Black faces were able to more quickly identify crime-relevant objects than those primed with White or no faces.[44] Participants primed with White faces were slower at detecting crime-relevant objects than those primed with no faces.[45] When it came to crime-irrelevant objects, exposure to either a Black or White face or to no face at all made no difference in the time it took participants to identify what the object was.[46] Eberhardt's study not only illustrates the strength of the Black-as-Criminal stereotype, it also suggests one reason why a police officer may be quicker to see a gun in the hands of an armed Black suspect than one in the hands of an armed White suspect—and why an officer might even think there is a gun in the hands of an unarmed Black suspect.

III
SHOOTER BIAS

Extensive social science research on race and the decision to shoot reveals that most people exhibit racial bias with respect to the decision whether or not to shoot a suspect. This part documents these studies.

A. The Early Shooter Bias Studies

In 2000, Anthony Greenwald conducted one of the first empirical studies on shooter bias.[47] In this study, a total of 106 undergraduates participated in two experiments.[48] Each participant was told to pretend they were a plainclothes

Reasonableness, 81 MINN. L. REV. 367, 402–423 (1996) (discussing the Black-as-Criminal stereotype).

39. Eberhardt et al., *supra* note 34.

40. *Id.* at 878. The primes (faces or lines) were shown on the screen for just 30 milliseconds and extensive pilot testing ensured that none of the participants were aware of the primes. *Id.* at 879–880.

41. *Id.*

42. *Id.*

43. *Id.* at 878.

44. *Id.* at 880.

45. *Id.*

46. *Id.*

47. Anthony G. Greenwald, Mark A. Oakes & Hunter G. Hoffman, *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (2003).

48. *Id.* at 401. Experiment 1 administered self-report and implicit attitude tests before the weapons

police officer responding to one of three categories of targets: (1) a criminal holding a gun, (2) a fellow police officer holding a gun, or (3) a citizen holding a non-gun object.[49] All of the targets appeared in street clothes so they were not distinguishable by dress.[50] Participants were told that targets would appear from behind a garbage dumpster on the computer screen and that they should shoot at criminals, respond with a safety signal to fellow police officers, and not respond to citizens holding harmless objects.[51] Race was the only variable distinguishing police officers from criminals.[52] Each participant performed two variations of the task—one in which the criminals were White and the police officers were Black and one in which these roles were switched.[53] Participants who responded within 800 to 900 milliseconds would hear the sound of a silencer-equipped gun being fired.[54] If the participant failed to respond within the deadline, a loud gunshot would issue, indicating that either a criminal had fired at the participant or a fellow police officer had fired.[55] Mistakenly shooting at a police officer or citizen led to a loud scream.[56]

Greenwald found that participants had greater difficulty distinguishing weapons from harmless objects when the person holding the object was Black.[57] They were also quicker to see a weapon when dealing with Black over White targets.[58] Greenwald concluded that the race of the target could affect the ability to distinguish a weapon from a harmless object and bias the decision to shoot.[59]

A 2001 study by B. Keith Payne confirmed the results of Greenwald's study.[60] Payne tested whether being primed with a Black face as opposed to a White face would affect both response latencies, that is, the speed with which participants would correctly identify an object as a gun or a tool, and accuracy in identification.[61] Participants were told they would see pairs of pictures flashed on a computer screen.[62] They were instructed to do nothing with the first picture, which would be a face, but to identify the object in the second picture as either a gun or a tool.[63]

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task while Experiment 2 administered these after the weapons task. *Id.*

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 404.
58. *Id.* at 403.
59. *Id.* at 405.
60. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001).
61. *Id.* at 182.
62. *Id.* at 184.
63. *Id.* The prime, either a Black or White face, would remain on the screen for approximately 200 milliseconds, and then was replaced immediately by a handgun or a tool. *Id.*

Participants in the study "identified guns faster when they were primed by a Black face than by a White face."[64] They also "identified tools more quickly when primed with a White face, compared to a Black face."[65]

A 2002 study by Joshua Correll reaffirmed the existence of shooter bias.[66] Correll showed study participants a series of one to four background scenes.[67] In the final background scene, a Black or White man would appear holding either a gun or something harmless.[68] The participants were told to decide as quickly as possible whether or not the target was holding a gun.[69] If the participant thought the target was holding a gun, they were to press a button labeled "shoot."[70] If they thought the person was holding an object other than a gun, they were to press a button labeled "don't shoot."[71] Participants were quicker to shoot an armed target if the target was Black than if he was White.[72] They were also quicker to not shoot an unarmed target if he was White than if he was Black.[73] When participants were given less time to decide whether to shoot, they mistakenly shot unarmed targets more often if they were Black than if they were White.[74] Participants also mistakenly decided not to shoot armed targets more often when those armed targets were White than when they were Black.[75] Shooter bias was evident in both Black and White participants.[76] Correll theorized that cultural stereotypes characterizing Blacks as aggressive, violent and dangerous likely led participants to display shooter bias.[77]

One possible criticism of the early shooter bias studies is the lack of external validity. External validity refers to the extent to which the results of a particular study are generalizable to other people and other situations. Psychology

64. *Id.* at 185.

65. *Id.* In the first experiment, subjects had unlimited time to respond to the second picture, and error rates were relatively low. *Id.* In a second experiment in which subjects were forced to respond quickly, Payne found that error rates increased. *Id.* at 187–88. Specifically, subjects were more likely to misidentify a tool as a handgun when primed with a Black face and more likely to misidentify a gun as a tool when primed with a White face. *Id.* at 189.

66. *See generally* Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002).

67. *Id.* at 1315.

68. *Id.*

69. *Id.*

70. *Id.* at 1316.

71. *Id.*

72. *Id.* at 1317.

73. *Id.*

74. *Id.* at 1319.

75. *Id.*

76. *Id.* at 1324 (noting that participants in Study 4 included twenty-five Blacks and twenty-one Whites and that both Black and White participants decided to shoot more quickly when the target was armed and Black than if he was armed and White and they pressed the "don't shoot" button more quickly if the target was unarmed and White than if he was unarmed and Black).

77. *Id.* at 1325.

students, the subjects in the early shooter bias studies, are not necessarily representative of police officers who undergo extensive training in the use of firearms. Moreover, pressing a button labeled "shoot" on a computer keyboard is a very different action from shooting a gun, which is what takes place in actual officer-involved shootings.[78] Additionally, "pressing a 'don't shoot' button requires the same action as pressing a 'shoot' button."[79] Lois James, who has conducted her own shooter bias studies but with vastly different results, explains why this is problematic:

> [W]hen a person makes a decision not to discharge a real firearm, no action is required. This distinction is critical because choosing between two equivalent actions has major neurophysiological differences compared with choosing to act or not. The natural inclination is not to act particularly under conditions of uncertainty or personal moral dilemma.[80]

James makes a good point that there is a big difference between pressing a button labeled "don't shoot" and not pulling the trigger of a gun in one's hand, but I question whether the natural inclination is not to act under conditions of uncertainty when one is faced with a perceived threat of death or serious bodily injury. When one thinks one is about to be killed, the natural inclination is to act to preserve one's life even if there is some uncertainty as to whether the attack is actually going to occur. James may be right that as a general matter, the natural inclination may be to not act when faced with a situation of uncertainty, but this is not likely to be true when one is faced with a kill-or-be-killed situation given the universal desire for self-preservation.

A second concern is that the early shooter bias studies used computer simulations rather than more realistic, high-definition shooting simulators. James aptly notes that "[v]iewing still images of people holding objects (e.g., weapons or cell phones) bears little relationship to real-world police encounters with people, where dynamic movement and contextual cues such as suspect compliance are critical."[81]

B. Testing Police Officers for Shooter Bias

To address some of the above-described concerns, social scientists began in 2005 to study whether police officers would exhibit similar signs of shooter bias as had been seen in the civilian context. In one study, E. Ashby Plant and B. Michelle Peruche tested fifty police officers, and found that they, just like the civilians in the early shooter bias studies, were more likely initially to mistakenly shoot unarmed Black suspects over unarmed White suspects.[82] After repeated exposure to a computer shooting simulation in which race was not a diagnostic cue as to whether the suspect was armed or unarmed, however,

78. James, James & Vila, *supra* note 28, at 4.

79. *Id.* at 5.

80. *Id.*

81. *Id.* at 5.

82. *See* E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180, 181–82 (2005).

police officers were able to eliminate this bias.[83] Repeated exposure to the shooting trials also resulted in more accurate responses.[84] In other words, over time, the number of hits (correct shootings of armed suspects) exceeded the number of false alarms (incorrect shootings of unarmed suspects) for the police officers.[85]

In a 2007 study, Joshua Correll used a videogame simulation to test both police officer and civilian reactions to armed and unarmed White and Black men who appeared in a variety of background images.[86] Like Plant and Peruche, Correll found that police officers did better than civilians on several different fronts. Although police officers, like civilians, showed racial bias in their initial reactions to the various targets by recognizing that a target was armed more quickly when that target was Black as opposed to when that target was White, their ultimate shooting decisions were more accurate than those of civilians.[87] Police officers also showed less racial bias than civilians in the ultimate decision to shoot.[88]

Modupe Akinola offers one explanation for why police officers may perform better than civilians in shooter bias studies involving computer simulations. "The conditions under which police officers engage in shoot/don't shoot decisions in laboratory studies are low in metabolic demands, making it unlikely that they will engender the level of stress or threat physiological reactivity that officers may experience when making real life shoot/don't shoot decisions."[89] Moreover, training in the use of deadly force and actual experience dealing with individuals on the street may facilitate the police officer's ability to control their responses in a shoot/don't shoot computer simulation.[90]

In a 2009 study of police officers and racial bias in the decision to shoot, Akinola induced a state of stress in police officers in order to examine the effects of stress on an officer's shooting decisions.[91] To induce this state of stress, Akinola mimicked the interview process police officers go through every two years when being considered for a promotion.[92] As part of this process, officers had to conduct a role play through a videogame simulation task while being evaluated.[93]

83. *Id.* at 182.

84. *Id.*

85. *Id.*

86. Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1020 (2007).

87. *Id.*

88. *Id.* at 1015.

89. Modupe Nyikoale Akinola, *Deadly Decisions: An Examination of Racial Bias in the Decision to Shoot Under Threat* 8 (Apr. 30, 2009) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard University Library system).

90. *Id.*

91. *Id.*

92. *Id.* at 11–12.

93. *Id.* at 12, 18.

Like the researchers who conducted the early shooter bias studies, Akinola found racial bias in the decision to shoot or not shoot.[94] Officers were more likely to not shoot when the target was White than when the target was Black.[95] When police officers were under acute stress, however, they were more accurate in the decision whether to shoot an armed Black target or not to shoot an unarmed Black target than when they were not under conditions of acute stress.[96] Akinola suggests that these findings reflect a possible over-correction effect.[97] She explains,

> [This kind of] over-correction effect has been found among White participants in intergroup interactions and in tasks requiring decision making about stigmatized or minority group members. In these contexts, the goal of appearing unprejudiced manifests itself in over-correction, which requires self-regulatory effort. Similarly, in the case of the shooter simulation, when police officers had greater resources, they appeared to engage in strategic behavior in an effort to not appear biased, resulting in a lower shooting threshold being set for White targets. Furthermore, since both minority and majority populations exhibited this effect in decision criterion, this suggests that *over-correction* may extend across social groups, and may be especially relevant for domains in which the appearance of prejudice can have severe consequences, as is the case with law enforcement.[98]

An alternative theory as to why police officers may have been more accurate in the decision whether to shoot a Black suspect when placed under conditions of acute stress is that an officer may perceive time as having slowed when confronted with a Black suspect.[99] One study documents this perceived slowing of time when a White male sees a Black face.[100] This slowing of time might allow an officer to more accurately gauge the level of threat he or she is facing. On the other hand, the researchers of this study suggest that this perceived slowing of time could encourage a police officer to shoot a Black individual sooner than he might shoot a White individual.[101]

A 2012 shooter bias study by Melody Sadler confirmed the findings of the early shooter bias studies.[102] In the first experiment to investigate shooter bias with respect to Latinos and Asians as well as Blacks and Whites, Sadler tested sixty-nine undergraduates from the University of Colorado and 224 police officers from various regions of the United States.[103] Subjects were told to press a button labeled "shoot" if a target who appeared on the computer screen was holding a gun, to press a button labeled "don't shoot" if the target was holding

94. *Id.* at 19.

95. *Id.* at 19.

96. *Id.* at 28.

97. *Id.* at 30.

98. *Id.* at 30–31.

99. Gordon B. Moskowitz, Imak Olcaysoy Okten & Cynthia M. Gooch, *On Race and Time*, 26 PSYCHOL. SCI. 1783, 1783 (2015).

100. *Id.*

101. *See id.* at 1792 ("The decision about when to shoot might be altered (i.e., shooting would happen sooner) if time perception slows.").

102. Melody S. Sadler et al., *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. SOC. ISSUES 286 (2012).

103. *Id.* at 290, 292, 299.

an innocuous object, and to make their decision within 850 milliseconds.[104] Both civilians and police officers were quicker to shoot at Black targets than White, Asian, and Latino targets.[105] Police officers were also quicker to shoot at Latinos relative to Asians and Whites and quicker to shoot at Whites relative to Asians, "suggesting racial bias in the decision to shoot is not simply an anti-Black phenomenon."[106]

Complicating the picture, three recent shooter bias studies, all by lead author Lois James, have reached a contrary conclusion, finding that police officer and civilian subjects were slower to shoot Black suspects than White suspects. In the first of these studies, published in 2013, James tested police officers, civilians, and military personnel using laboratory simulators like those used by many law enforcement agencies for training their officers.[107] James found that all of the participants took longer to shoot Black suspects than White or Hispanic suspects.[108] She also found that participants were more likely to shoot unarmed White suspects than unarmed Black or Hispanic suspects and were more likely to refrain from shooting armed Black suspects compared to armed White and Hispanic suspects.[109] In a second study published in 2014, James found that civilians, even those with implicit racial bias, were significantly slower to fire at Black suspects than at White or Hispanic suspects.[110] Although these studies had the advantage of being more realistic than the earlier computer-simulation studies since they used high quality laboratory simulators that more closely replicated actual police–citizen encounters, they also involved relatively small sample sizes from which it is difficult to generalize findings. The first experiment in the 2013 study, for example, involved just six police officers, twelve civilians, and six military personnel.[111] The 2014 study tested just forty-eight civilians.[112]

Subsequently, James conducted a third study, testing eighty police officers from the Spokane Metropolitan Police Department.[113] James found that these police officers showed the same kind of counter-bias found in her 2013 and 2014

104. *Id.* at 292.

105. *See id.* at 295 ("[P]articipants were especially likely to favor the 'shoot' response over the 'don't shoot' response when the target was Black rather than any other race.").

106. *Id.* at 306.

107. Lois James, Bryan Vila & Kenn Daratha, *Results from Experimental Trials Testing Participant Responses to White, Hispanic and Black Suspects in High-Fidelity Deadly Force Judgment and Decision-Making Simulations*, 9 J. EXPERIMENTAL CRIMINOLOGY 189, 196 (2013).

108. *Id.* at 204.

109. *Id. Accord* Mark R. Chaires, *Stereotypes and Deadly Force Decision-Making* (2015) (unpublished Ph.D. dissertation, University at Albany, State University of New York) (finding that the decision to use deadly force was unrelated to race and that unarmed White suspects were more often the recipients of erroneous deadly force decisions).

110. Lois James, David Klinger & Bryan Vila, *Racial and Ethnic Bias in Decisions to Shoot Seen Through a Stronger Lens: Experimental Results from High-Fidelity Laboratory Simulations*, 10 J. EXPERIMENTAL CRIMINOLOGY 323, 334–35 (2014).

111. James, Vila & Daratha, *supra* note 107, at 197.

112. James, Klinger & Vila, *supra* note 110, at 331.

113. James, James & Vila, *supra* note 28 at 462.

studies.[114] Police officers in this most recent study took significantly longer to shoot armed Black suspects than armed White suspects.[115] They were also approximately three times less likely to shoot unarmed Black suspects than unarmed White suspects.[116] This was despite the fact that ninety-six percent of the officers demonstrated implicit bias on a race-weapons implicit association test they took along with a number of other cognitive skills tests that had nothing to do with race.[117] James opines that the most likely reason for the counter-bias shown in her studies is officer "concerns about the social and legal consequences of shooting a member of a historically oppressed racial group" coupled with the heightened media attention that occurs after an officer-involved shooting of a Black suspect.[118]

The contradictory findings of the various shooter bias studies suggest that implicit racial bias may be playing less of a role in police shootings than initially thought. Indeed, recent research by Phillip Atiba Goff and L. Song Richardson on police officers and stereotype threat also suggests that racial bias—implicit or explicit—plays less of a role in police decisions to shoot than whether the officer feels confident in his or her ability to command respect from the subject.[119] Similarly, Frank Rudy Cooper suggests that police officers may be quicker to act punitively against Black suspects than White suspects less because of implicit racial bias and more because they perceive Blacks to pose a greater threat to their masculinity than Whites.[120] Nonetheless, because the bulk

114. *Id.* at 468.

115. *Id.* at 469.

116. *Id.* James acknowledges that some might believe the police officer participants in her study acted the way they did in order to appear unbiased to the researchers monitoring their behavior, but rejects this possibility, explaining that while an observer effect is certainly possible, it is not likely for the following reasons. *Id*. at 471–73. First, the purpose of the study (to investigate whether race of the suspect affects shooting decisions) was never explained to the suspects nor was it mentioned to the research assistants who were responsible for leading the police officer participants through the simulations. *Id.* at 471. Second, even though the participants completed the race–weapons implicit associations test, "this test was buried in a 60-minute-long battery of cognitive tests" that measured other things. *Id.* at 472. Third, several police officer participants told the researchers that they had no idea they were being tested to see if suspect race influenced their shooting decisions. *Id.* Fourth, the scenarios were randomized so participants did not get a scenario involving a White suspect followed immediately by a similar scenario involving a Black suspect. *Id.* Finally, the average difference in reaction time between shooting a White suspect in shooting a Black suspect was 200 ms, which was "not enough time to suggest a deliberate and considered response on the part of participants." *Id.* James added that even if the police officer participants were trying to appear unbiased when responding to the scenarios, given the prevalence of bystanders with camera phones and the increasing use of dashboard cameras and body worn cameras, police officers on the street are also aware that they are constantly being monitored and may try to make sure that their actions do not appear to be biased. *Id.*

117. *Id.* at 472.

118. *Id.* at 472–73. It may also be the case that heightened attention to race and the use of deadly force following the shooting of Trayvon Martin by George Zimmerman in 2013 encouraged participants to resist the inclination to shoot Black individuals.

119. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO STATE J. CRIM. L. 115 (2014); L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2966–70 (2015).

120. Frank Rudy Cooper, *Training to Reduce 'Cop Macho' and 'Contempt of Cop' Could Reduce Police Violence*, THE CONVERSATION (Dec. 18, 2015 6:05 AM), https://theconversation.com/training-

of the research on shooter bias indicates that race plays some role in the decision to shoot, proposals for reform should seek ways to reduce the possibility of racial bias impacting the police officer's decision to shoot, as incorrect shooting decisions can harm not only unarmed Black civilians who are mistakenly perceived to be armed and dangerous, but also police officers who may be too slow to perceive when a White suspect is armed.[121]

IV
PROPOSALS FOR REFORM

It is important to note at the outset that police officers serve a vital function in our society and often risk their lives to protect those living in the communities they serve. Any reforms that are urged should not diminish our police officers' ability to protect and serve, for that would harm not just our police officers, but all of us. Police officers often have to make split-second decisions about whether to shoot an individual who appears to be a threat when the wrong decision could mean death for the officer or others.[122] This is why juries in police-shooting cases often give police officers the benefit of the doubt. Navigating the space between shooting a person who poses a real threat of death or serious bodily injury and refraining from shooting a person who does not pose such a threat is not an easy task. We must be mindful of this when attempting to curb the number of lives lost due to unnecessary uses of deadly force by the police.

A. Training to Reduce Bias and Increase Accuracy in the Decision to Shoot

One way to minimize the number of problematic police shootings that may be considered justified under current law is to enhance the training that police officers receive in the use of deadly force. There is reason to think that training in the use of deadly force already has a positive impact on police officers. Recall Joshua Correll's 2007 shooter bias study, which tested 237 police officers and 127 civilians.[123] Correll found that police officers were more accurate and showed less racial bias than civilians in the ultimate decision to shoot.[124] This is

to-reduce-cop-macho-and-contempt-of-cop-could-reduce-police-violence-51983; Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009) (arguing that an officer's concern over appearing sufficiently masculine, as well as the race of the suspect, can affect police interactions with men of color); Angela P. Harris, *Gender Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000) (discussing ways in which masculinity and race affect police encounters with Black men); *see also* Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735 (2015) (cautioning that racial minorities and women may be less able to challenge police or engage in what he calls "contestatory citizenship").

121. *See* text accompanying notes 58, 64, 72–76, 81, 94, 104, and 127–131. *But compare* notes 107–110, 114–115, 150–154.

122. *See generally* DAVID KLINGER, INTO THE KILL ZONE: A COP'S EYE VIEW OF DEADLY FORCE (2004) (documenting actual cases in which police officers had to make split-second decisions about whether to use deadly force).

123. Correll et al., *supra* note 86, at 1009.

124. *Id.* at 1015.

probably because police officers, unlike most civilians, receive substantial training in the use of deadly force.

One way to both improve accuracy in the decision to shoot and reduce racial bias is suggested in research conducted by E. Ashby Plant, B. Michelle Peruche, and David A. Butz. Plant, Peruche, and Butz designed a shooting program in which race was not a diagnostic cue as to whether a target was holding a gun or a harmless object. Participants in this experiment were equally likely to see a Black or White face and each face was equally likely to be paired with a gun or a harmless object.[125]

In the early trials, participants made more racially biased errors than in the later trials.[126] They more often incorrectly pressed the "shoot" button when a Black face was paired with a neutral object than when a Black face was paired with a gun.[127] Conversely, they more often incorrectly pressed the "don't shoot" button when a White face was paired with a gun than when a White face was paired with a harmless object.[128]

As participants continued engaging in this shooting program, however, the racial bias evident in the earlier trials disappeared.[129] To test whether it was merely the practice of shooting or the shooting program itself that led to the elimination of bias, Plant, Peruche, and Butz conducted another experiment in which participants engaged in a shooting program in which researchers did not try to ensure that race was not a diagnostic cue as to whether the suspect was holding a gun or a neutral object.[130] In contrast to the first shooting program, repeated practice in this latter shooting program did not eliminate racial bias.[131] In both the early and later trials, officers made more errors when a White face was paired with a gun and when a Black face was paired with a neutral object.[132] Subsequent research by Plant and Peruche, using police officers as subjects, confirmed that repeated exposure to a shooting program in which race was not a diagnostic cue as to whether a suspect was holding a weapon or a harmless object both increased accuracy and reduced racial bias in police officers' decisions to shoot.[133] These experiments suggest that practice in shooting when race is not correlated to the presence or absence of a weapon can help improve accuracy and reduce racial bias in the decision to shoot. Police departments should borrow from Plant and Peruche's design, but, if feasible, should use

125. E. Ashby Plant, B. Michelle Peruche, and David A. Butz, *Eliminating Automatic Racial Bias: Making Race Non-Diagnostic for Responses to Criminal Suspects*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 141, 143 (2005). Participants completed twenty practice trials and 160 test trials. *Id.* at 145.

126. *Id.* at 145.

127. *Id.*

128. *Id.*

129. *Id.* at 147.

130. *Id.* at 149 (outlining how, in this latter experiment, Black faces were more likely to be paired with guns and White faces were more likely to be paired with harmless objects to conform to societal stereotypes about Blacks and Whites).

131. *Id.* at 150.

132. *Id.*

133. Plant & Peruche, *supra* note 82, at 182–83 (testing fifty police officers from Florida).

shooting simulators instead of computer keyboard exercises to more closely replicate on-the-street experiences.

B. What about Diversity, Cultural Sensitivity, and Implicit Bias Training?

It is important to proceed with caution when trying to implement training programs to reduce racial bias. Some research suggests that diversity training programs aimed at improving attitudes toward people from different racial or ethnic minority groups do not work and can actually exacerbate attitudes,[134] particularly when individuals are required to attend such trainings.[135] Voluntary diversity programs, in contrast, may be more successful than mandatory programs at reducing bias.[136] Individuals who voluntarily participate in such programs probably already believe in the importance of eliminating racial bias, so one reason why voluntary diversity training programs may be more successful than mandatory programs may simply be because such programs are preaching to the choir.

In lieu of diversity or cultural sensitivity trainings aimed at getting people to be more accepting of racial, ethnic, or cultural difference, many favor implicit bias training.[137] Implicit bias training aims to raise awareness of the ways in which all of us are implicitly biased in favor of certain groups and against other groups.[138] A wealth of social science research suggests that making people aware of their own implicit biases can help reduce bias because individuals can then

134. *See* Peter Bregman, *Diversity Training Doesn't Work*, HARV. BUS. REV. (Mar. 12, 2012) (citing Frank Dobbin, Alezandra Kalev & Erin Kelly, *Diversity Management in Corporate America*, CONTEXTS, Fall 2007, at 21), https://hbr.org/2012/03/diversity-training-doesnt-work; s*ee also* B. Michelle Peruche & E. Ashby Plant, *The Correlates of Law Enforcement Officers' Automatic and Controlled Race-Based Responses to Criminal Suspects*, 28 BASIC & APPLIED SOC. PSYCHOL. 193, 198 (2006) (finding that diversity training did not reduce racial bias in the decision to shoot).

135. *See* Suzanne Lucas, *Why You Should Stop Attending Diversity Training*, CBS NEWS (May 2, 2012, 8:43 AM), http://www.cbsnews.com/news/why-you-should-stop-attending-diversity-training/; *see also* Shankar Vedantam, *Most Diversity Training Ineffective, Study Finds*, WASH. POST (Jan. 20, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/01/19/AR2008011901899.html.

136. Laurie A. Rudman, Richard D. Ashmore & Melvin L. Gary, *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 865 (2001) (finding that students voluntarily enrolled in a prejudice and conflict seminar showed reduced levels of implicit and explicit bias at the end of the semester compared to students who did not enroll in the seminar). Rudman notes that when individuals are forced to undergo diversity training, the training may result in backlash because individuals "may perceive a threat to their freedom of expression or be offended by the implication that they are prejudiced." *Id*. at 857.

137. *E.g.*, Tracey G. Gove, *Implicit Bias and Law Enforcement*, POLICE CHIEF, Oct. 2011, at 44; Tami Abdollah, *Police Agencies Line Up to Learn About Unconscious Bias*, POLICEONE.COM (Mar. 9, 2015), https://www.policeone.com/patrol-issues/articles/8415353-Police-agencies-line-up-to-learn-about-unconscious-bias/ (noting that implicit bias training for law enforcement officers is gaining traction among police departments in dozens of cities); Tracie L. Keesee, *Three Ways to Reduce Implicit Bias in Policing*, GREATER GOOD SCI. CTR. (July 2, 2015), http://greatergood.berkeley.edu/article/item/three_ways_to_reduce_implicit_bias_in_policing.

138. Keesee, *supra*, note 137.

consciously work to combat those implicit biases.[139] Some police departments have already started implementing implicit bias training.[140]

Professor Lorie Fridell, an associate professor in the Department of Criminology at the University of South Florida, is at the forefront of such training. In 2013, Professor Fridell received a $1 million grant from the U.S. Department of Justice to conduct implicit bias trainings for police officers across the nation.[141] Fridell runs the Fair and Impartial Policing training program, which trains officers on the effects of unconscious bias and gives them information and skills to help them reduce and manage their biases.[142] Through this program, police officers learn that policing based on stereotypes and biases might lead to unsafe decisions, such as not frisking the White woman who has a weapon or not being vigilant against the White man in the BMW.[143]

139. *See, e.g.*, Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 14–15 (1989) (concluding that when egalitarian-minded persons are made aware of stereotypes, they will inhibit their negative stereotypes-congruent responses and replace them with non-prejudiced thoughts); Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL'Y 71, 141 (2010) ("Awareness of bias is critical for mental decontamination success."); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Racial Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1586–90 (2013) (discussing importance of making race salient to minimize the effects of implicit racial bias). *See generally* Laurie A. Rudman, Richard D. Ashmore & Melvin L. Gary, *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009).

140. *See* Abdollah, *supra* note 137 (noting that the Los Angeles police department plans to have more than 5000 of its officers attend implicit bias training over the next several years). In 2008, the Chicago Police Department was at the forefront of implicit bias training. *See* Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to the Implicit Black-Crime Association*, *in* RACIAL DIVIDE: RACIAL AND ETHNIC BIAS IN THE CRIMINAL JUSTICE SYSTEM 39, 53 (Lynch, Patterson, & Childs eds. 2008) (detailing its then-innovative curriculum aimed at helping recruits to the Chicago Police Department "see how their biases and stereotypes (pertaining to gender, race, ethnicity, sexual orientation, and other characteristics) impact their perceptions and behavior and result in unjust, ineffective and unsafe policing"). Recruits would engage in role-playing exercises in which stereotype-consistent behavior would result in "unsafe tactics, ineffective investigations and unjust arrests." *Id.* For example, the woman with the gun would not be frisked, the sex crime committed by a female against a male would not be uncovered, and the law-abiding young men of color on the street would be arrested. *Id.* In their debriefings, recruits would find out how their biases led to faulty decisionmaking. *Id.* It is unclear whether Officer Jason Van Dyke, who was a fourteen-year veteran of the Chicago Police Department when he shot Laquan McDonald in 2014, attended any such training.

141. Jessica Vander Velde, *USF Professor Challenges Law Enforcement to Examine Bias*, TAMPA BAY TIMES (Nov. 24, 2013, 7:27 PM), http://www.tampabay.com/news/publicsafety/usf-professor-challenges-cops-to-examine-bias/2154068.

142. Lorie Fridell, *This Is Not Your Grandparents' Prejudice: The Implications of the Modern Science of Bias for Police Training*, TRANSLATIONAL CRIMINOLOGY, Fall 2013, http://cebcp.org/wp-content/TCmagazine/TC5-Fall2013.

143. Martin Kaste, *Police Officers Debate Effectiveness of Anti-Bias Training*, NPR, (Apr. 6, 2015, 4:36 PM), http://www.npr.org/2015/04/06/397891177/police-officers-debate-effectiveness-of-anti-bias-training*; see also* Sarah Green Carmichael, *Training Police Departments to Be Less Biased*, HARV. BUS. REV. (Mar. 6, 2015), https://hbr.org/2015/03/training-police-departments-to-be-less-biased (detailing interview with Anna Laszlo, Director of Fair and Impartial Policing, who explains the nuts and bolts of implicit bias training for police officers).

It is unclear whether implicit bias training is an effective way of reducing racial bias in police officers. Joshua Correll, one of the leading researchers on shooter bias, questions whether implicit bias training for police officers is a good idea, explaining that "[t]here are a number of very compelling studies that show that if you just ask somebody to try really hard to not show racial bias, you can actually inadvertently increase racial bias."[144] Some critics of implicit bias training say such training could actually endanger officers' lives by encouraging officers to hesitate in cases in which they need to act quickly.[145]

Indeed, some social science research suggests that calling attention to race, either by asking people not to rely on race or asking them to rely on race, counterintuitively increases the tendency to stereotypically misidentify non-weapon objects as weapons. For example, in a 2002 study, B. Keith Payne tested whether actively highlighting race prior to the decision to shoot reduced or increased stereotype-congruent errors in the decision to shoot.[146] Participants were told they would see pairs of pictures presented briefly—a face in the first picture and an object, either a gun or a hand tool, in the second picture—and they were to decide quickly whether the object in the second picture was a gun or a tool.[147] Individuals in the control group were given no other instructions.[148] Participants in the "Avoid Race" group were given the same instructions described above, but were also told,

> You have been randomly assigned to take the perspective of a completely unbiased person. Regardless of your personal views, we would like you to base your responses only on whether the second object looks more like a gun or tool. Try not to let the race of the face influence your decisions.[149]

Participants in the "Use Race" group were given the same instructions as the control group, but were also told,

> You have been randomly assigned to the "racial profiling" condition. Regardless of your personal views, we would like you to play the role of someone engaged in racial profiling. That is, try to make correct classifications, but we would like you to use the race of the faces to help you identify the gun or tool in question.[150]

144. Kaste, *supra* note 143*; see also* Neil Macrae et al., *Out of Mind but Back in Sight*: *Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994) (finding that subjects who were instructed not to rely on stereotypes were able to temporarily suppress the stereotype at issue, but once the initial experiment was over, those subjects were more inclined to rely on that stereotype than subjects who were not given any stereotype-suppression instruction).

145. Tami Abdollah, *Police Agencies Line Up to Learn About Unconscious Bias*, POLICEONE.COM (Mar. 9, 2015), https://www.policeone.com/patrol-issues/articles/8415353-Police-agencies-line-up-to-learn-about-unconscious-bias/ (noting that some researchers say implicit bias training could potentially endanger police officers and the public by encouraging officers to hesitate in cases where they should shoot).

146. B. Keith Payne, Alan J. Lambert & Larry L. Jacoby, *Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 384 (2002).

147. *Id.* at 388.

148. *Id.*

149. *Id.*

150. *Id.*

Consistent with the bulk of the shooter bias research that has been conducted to date, all of the participants misidentified tools as guns more often after seeing a Black face than after seeing a White face.[151] They also misidentified guns as tools more often after seeing a White face than after seeing a Black face.[152] In all three conditions, stereotype-congruent errors, that is, "mistakenly calling a tool a gun when primed with a Black face or mistakenly calling a gun a tool when primed with a White face," were more likely than stereotype-incongruent errors.[153] Moreover, the difference between stereotype-congruent and stereotype-incongruent errors became greater as processing time decreased.[154] Even participants who self-identified as motivated to avoid relying on stereotypes could not reduce the impact of the racial primes on their responses.[155] Surprisingly, making race salient increased the tendency of individuals to stereotypically misidentify objects regardless of whether participants were told to avoid relying on race or to use race.[156] Participants in both the "Avoid Race" and the "Use Race" conditions were more likely to misidentify harmless objects as guns when held by Blacks and misidentify guns as harmless objects when held by Whites than participants not given any instruction calling attention to race.

Even though this preliminary research suggests that making officers aware of their implicit biases would not be an effective way to reduce racial bias in the decision to shoot, it is hard to conclusively assert, based on just one study, that implicit bias training would be completely useless, especially in light of extensive research to the contrary.[157] It may be that the way race was made salient in this experiment rendered the training an ineffective means of reducing racial bias. There is a big difference between being told to think about race and actually engaging in role-playing that demonstrates how reliance on racial and other stereotypes can endanger the officer. Implicit bias training of police officers may be an effective way to reduce racial bias, but more research is needed before any definitive conclusions can be drawn on this front.

C. Requiring Ongoing Training in the Martial Arts

My second proposal involves mandating regular and ongoing martial arts training for all officers. Most police departments require their recruits to take approximately forty-four hours of self-defense training,[158] but requirements for

151. *Id.* at 389.

152. *Id.*

153. *Id.* at 390.

154. *Id.*

155. *Id.*

156. *Id.* at 390–91.

157. Cynthia Lee, *A New Approach to Voir Dire into Racial Bias*, 5 U.C. IRVINE L. REV. 843, 861–63 (2015) (discussing race salience research); Lee, *Making Race Salient*, *supra* note 139, at 1586–90 (discussing race salience research).

158. DEP'T OF JUST., BUREAU OF JUSTICE STATS., STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES 1–6 (2002); *see Training/Academy Life*, DISCOVER POLICING (Mar. 18, 2008),

ongoing self-defense training of officers after their initial recruitment vary greatly between states and police departments. Forty-four hours of self-defense training on a one-time basis is not sufficient. Although recruits may learn good techniques for disabling a suspect, without regular and sustained practice of such techniques, a police officer is unlikely to be able to effectively use those techniques if and when needed on the street.[159]

Mandatory regular and ongoing martial arts training for all police officers would be beneficial for several reasons. First, regular and ongoing martial arts training would enhance an individual officer's physical strength. Police officers who work the streets must be physically fit in order to excel at their jobs. Regular martial arts training can help condition the body, not only strengthening the legs, arms, and abdominal muscles, but also improving stamina since a rigorous martial arts training session can also be a high-intensity cardio workout. Even individuals who are not naturally athletic can become stronger through regular martial arts training. Another advantage of martial arts training is that one does not need to be tall or big to be a good martial artist. Indeed, the beauty of martial arts is that a small person who is strong and quick can defeat a larger opponent.[160]

Second, regular and ongoing martial arts training would enhance an individual officer's mental and emotional well-being and help to relieve stress—a significant issue for today's law enforcement officers.[161] Work and family obligations, however, may make it difficult for an officer to make time for regular training. If police officers were required to engage in martial arts training—if such training were considered part of the job–they would have no excuse for not training.[162] Regular martial arts training would help officers to be at their peak, not just physically, but also mentally and emotionally. The meditation that is a regular part of traditional martial arts training, usually

http://discoverpolicing.org/what_does_take/?fa=training_academy_life.

159. *See* NORM STAMPER, TO PROTECT AND SERVE: HOW TO FIX AMERICA'S POLICE 117 (2016) (noting that very few law enforcement agencies provide sufficient entry-level, much less continuing education and training, in the martial arts and that such training should be extensive and ongoing).

160. *See* ROBERT HILL, WORLD OF MARTIAL ARTS: THE HISTORY OF MARTIAL ARTS 3 (2008) ("Special programs in many of the martial arts have been designed to train a smaller or more fragile person to handle a larger, stronger assailant.").

161. *See* 1 ENCYCLOPEDIA OF PSYCHOLOGY AND LAW 587 (Brian L. Cutler ed., 2008) (reporting that untreated stress among police officers makes officers thirty percent more likely to experience health problems and ten times more likely to become depressed than members of other professions). *But see* Gregory M. Kane, *Perceived Effects of Martial Arts Training on Mood* 57 (Jan. 2008) (unpublished Ph.D. dissertation, University of Connecticut) (on file with author) (finding both positive and negative mood-altering effects with martial arts training).

162. Greg Ellifritz, *Police Defensive Tactics Training—Are Officers Getting Enough?*, ACTIVE RESPONSE TRAINING (Dec. 18, 2013), http://www.activeresponsetraining.net/police-defensive-tactics-training-are-officers-getting-enough (finding that the average police officer in Ohio reported receiving less than seven hours of weaponless defensive tactics training per year and that the primary non-cost related reason officers gave for not receiving sufficient training in hand to hand combat was lack of a legal requirement from the Ohio Peace Officer Training Commission).

occurring before and after each training session, would help promote mindfulness.[163]

Of course, any rigorous exercise program can enhance physical strength and mental and emotional well-being. Why is martial arts training better as a training regimen for police officers than, for example, jogging or weight lifting? A third benefit to regular and ongoing martial arts training is that such training can help an officer to remain calm when faced with an unruly or combative suspect. One key goal of martial arts training is learning to remain calm in a situation of danger.[164] Most persons will panic when attacked and either freeze or flee.[165] A person who has been training regularly in the martial arts is more likely to remain calm and stay focused on the task at hand since he or she is accustomed to being attacked during sparring practice.[166] One who practices martial arts is repeatedly placed in situations of stress during sparring exercises.[167] The martial artist also knows from such practice that one can get hit and survive.[168] An officer who engages in regular martial arts training would thus be more likely to remain calm when faced with a volatile situation on the street and be able to handle the situation in the way that is most appropriate under the circumstances.

Fourth, regular martial arts training can help improve an officer's ability to accurately assess the dangerousness of a given situation. When an officer is stressed out or not getting enough sleep, that officer is more likely to make mistakes on the job.[169] Many of the shooter bias studies discussed earlier found that error rates increased under time pressure.[170] Error rates may also increase

163. *See* SANG H. KIM, TEACHING MARTIAL ARTS: THE WAY OF THE MASTER 84 (2d ed. 1997) (discussing the practice and effect of meditation before and after martial arts training). "Mindfulness" is used here to refer to the practice of intentionally "bringing one's attention to the internal and external experiences occurring in the present moment" often developed through the practice of meditation. *See* Ruth A. Baer, *Mindfulness Training as a Clinical Intervention: A Conceptual and Empirical Review*, 10 CLINICAL PSYCHOL.: SCI. & PRACTICE. 125 (2003).

164. *See* CARL BROWN, THE LAW AND MARTIAL ARTS 199 (1998) ("Martial artists are trained to display fudoshin (calmness in an emergency).").

165. *See* DAVID M. BUSS, EVOLUTIONARY PSYCHOLOGY: THE NEW SCIENCE OF THE MIND 86 (5th ed. 2015).

166. *See* ASHLEY P. MARTIN, THE COMPLETE MARTIAL ARTS TRAINING MANUAL: AN INTEGRATED APPROACH 9–12 (2012) (discussing the benefits of sparring practice).

167. *Id.*

168. Stephanie Hoppe notes that sparring teaches one to get "used to the idea of being hit." STEPHANIE T. HOPPE, SHARP SPEAR, CRYSTAL MIRROR: MARTIAL ARTS IN WOMEN'S LIVES 260 (1998).

169. *Nat'l Inst. of Justice, Officer Work Hours, Stress, and Fatigue*, NAT'L INST. OF JUST. (Aug. 13, 2012), http://www.nij.gov/topics/law-enforcement/officer-safety/stress-fatigue/pages/welcome.aspx (reporting that stress and fatigue among officers can impair officers' physical and mental ability, create a cycle of fatigue, limit job performance, and damage officers' health); KÄREN MATISON. HESS & CHRISTINE HESS ORTHMANN, MANAGEMENT AND SUPERVISION IN LAW ENFORCEMENT 408 (6th ed. 2012) (finding that stress and fatigue increases the likelihood that an officer will engage in inappropriate uses of force, have more difficulty dealing with members of the community, and die in the line of duty).

170. Payne, *supra* note 60, at 187–88; Correll, *The Police Officer's Dilemma*, *supra* note 66, at 1319.

whenever an officer has not gotten sufficient sleep or if an officer is very stressed out. If an officer is engaging in regular and ongoing martial arts training, the officer is less likely to be stressed out and should sleep more soundly. Being physically fit, getting sufficient sleep, and relieving stress can only help officers who are pressed to make split-second decisions.

Fifth, regular martial arts training can give the officer the confidence needed to handle a volatile situation without feeling pressure to shoot right away. Regular martial arts training would help the officer to develop his or her inner power, also known as "chi." If one has strong chi, one can win even before the fight begins. For example, my husband, who is a martial arts instructor, told me about an incident in which a motorcyclist with a gun made an unsuccessful attempt to rob him. My husband was driving his SUV down a one-way alley. He noticed a motorcyclist driving toward him, the wrong way. Immediately, he had a gut feeling that something was not right. Sure enough, the motorcyclist stopped next to his SUV, knocked on his window, then said, "Give me your wallet. I have a gun," opening his jacket to show a large gun. Even before the motorcyclist knocked on his window, my husband had already unbuckled his seat belt and had his hand on the door handle, ready to open the car door and knock the motorcyclist down off his motorcycle and follow up with a disabling punch or kick if the motorcyclist made an aggressive move. My husband looked at the motorcyclist and said, "You want my wallet? You picked the wrong person." The motorcyclist stared into my husband's eyes for a second and then drove off quickly. My husband was able to win without fighting. His inner power was so strong that he was able to convey to the motorcyclist that the motorcyclist didn't stand a chance if he were to attempt a robbery.

As noted above, the research on police officers and stereotype threat suggests that police officers with more confidence in their ability to command respect and handle volatile situations are less likely than police officers without such confidence to shoot noncompliant but unarmed Black suspects.[171] One way to bolster such confidence is to require ongoing and regular martial arts training. Much traditional martial arts training involves repetition. By practicing the same punches, blocks, and kicks over and over, the martial artist becomes expert at these moves. The key is repeated and sustained practice, which is necessary if one wants to be really good at anything.[172] Practicing controlled sparring helps the body learn what to do if attacked. By practicing how to block a punch to the face over and over, one's responses become automatic. Practicing free sparring helps one to react without knowing what is coming.

Finally, regular and ongoing martial arts training can help improve an officer's intuition. Officers need to be able to accurately read a situation. They

171. Richardson & Goff, *supra* note 119.

172. *See* MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS 40 (2008) (noting that "excellence at performing a complex task requires a critical minimum level of practice" and that most of the successful people in the world have become experts at what they do only after they put in at least 10,000 hours of practice).

must be able to quickly differentiate between unstable people who do not pose a true threat of harm and individuals who do pose a true threat of harm to the officer or others. As Gavin de Becker notes in *The Gift of Fear*, all of us have intuitions about other people, but we need to learn to pay more attention to our intuitions.[173] Police officers need to rely on their intuitions even more so than ordinary citizens because they are more likely to find themselves in situations of danger. Regular and ongoing martial arts training can help police officers hone their ability to sense true danger.

Despite its many benefits, martial arts training will not be a magic solution in all cases. Some police officers may not be naturally good at martial arts and all the training in the world won't make them good. But even for these police officers, regular and ongoing martial arts training will keep them fit, relieve stress, and help them to remain calm in the face of danger.

Some police officers may use their martial arts skills to hurt civilians. These police officers can and should be disciplined if they abuse their martial arts skills. They should also pay more attention to the philosophy underlying martial arts. A key teaching of karate do is never to initiate an attack in real life. Karate is supposed to be used defensively if, and only if, one is attacked.[174] This is why virtually all the kata, or forms, in karate start with a block, not an attack.[175]

The biggest problem with this reform proposal, however, lies in its implementation. Most police officers would probably agree that regular and ongoing martial arts training would be beneficial but would also maintain that they simply lack the time to engage in such training. If each state's Peace Officer Training Commission were to make martial arts training a legal requirement[176] or if insurance companies were to make regular and ongoing martial arts training a condition of insurance,[177] this would go a long way toward incentivizing police departments to give their officers time off for training or count such training as part of an officer's work. The federal government should provide grant monies to police departments to help them build on-site training

173. GAVIN DE BECKER, THE GIFT OF FEAR: SURVIVAL SIGNALS THAT PROTECT US FROM VIOLENCE (1997).

174. *See* HIDETAKA NISHIYAMA & RICHARD C. BROWN, KARATE: THE ART OF "EMPTY-HAND" FIGHTING 13 (Tuttle Publishing 1960) (translating the two Japanese characters that make up the word "karate" to mean "empty hands," reflecting "the fact that karate originated as a system of self-defense which relied on the effective use of the unarmed body of its practitioner").

175. ROBIN L. REILLY, COMPLETE SHOTOKAN KARATE: THE SAMURAI LEGACY AND MODERN PRACTICE 92 (1998) (noting that all kata begin with a defensive posture, then a blocking technique, and never an offensive move because it is assumed that the practitioner is training for self-defense, not for attack); KENEI MABUNI, EMPTY HAND: THE ESSENCE OF BUDŌ KARATE (Carlos Molina ed., 2009) (noting that kata always begins with a block).

176. Ellifritz, *supra* note 162.

177. The idea of using insurance companies to pressure police departments to enhance training requirements comes from John Rappaport. *See* John Rappaport, *Cops Can Ignore Protesters; They Can't Ignore Their Insurers*, WASH. POST, May 8, 2016, at B1–B2. *See also* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. ___ (forthcoming 2017) (manuscript on file with author) (arguing that liability insurers are capable of effecting meaningful change within police departments).

facilities for martial arts training. Police departments that cannot build an on-site facility could negotiate with reputable martial arts studios for discounted rates. Martial arts studios should welcome the added income stream and the influx of police officer students since they would likely bring an added level of dedication and seriousness to each practice. Police departments that currently provide tuition remission for higher education should expand such programs to include reimbursement for the cost of martial arts training.[178]

V
CONCLUSION

The August 2014 shooting of Michael Brown by Officer Darren Wilson in Ferguson, Missouri triggered a national conversation about race and policing that continues today.[179] Even though the "hands up, don't shoot" narrative that became a rallying cry for Black Lives Matter protesters was later discredited by a Department of Justice investigation into the shooting of Michael Brown,[180] this conversation is important because shootings of minority victims can provoke mistrust between community members and the police and lead to civil unrest. The community may perceive the police as racist even when an individual officer might have been acting justifiably. And the police, in turn, might hesitate to intervene in situations involving criminal activity even when police such intervention would be appropriate.[181]

178. Ellifritz, *supra* note 162.

179. This national conversation is due in large part to the activism of members of the Black Lives Matter movement. *See* Sullivan, Jr., *supra* note 17.

180. Michael Brown's friend, Dorian Johnson, who was with Brown when he was shot, told police that Brown had his hands up and was trying to surrender when Officer Darren Wilson shot him. *See* Eliott C. McLaughlin, *What We Know About Michael Brown's Shooting*, CNN (Aug. 15, 2014, 12:10 AM), http://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know [http://perma.cc/SK6Y-YMZ8]; Eyder Peralta, *Ferguson Documents: What Michael Brown's Friend Saw*, NPR (Nov. 26, 2014, 3:14 PM), http://www.npr.org/sections/thetwo-way/2014/11/26/366827836/ferguson-documents-what-michael-browns-friend-saw. The belief that Brown was shot while trying to surrender led members of the St. Louis Rams football team to walk onto the field at a game against the Oakland Raiders in St. Louis, Missouri, with their hands up in a show of solidarity with those protesting the shooting of Michael Brown. Adam Howard, *St. Louis Rams Players Show Solidarity with Ferguson Protesters*, MSNBC (Dec. 1, 2014, 10:43 AM), http://www.msnbc.com/msnbc/st-louis-rams-show-solidarity-ferguson-protesters. After an investigation into the shooting, however, the U.S. Department of Justice found that the physical and forensic evidence supported Officer Wilson's claim of self-defense and that the officer shot Brown as he was moving toward the officer. *See* U.S. DEP'T OF JUST., REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 5–8 (2015).

181. Some have blamed the Black Lives Matter movement for the uptick in violent crime across the nation, suggesting that the movement is at fault for making police officers hesitant to do their jobs. *See* Wesley Lowery, *FBI Chief Again Talks of Chilling Effect on Law Enforcement*, WASH. POST, Oct. 27, 2015, at A7; Michael S. Schmidt & Matt Apuzzo, *F.B.I. Chief Links Scrutiny of Police with Rise in Violent Crime*, N.Y. TIMES (Oct. 23, 2015), http://www.nytimes.com/2015/10/24/us/politics/fbi-chief-links-scrutiny-of-police-with-rise-in-violent-crime.html. The notion that increased public scrutiny of police has deterred police from doing their job has been called the "Ferguson Effect." *See, e.g.,* Christine Byers, *Crime Up After Ferguson and More Police Needed, Top St. Louis Area Chiefs Say*, ST. LOUIS POST-DISPATCH (Nov. 15, 2014), http://www.stltoday.com/news/local/crime-and-courts/crime-

This conversation about race and policing should be of concern to everyone because problematic shootings by police cost taxpayers millions of dollars in settlements arising from civil lawsuits.[182] These monies could instead be going toward improving social services, schools, and jobs. The need for reform of policing practices, however, transcends race. Almost half of all individuals shot and killed by police each year are White.[183]

up-after-ferguson-and-more-police-needed-top-st/article_04d9f99f-9a9a-51be-a231-1707a57b50d6.html; Matt Ford, *Debunking the Ferguson Effect*, THE ATLANTIC, Nov. 21, 2015, http://www.theatlantic.com/politics/archive/2015/11/ferguson-effect/416931/.; Ashley Gold, *Why Has the Murder Rate in Some U.S. Cities Suddenly Spiked?*, BBC NEWS (June 5, 2015), http://www.bbc.com/news/world-us-canada-32995911 (noting that the term "Ferguson Effect" was coined by St. Louis Police Chief Sam Dotson, in a 2014 column in the St. Louis Post Dispatch); Heather MacDonald, *The New Nationwide Crime Wave*, WALL STREET J. (May 29, 2015, 6:27 PM), http://www.wsj.com/articles/the-new-nationwide-crime-wave-143293842.; It is not clear, however, that public scrutiny of police shootings has impacted police officers' willingness to do their jobs. *See* Phillip M. Bailey, *Study: Cops Less Motivated Post-Ferguson*, USA TODAY, Nov. 20, 2015, at 12A ("A study co-authored by a University of Louisville criminologist shows that public scrutiny surrounding police shootings of unarmed civilians has diminished officers' morale but has not created a 'Ferguson effect,' which claims the criticism has impacted officers' willingness to perform their duties."); *see also* Juliet Eilperin & Wesley Lowery, *Obama Denies Police Are Shying from Duty*, WASH. POST, Oct. 28, 2015, at A3; Darryl Fears, *In Milwaukee, Weak Evidence for 'Ferguson Effect,'* WASH. POST, Dec. 6, 2015, at A9; Tracey L. Meares & Jeffrey A. Fagan, *Crime Statistics Don't Show That the Sky is Falling*, INT'L N.Y. TIMES (Dec. 16, 2015, 6:07 PM), http://www.nytimes.com/roomfordebate/2015/06/04/have-fearful-police-brought-an-end-to-the-drop-in-crime/crime-statistics-dont-show-that-the-sky-is-falling (noting that there is little evidence to support the claim that there has been a "Ferguson effect"); Richard Rosenfeld, *Was There a "Ferguson Effect" on Crime in St. Louis?* THE SENTENCING PROJECT (June 2015), http://sentencingproject.org/doc/publications/inc_Ferguson_Effect.pdf (finding that although the homicide count in St. Louis was higher in 2014 than in 2013 for most of the year, the gap between the two years began to increase two months before the events in Ferguson). A November 2015 report by the Brennan Center for Justice found that although crime was on the increase in some U.S. cities, nationwide crime rates were on the decline. *See* Jon Schuppe, *Researchers Cast Doubt on "Ferguson Effect" as Cause of Crime Spikes*, NBC NEWS (Nov. 27, 2015, 12:40 PM), http://www.nbcnews.com/news/us-news/researchers-cast-doubt-ferguson-effect-cause-crime-spikes-n467251.

182. Over the past decade, the city of Chicago has spent more than $500 million on police related court judgments, settlements, and legal fees. Peter Slevin & Julieet Eilperin, *A Killing and Video Test Emanuel's Political Skill*, WASH. POST, Dec. 4, 2015, at A2*; see also* Marc Fisher, Scott Higham & Derek Hawkins, *Uneven Justice*, WASH. POST, Nov. 4, 2015, at A1 (finding that most families who filed a civil lawsuit after a fatal shooting in which the police officer was criminally charged won awards ranging from $7,500 to $8.5 million); *see also, e.g.*, The city of North Charleston, South Carolina, agreed to pay $6.5 million to the family of Walter Scott, the unarmed Black man who was shot and killed while running away from a White police officer in April 2015. Alex Johnson, *South Carolina Town Settles with Walter Scott's Family for $6.5 Million*, NBC NEWS (Oct. 8, 2015, 8:42 PM) (detailing how the city of North Charleston, South Carolina, agreed to pay $6.5 million to the family of Walter Scott, the unarmed Black man who was shot and killed while running away from a White police officer in April 2015), http://www.nbcnews.com/storyline/walter-scott-shooting/south-carolina-town-settles-walter-scotts-family-6-5-million-n441426; Keith L. Alexander, *Baltimore to Pay $6.4 Million Settlement to Gray's Family*, WASH. POST, Sept. 9, 2015, at A1 (following the death of Freddie Gray, a Black man who died while in police custody in a police van, the City of Baltimore agreed to pay Freddie Gray's family $6.4 million even though Gray's family had not yet filed a civil lawsuit in the case).

183. *See* Gabrielson, Grochowski & Sagara, *supra* note 19 (noting that some forty-four percent of all those killed by police across the past thirty-three years were White); *see also* Valerie Richardson, *Police Kill More Whites Than Blacks, but Minority Deaths Generate More Outrage*, WASH. TIMES (Apr. 21, 2015), http://www.washingtontimes.com/news/2015/apr/21/police-kill-more-whites-than-blacks-but-minority-d/?page=all (reporting that roughly forty-nine percent of those killed by officers from May 2013 to April 2015 were White, thirty percent were Black, nineteen percent were Hispanic and two percent

In recognition of these realities, this article proposes two ways to enhance the training that police officers currently receive.[184] One reform proposal—training in the use of force aimed at reducing racial bias and improving accuracy in the decision to shoot—directly responds to the numerous studies suggesting that police officers, like citizens, are quicker to see a weapon in the hands of a Black person than in the hands of a White person. The other, recognizing that the need for reform transcends race, is race neutral: police officers should be required to engage in regular and ongoing weaponless martial arts training. These are modest proposals for reform, but if either of these reforms can save even one life, they will have been worth the effort.

were Asian or other races); FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: SUPPLEMENTARY HOMICIDE REPORT (2012) (noting that fifty-two percent of the victims of police homicides in the given time period were White and thirty-one percent were Black).

184. William Yeomans reminds us of "the limits of criminal prosecutions as vehicles for change." William Yeomans, *The Red Herring in Prosecuting Officers*, WASH. POST, May 25, 2016, at A19 ("Prosecutions focus on individual circumstances and personalized evaluations of culpability" and "occur within a structure designed to protect individual defendants through procedural safeguards, including rights to counsel, to confront witnesses, to a jury and against self-incrimination and, most important, the requirement that the government prove guilt beyond a reasonable doubt.").

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 19

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- : 9988/2014

PETER LIANG, :

Defendant. :

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MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO SET ASIDE VERDICT

At the conclusion of all the evidence, the defense moved to dismiss all of the charges against Peter Liang, and the Court reserved decision on the motion. (Tr. 1111-13)("I will hold off my decision until after the verdict"). Peter Liang was then convicted of Manslaughter in the Second Degree and Official Misconduct. We now renew the motion to dismiss those charges. See CPL §290.10(1); see also Tr. 1393-94 ("I had reserved my decision [and] continue to do so"); cf. CPL §330.30 ("at any time after the rendition of a verdict of guilty and before sentence . . . a [court may] set aside or modify the verdict [on] [a]ny ground . . . which, if raised upon an appeal . . . would require a reversal or modification as a matter of law by an appellate court").

I. FACTUAL BACKGROUND

A. The People's Case

1. The Testimony of Police Officer Shaun Landau

The People's principal witness was Police Officer Shaun Landau, who gave this account of the night of the shooting.[1] On Thursday, November 20, 2014, Officers Landau and

[1] Officer Landau received immunity from prosecution; he was terminated from the New York City Police Department ("NYPD") after the trial.

Liang were summoned to do an overtime tour -- 5:30 p.m. until 2:05 a.m. -- in the Pink Houses, a group of Housing Authority buildings in East New York. (Tr. 592). Officers Landau and Liang were "rookies," having graduated from the Police Academy 11 months earlier, and had been partners for eight months. (Tr. 586, 667). The Pink Houses are one of New York City's most dangerous locations. (Tr. 142, 251). Indeed, there had been a shooting there the week before, and Officers Landau and Liang were called in that night to address the "shootings condition" and to "make sure everything was safe." (Tr. 594, 661). It was only the second time that the two officers had worked in the Pink Houses. (Tr. 664).

At 11:10 p.m., after canvassing the grounds and other buildings, Officers Landau and Liang entered the eight-story building at 2724 Linden Boulevard to do "floor checks." (Tr. 600). There was no one in the lobby, and they took the elevator to the eighth floor. Once there, they walked down the hallway, intending to enter the stairwell, walk up to the roof, and then walk down, checking each floor. (Tr. 602). When they reached the end of the hallway, they peered through the window in the metal door and saw nothing. It was "[p]ure darkness, pitch black" because the stairwell lights on the eighth and seventh floors were not working. (Tr. 171, 604, 770). Officer Liang pulled out his flashlight with his right hand and his gun with his left hand (he is left-handed) and pushed the stairwell door open with his right shoulder. (Tr. 612-13). As he did, his body "turn[ed] to the left"; his left arm was "on the side of his back"; he seemed to "flinch"; and then a "shot just went off." (Tr. 614, 619, 714); id. at 620 ("[a] gun just, just fired out of nowhere," while the door was still open).

Immediately after the shot, Officer Liang returned to the hallway. Shocked, Officer Landau asked him "[w]hat the fuck happened," and Officer Liang responded "I just shot

by accident. I'm sorry, it went off by accident." (Tr. 619, 721).[2] He then said "I'm fired," which Officer Landau took to mean that Officer Liang thought he would lose his job for having accidentally discharged his gun. (Tr. 619-21). Their ears still ringing from the gun shot, the two officers went "back and forth" about who should "call it in" to Sergeant Martinez, their supervisor. (Tr. 622). Officer Landau "pulled out" Sergeant Martinez's number on his cell phone and handed the phone to Officer Liang. When Officer Liang pressed the number, however, Officer Landau "took the phone out [of his hand] and . . . hung up." (Tr. 624). At the time, the officers had no idea that anyone had been shot. (Tr. 725-26).

After a few minutes, the two officers went into the stairwell to see if there was a bullet hole in the wall. (Tr. 624-26). When they entered the stairwell, they heard the sound of a person (or persons) below, and immediately ran down the stairs. (Tr. 627-28)("[i]t . . . sounded like . . . grunting crying, something along those lines"). On reaching the fifth floor landing, the officers saw a man lying on the floor and a woman crouched over him crying. Officer Liang knelt next to the man and yelled "[o]h my God, someone's shot.' (Tr. 635). Hearing those words, Officer Landau urged him to "put it over, put it over," and heard Officer Liang broadcast "accidental discharge, MOS involved, male shot, we need a bus." (Tr. 631, 650).[3] Officer Liang also broadcast "Pink House Post One" several times and shouted at a woman in the stairwell to give him the address of the building. (Tr. 645-46).

2. Other Evidence

In addition to the testimony of Officer Landau, the jury heard this evidence in the People's case:

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[2] A shell casing from Officer Liang's gun was found in the eighth floor landing next to the door.

[3] "MOS" means member of service, and a "bus" is an ambulance.

a. Akai Gurley's Death. As Officer Liang was entering the stairwell on the eighth floor, Melissa Butler and Akai Gurley were on the landing one floor below. Mr. Gurley was 28 years old, and Ms. Butler, who lived in apartment 7G, was his girlfriend. They had spent the night talking and braiding his hair. (Tr. 389). Shortly after 11:00 p.m., Mr. Gurley decided to go home, and the couple chose to use the stairwell because the elevator was slow. (Tr. 390). When they entered the dark stairwell, the "door on the eighth floor opened [and slammed against] the wall and then a shot went off" and there was a "muzzle burst" from above. (Tr. 394-95). Not knowing what had happened, they ran downstairs until Mr. Gurley collapsed on the fifth floor landing. (Tr. 396). Ms. Butler went to help him and noticed that he was bleeding from the chest. (Tr. 397). She then ran down one floor and asked the resident of apartment 4A, Melissa Lopez, to call 911 to report that her boyfriend had been shot. (Tr. 46, 398-99).

Ms. Lopez testified that she called 911 and reported the shooting and was transferred to E.M.S. (The evidence showed that the call was received at 11:14:46 p.m.) She then conveyed the "E.M.S. lady['s]" instructions to Ms. Butler on how to perform CPR, which Ms. Butler carried out. (Tr. 52). By that time, Officers Liang and Landau had arrived on the fifth floor landing, and Officer Liang asked Ms. Lopez two or three times for her address. (Tr. 74). He appeared "like stuck," "dumbfounded" and "like shocked." (Tr. 81-83).[4]

b. The Aftermath. Lieutenant Vitaliy Zelikov and numerous officers responded promptly to the radio call for a "possible person shot." (Tr. 228). As Lieutenant

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[4] The 911 call indicates that Officer Liang asked Ms. Lopez for the building's address at 11:17:38, 11:17:41, and 11:18:12. (PX 21; Tr. 832-33). That he could not "process" what she was telling him is clear. One can hear him saying "2724?" and later "2721?" and then "24." The first time that he asked for the address, Ms. Lopez told him that she was "on the phone with the ambulance right now."

Zelikov walked up the stairwell to the fourth floor, he saw Officer Liang, who seemed "frozen." He was clearly "shaken up, pale, and . . . unsteady on his feet." (Tr. 232, 236); see also Tr. 172 (Officer Liang had "a thousand yard stare"). Lieutenant Zelikov asked what had happened, and Officer Liang "pointed toward the fifth floor" and said "I shot him by accident." (Tr. 230). After taking Officer Liang's gun, Lieutenant Zelikov walked to the fifth floor landing, where he saw Ms. Butler performing CPR and directed a police officer to take over. When he returned to the fourth floor landing, he found Officer Liang "distraught," "incoherent," and "hyperventilating" and ordered an ambulance to take him to the hospital. (Tr. 259-61, 691).

Mr. Gurley was taken to the hospital and pronounced dead. A medical examiner testified that he died from a bullet wound that had penetrated his chest cavity, gone through the heart, and lodged in his liver. (Tr. 791-92). The bullet had ricocheted off the concrete wall in the seventh floor stairwell near where he and Ms. Butler had been standing. (Tr. 200).[5] The medical examiner testified that basic CPR could not have saved him -- that with "this particular type of injury," a person can live only "minutes." (Tr. 794, 805).

c. Officer Liang's Gun. Officer Liang was carrying a Glock Model 19, semiautomatic 9mm pistol, which is one of three models that NYPD officers are authorized to carry. (Tr. 277). It has a capacity of 16 cartridges. (Id.). The gun has no external safety, but it has been adjusted to require nine to twelve pounds of "trigger pull" -- i.e., the pull needed to

[5] A retired police sergeant who had spent his professional life in law enforcement testified that he had never heard of a ricochet shot killing someone. (Tr. 922).

discharge a bullet. (Tr. 282).[6] Officer Liang's gun required 11 1/2 pounds of pressure if pulled in the middle and less on the tip. (Tr. 281, 297).[7]

d. Police Use of Guns in a Stairwell. As noted, Officers Landau and Liang were doing a "floor check" in the Pink House building when Officer Liang's gun discharged. Numerous officers testified that in entering a stairwell, it is sound practice for an officer to have his gun in his hand with his finger along the side of the gun and the gun pointed in a safe direction. (Tr. 167). Officer Andrae Fernandez testified that he had received "training within the Housing Bureau that when you're going to approach a roof landing, you have your gun out of the holster." (Id.). Detective Matthew Parlo, Detective Nathan Garcia and Officer Landau gave similar testimony. (Tr. 319, 350-51)("Senior Housing police officers taught [us] to have [a] firearm out" when approaching the roof landing). Officer Landau testified that Officer Liang's regular practice when entering a stairwell was to have his gun out with his finger on the side of the gun. He did not see Officer Liang put his finger on the trigger that night. (Tr. 710, 713).

e. Startled Response. Detective Mark Acevedo, who works in the NYPD Firearms Analysis Section, gave this testimony about "startled response":

> Q. Do you know what a startled response is?
>
> A. It's a reaction to when you become startled or afraid and the body reacts in a way that you might not realize how it's reacting.
>
> Q. And that way is your hands clench; right?

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[6] An external safety is located on the outside of the weapon, and an officer has to disengage it with his finger or thumb. (Tr. 919). The military and several police departments use guns with external safeties. (Tr. 534, 919-20).

[7] A Glock ordinarily requires 5 1/2 pounds of trigger pull. For the NYPD, Glock adds a specially-designed "NY2" trigger to make the gun somewhat more difficult to discharge. (Tr. 281-82). Twice at trial, once in the People's case and once during deliberations, the jurors were permitted to pull the trigger of Officer Liang's gun.

A. Yes.

(Tr. 294). And Detective Joseph Agosto, a Police Academy firearms instructor, testified that when an officer is startled and his hand "clench[es] up," it is possible for the gun to accidentally discharge, even if the officer is initially holding his finger on the outside of the frame. (Tr. 544).[8]

f. Traffic in the Stairwell. Officer Landau testified that it was "very rare" to find someone in the stairwell of a Housing Project building. (Tr. 709). That Thursday night, he and Officer Liang had encountered no one in the stairwells of the other buildings that they had canvassed. (Tr. 760-61, 1014).

g. CPR Training. A Police Academy instructor testified that NYPD recruits receive six to seven hours training in CPR and are tested on what they learn. (Tr. 431). A recruit must score 85 percent to pass the test. According to Officer Landau, however, the training was not rigorous, and the recruits were "fed the answers" to the exam, so that they would pass. (Tr. 758). Officer Landau testified that he did not relieve Ms. Butler when he saw her performing CPR because he "didn't feel qualified." (Tr. 744).[9] Notably, officers were instructed

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[8] The academic literature confirms Detective Agosto's testimony. See Christopher Heim et al., The Risk of Involuntary Firearms Discharge, 48(3) Human Factors 413, 418 (2006)(empirical study shows that "police officers may unconsciously make contact with the trigger despite regulations stipulating that the trigger finger be kept outside the trigger guard [and] the resulting pressure on the trigger can be sufficient to unintentionally overcome the trigger pull of most police weapons"); Roger M. Enoka, Involuntary Muscle Contractions and the Unintentional Discharge of a Firearm, 3(2) Law Enforcement Executive Forum 27 (2003)("[u]nintentional discharges . . . are the result of involuntary muscle contractions that occur during the appropriate handling of a firearm"; sometimes, "the index finger could be forced to join the gripping action and it could even slip inside the trigger guard and depress the trigger").

[9] Although the People told the jury in their opening statement that Officer Liang had been "carefully trained in CPR" (Tr. 20), it is now clear that he was not. After the trial, the instructor assigned to teach CPR to Officer Liang's class was "stripped of her gun and shield for

at the Police Academy not to render assistance that was beyond their ability to perform. (Tr. 461-62).

B. The Defense Case

Officer Liang testified in his own defense, and his testimony was similar to that of Officer Landau. He told the jury that on November 20, 2014, he and Officer Landau did a 6:00 p.m. to 2:00 a.m. overtime tour "because of the shootings and the robber[ies] that [were] happening in the Pink Houses" (Tr. 1011-12); that that night, they had done "floor checks" in two buildings before entering 2724 Linden Boulevard and had seen no one in the stairwells of either buildings (Tr. 1014-15); and that they entered 2724 Linden Boulevard and took the elevator to the eighth floor, intending to go up to the roof and then walk down. (Tr. 1016-17).[10]

After leaving the elevator, Officers Liang and Landau walked to the stairwell and saw that it was pitch black. Officer Liang then took out his weapon and his flashlight and pushed open the door to the stairwell with his shoulder. His gun was in his left hand pointed down with his finger "on the side of the weapon." (Tr. 1017). And then this:

> I open the door, push it on my right shoulder and when I -- and as soon as I got in, I heard something on my left side, quick sound, and it just startled me. And the gun went off after my body tensed up.

(Tr. 1019); see also id. at 1074 ("I just turned and the gun went off"). His ears ringing, Officer Liang then reholstered his gun, pointed his flashlight down the stairs, saw no one, and moved

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conducting insufficient CPR training." Police Academy Instructor Stripped of Gun, Shield, New York Daily News, March 9, 2016.

[10] Officer Liang also testified that there were almost no people in the stairwells of Housing Authority buildings at night -- that at that time "the elevator comes a lot faster and there's no need to walk the stairs"). (Tr. 1096, 1097)(pedestrian traffic is "almost nonexistent"). The lobby video showed that the elevator came immediately that night when Officer Liang pushed the button. See DX F.

back into the hallway. (Tr.1019, 1076); (Tr. 1078)("it was just a natural reaction to go back into the light").[11]

Once back in the hallway, Officer Landau asked "what the fuck happened," and Officer Liang responded that he had "accidentally fired a shot." (Tr. 1020). He wondered aloud if he could be "fired" for accidentally discharging his gun and told Officer Landau to "call it in [to the Sergeant]." (Tr. 1020). After some back and forth about who should make the call, Officer Liang took Officer Landau's phone, which had the Sergeant's number programmed in it, and dialed the number, but Officer Landau stopped him and took the phone from him. (Tr. 1021).

Not knowing that anyone had been hit by the accidental shot, the two officers went back into the staircase to see where the bullet had struck. When they reached the seventh floor, Officer Liang heard "someone crying" and raced down the stairs. On the fifth floor landing, he saw Mr. Gurley lying there with Ms. Butler by his side. (Tr. 1022, 1082). Officer Liang then bent over Mr. Gurley, saw that his eyes were "rolled back," realized that he was badly injured and exclaimed "[o]h my God, someone's hit." (Tr. 1022, 1081). He sent over the radio

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[11] On cross-examination, there was this testimony:

> Q. And whatever startled you was down and from the left?
>
> . . . .
>
> A. Yes.
>
> Q. You knew that was a person. Right?
>
> A. No, I didn't know.
>
> Q. You didn't know? So, tell us what was it that startled you.
>
> A. It was some quick sound.

(Tr. 1056).

the message "Pink Post One, male shot, call bus." Because he didn't know the building's address, he asked Ms. Lopez, who was in the stairwell, for the address "many times and she told him the address many times." (Tr. 1025). He had "trouble processing" what she said, but eventually "put the address over with [his] post." (Id.). He was "panicking" and "in disbelief" that someone actually had been shot with his gun. (Tr. 1026).

Within seconds of arriving at the fifth floor landing, Officer Liang saw Ms. Lopez screaming instructions to Ms. Butler on how to perform CPR. (Tr. 1084). He knew that Ms. Lopez was "on the phone with 911" and that she was relaying what she was being told. (Tr. 1085).[12] He did not attempt to perform CPR, believing that the best thing was "to call [for] professional medical help." (Tr. 1025-26). Like Officer Landau, Officer Liang testified that he had not received meaningful CPR training at the Police Academy and had been given the answers to the test. (Tr. 1005-06, 1036-37).

The jury also heard from several other defense witnesses. Daniel Reefer, a private investigator, testified that he spent an hour in the 2724 Linden Boulevard stairwell on January 20, 2016 (from 7:45 p.m. to 8:45 p.m.) and January 21, 2016 (from 10:30 p.m. to 11:30 p.m.), and saw "no activity." (Tr. 955-58, 968). Robert Lamonica, a firearms expert, testified that he tested Officer Liang's gun using more sophisticated technology than that available in the

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[12] On cross-examination, Officer Liang gave this testimony:

> Q. But by the time you got downstairs, Ms. Lopez was already on the phone. Right?
>
> A. Right.
>
> Q. She was already speaking to 911. Right?
>
> A. . . . Yes.

(Tr. 1086).

NYPD laboratory and that the trigger pull at the tip was 10.3 pounds. (Tr. 929-30). And Officer John Funk testified that he was in Officers Liang and Landau's class at the Police Academy and that the CPR training was inadequate. (Tr. 873-74).

II. ARGUMENT

As discussed below, the evidence was legally insufficient to support Peter Liang's convictions for Manslaughter in the Second Degree and Official Misconduct. A verdict is legally sufficient "when, viewing the facts in the light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt." People v. Donaldson, 9 N.Y.3d 342, 349 (2007). No such valid line exists here.

A. Reckless Manslaughter

The basic legal principles are familiar. Second degree manslaughter is committed when a defendant recklessly causes the death of another person. Penal Law §125.15. A person acts "recklessly," when he "is aware of and consciously disregards a substantial and unjustifiable risk that [death] will occur." Penal Law §15.05(3). And the risk "must be of such nature and degree that the disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." Id. The risk must reflect "the kind of seriously blameworthy carelessness whose seriousness would be apparent to anyone who shares the community's general sense of right and wrong." People v. Asaro, 21 N.Y.3d 677, 685 (2013).

A classic case of reckless manslaughter is People v. Garcia, 114 A.D.2d 423 (2d Dept. 1985). There, the defendant fired his 12-gauge shotgun in the direction of a group of children in a backyard two doors away and killed an 11-year old boy. The defendant was aware of and consciously disregarded a substantial and unjustifiable risk that a child would be killed

from his shot, and his disregard constituted a gross deviation from the standard of conduct that a reasonable person would have observed in the circumstances. He was seriously blameworthy, and his conviction was therefore upheld.

Other defendants convicted of reckless manslaughter in shooting deaths have likewise been seriously blameworthy. See, e.g., People v. Licitra, 47 N.Y.2d 554, 559 (1979)(defendant, without justification, "removed a loaded revolver from his belt area, swung it across his body with his finger on the trigger, and allowed the barrel to point in the direction of another person, barely three feet away," when the gun discharged); People v. Speringo, 258 A.D.2d 379, 380 (1st Dept. 1999)(defendant, "an off-duty police officer, entered a restaurant inebriated, precipitated a fight, drew his weapon, and pointed it at the head of a patron, whereupon the gun discharged as people attempted to wrest it away from him"); People v. Hill, 266 A.D.2d 473, 474 (2d Dept. 1999)(defendant held "a loaded shotgun with his finger on the trigger in close proximity to the victim" and the gun discharged); People v. Abreu-Guzman, 39 A.D.3d 413 (1st Dept. 2007)("under pressure from the other participant, [defendant] fired the fatal shot in the victim's direction without looking"); People v. Johnson, 205 A.D.2d 707, 708 (2d Dept. 1994)(defendant "pointed a gun at his girlfriend's head at . . . close range" without "inspect[ing] the chamber to determine if any bullets remained therein" and "pulled the trigger"); People v. Coley, 289 A.D.2d 252, 253 (2d Dept. 2001)(defendant "danced and posed with a loaded handgun in front of the decedent and two other teenaged females, and while . . . handling the gun it discharged, killing the decedent"); People v. Perez, 278 A.D.2d 2, 3 (1st Dept. 2000)("defendant took a loaded weapon from his pocket and pointed it at the deceased's chest" and the gun discharged during a struggle).

Never before has a defendant been convicted of reckless manslaughter on less proof of blameworthy conduct than that adduced against Peter Liang. Fairly viewed, the evidence showed that Officer Liang entered the pitch black stairway of a dangerous Housing Authority building with his finger on the side of the gun and the gun pointed downward. As his partner, a prosecution witness, testified, that was the way they were trained to proceed and that was Officer Liang's regular practice. See Halloran v. Virginia Chemicals, Inc., 41 N.Y.2d 386, 392 (1977)("[p]roof of a deliberate and repetitive practice . . . is highly probative"). Once in the stairway, Officer Liang was startled by a quick sound and "flinched." His hand clenched, his finger accidentally pressed against the trigger, and a bullet was discharged into the stairwell below.

If that is what occurred, and it almost certainly is, then a manslaughter conviction cannot be upheld. Officer Liang did not disregard a substantial and unjustifiable risk that death would occur from his actions. Mr. Gurley's death was a tragic and freak accident in which a coincidence of timing (Officer Liang's entering the eighth floor stairwell at the same time that Mr. Gurley was present a floor below), a well-documented human reflex (Officer Liang's startled response on hearing an unexpected sound in a pitch black stairwell) and an odd ricochet (one unprecedented in NYPD annals) combined to cause the death of an innocent man.

Of course, the prosecution's theory has always been that Officer Liang had his finger on the trigger as he entered the stairwell. Even if that were so, his reckless manslaughter conviction still could not stand.[13] For a police officer to have his finger on the trigger may

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[13] Notably, there was no direct evidence that Officer Liang's finger was on the trigger when he entered the stairwell. Officer Liang testified that it was not, and Officer Landau testified that it was Officer Liang's regular practice to keep his finger on the gun's frame. The People rely on the inference that because Officer Liang's finger was on the trigger when the gun discharged, it must have been there when he went through the door. At this stage, it is not required that the

violate police procedure, but it is not seriously blameworthy conduct that warrants criminal condemnation. See People v. Lewis, 53 A.D.2d 963, 964 (3d Dept. 1976)("[c]riminal liability cannot be predicated upon every careless act merely because [it] results in [a] death"). That a rookie officer (or any officer) might be on high alert when entering a dark stairwell in a building he has patrolled only once before and to which he has been assigned to check for "shooting conditions" is not surprising. See People v. Lora, 85 A.D.3d 487, 495 (1st Dept. 2011)("[i]n evaluating the propriety and reasonableness of the actions by the police, [a court] must take cognizance of the realities of urban life in relation to the dangers to which officers are exposed"). Thus, even if one could find that Officer Liang's finger was on the trigger when he pushed open the door, that conduct would not be a "gross deviation" from the standard of conduct that a reasonable officer might observe in such circumstances. See Model Penal Code §2.02 Commentary at 237 (1985)("[e]ven substantial risks, it is clear, may be created without recklessness when the actor is seeking to serve a proper purpose").

Moreover, it bears emphasis that the People offered no evidence to contradict Officer Liang's testimony that his gun was pointed down when he entered the stairwell. Any suggestion to the contrary is pure speculation. See People v. Choremi, 301 N.Y. 417, 419 (1950)("[s]uspicion and surmise [do not] constitute[] that kind of proof which our system of justice demands to support a conviction"); (Tr. 1310)("your verdict . . . must not rest upon baseless speculations"). Under normal circumstances, pointing a gun toward the ground should dissipate the risk that an accidental discharge will result in a death. See Tr. 484 (testimony of Detective Agosto: one of the four factors that must be present before a firearm discharge can

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People prove their case to a "moral certainty" even though the proof was circumstantial, see People v. Hines, 97 N.Y.2d 56, 62 (2001)(the moral certainty standard is "reserved . . . [for] the trier of fact"), but the lack of direct proof on this question -- whether Officer Liang's finger was on the trigger when he entered the stairwell -- highlights the weakness of the People's case.

injure someone is that "the muzzle must be pointed at someone"). The risk that a gun pointed downwards will accidentally discharge and kill an unseen person standing at the bottom of a staircase is so remote that it cannot be the basis for a manslaughter conviction. See generally People v. Warner-Lambert Co., 51 N.Y.2d 295 (1980)(declining to impose criminal liability where death occurred in a manner that was unforeseeable).

Furthermore, as several witnesses testified, the stairwells of Housing Authority buildings are rarely populated late at night. That was Officer Liang's firm belief (and also Officer Landau's), and their experience at two other buildings that night confirmed it. The fact that the stairwell was pitch black made it even more unlikely that a resident might be walking there. Thus, the risk of an accidental discharge harming someone in the stairwell was not "substantial," which is what the criminal law requires for a conviction. Put differently, unlike the defendants Garcia, Licitra, Speringo, Hill, Abreu-Guzman, Johnson, Coley and Perez, Officer Liang had no idea that anyone was anywhere in his vicinity when his firearm discharged. See People v. Johnson, 131 A.D.2d 697, 698 (2d Dept.1987)("that there was a risk is apparent from the fact that the death occurred; however, it was not so substantial, or of such a nature, that a reasonable person would be under a duty to perceive it").

Although not a shooting case, the decision of the Court of Appeals in People v. Cabrera, 10 N.Y.3d 370 (2008), is instructive. There, Cabrera, a young and inexperienced driver, entered a tricky downhill curve at 70 miles per hour, well in excess of the posted 40 mile per hour warning sign. Moreover, he had four teenage friends in the car, none of whom was wearing a seat belt, even though his "junior license" precluded him from operating a vehicle "with more than two passengers under 21 years of age who [were] not members of [his] immediate family" and required him "to ensure that all passengers have buckled their seat belts."

Id. at 372. Once in the curve, the car rotated and slid off the road, crashing into a utility pole and killing three of the passengers. On these facts, the Court of Appeals set aside Cabrera's homicide conviction. Although acknowledging that Cabrera's behavior was "certainly negligent and unquestionable blameworthy," the Court found that it was not so "morally blameworthy" as to convert a civil wrong into a crime. Id. at 378.

Cabrera reminds us that a homicide conviction -- here the Class C felony of reckless manslaughter -- requires "seriously condemnatory behavior." Id. It is not enough that there is careless conduct creating a risk of a tragic accident or that clear regulations are flouted. If Cabrera is not a criminal, then Peter Liang is not as well.

Finally, it bears note that the prosecutor advanced a new theory in summation -- that Officer Liang intentionally "fired a shot near towards where Akai Gurley stood," knowing someone was there. (Tr. 1225)("he knew someone was there"). Whatever the propriety of the prosecutor's switching theories, the new theory is bankrupt. Officer Liang's every action shows that he had no knowledge that anyone was in the stairwell and that the shot was unintentional. Only one shot was discharged, and Officer Liang gave no pursuit. There was no evidence that his arm was extended, and no reason to think the bullet would have hit where it did if it were. After the gun went off, Officer Liang reentered the stairwell and told Officer Landau that it had happened "by accident." His words were a spontaneous declaration and undoubtedly true. People v. Johnson, 1 N.Y.3d 302, 306 (2003)(during such a brief period, "considerations of self-interest could not have been brought fully to bear by reasoned reflection"). Officer Liang and Officer Landau then went back and forth as to who should call the Sergeant to report that accidental discharge -- a shot which they feared might get Officer Liang "fired" but never

suspected had caused a death. In short, the claim that Officer Liang fired his gun intentionally at someone in the stairwell finds no support in the record of this case.

For these reasons, the evidence was legally insufficient to support Officer Liang's reckless manslaughter conviction.

B. Official Misconduct

Peter Liang was also convicted of the Class A misdemeanor of Official Misconduct for "knowingly refrain[ing] from performing a duty . . . clearly inherent in the nature of his office." Penal Law §195.00(2). In their Bill of Particulars, the People specified that the charge was based on Officer Liang's "knowingly refraining from performing his duty to seek or provide medical care for Mr. Gurley." People's Bill of Particulars at ¶ 33; see People v. Barnes, 50 N.Y.2d 375, 379 n.3 (1980)(prosecution is limited to the theory it advances in the bill of particular). On any reasonable view of the evidence, that charge cannot survive scrutiny.

The seminal case is People v. Feerick, 93 N.Y.2d 433 (1999). There, the defendants, in direct contravention of an order from their lieutenant, pushed their way into an apartment with weapons drawn and without a search warrant, restrained the occupants, ransacked the apartment, and threatened the occupants with arrest, all in an effort to recover one of the officer's police radio, which had been lost in the building. On these facts, the Court of Appeals upheld the officers' convictions for Official Misconduct, finding that they were "engaged in ultra vires criminal conduct." Id. at 448; see also id. at 449 ("although purportedly acting under the authority of the Police Department and while on duty, [the defendants] were not pursuing the radio in furtherance of prescribed law enforcement duties, but rather in violation of orders and for their own benefit")(emphasis in original).

What is important here are not the facts of Feerick, which are light years from this case, but the cautionary notes that the Court sounded about the reach of the Official Misconduct

statute. Those notes included these: "good faith but honest errors in fulfilling one's official duties are not what the Legislature meant to criminalize," id. at 445; "[t]he Legislature intended to encompass flagrant and intentional abuse of authority by those empowered to enforce the law," id.; "the Legislature sought to ensure that good faith miscalculations in the exercise o official judgment did not run the risk of a criminal prosecution," id. at 446; the "benefit ingredient [of the statute] excludes . . . neglect of duty, which, though possibly a basis for removal or disciplinary action . . . does not seem a fair basis for the automatic imposition of criminal sanctions," id.; and "[p]roof that a public servant intended to receive a benefit . . . negates the possibility that the misconduct was the product of inadvertence, incompetence, blunder, neglect or dereliction of duty, or any other act, no matter how egregious, that might more properly be considered in a disciplinary rather than a criminal forum," id. at 448 (emphasis added).

Applying these rigorous standards, Peter Liang's Official Misconduct conviction cannot stand. First, it is clear that Officer Liang could not have "knowingly" refrained from seeking or providing medical care for Mr. Gurley until he knew that Mr. Gurley had been shot. That knowledge did not exist until Officer Liang ran down to the fifth floor landing, knelt over Mr. Gurley and realized what had occurred. (Tr. 1022, 1081)("Oh my God, someone's hit"). What happened before that in the eighth floor hallway, when Officers Liang and Landau went back and forth about who should call Sergeant Martinez, is therefore irrelevant. Officer Liang might be criticized for not promptly reporting the accidental discharge, but that is not the inaction with which he is charged.

Second, soon after arriving at the fifth floor landing, Officer Liang saw Ms. Butler performing CPR on Mr. Gurley on the instructions of an "E.M.S. lady," which Ms. Lopez was

relaying. Officer Liang had no duty to take over for her, and no reason to believe that he was more capable at the task. No police procedure required him to perform CPR, and he had received grossly inadequate training in it. See W. Donnino, Practice Commentary, Penal Law §195 ("the duty to act [must] be so clear that the public servant is fairly on notice as to the standards that he or she must meet"). In calling for help, Officer Liang did what a reasonable officer would do in the circumstances.[14]

Third, there is not the slightest suggestion that Officer Liang's conduct on the fifth floor landing was intended to obtain a benefit for himself or deprive Mr. Gurley of one. What cannot be ignored is that when he saw Mr. Gurley lying on the ground, Officer Liang was in shock. In Ms. Lopez's words, he was "stuck." He had trouble processing the address of the building as she repeatedly gave it to him. On this record, no fact finder could reasonably conclude that he was seeking to advantage himself or harm Mr. Gurley, whose fate was inextricably tied to his own. See People v. Esposito, 160 A.D.2d 378, 379 (1st Dept. 1990)("the . . . imposition of criminal sanctions [cannot be] based on some ill-defined benefit").

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[14] The jury heard this testimony for a senior instructor at the Police Academy:

> Q. So, if a police officer comes upon a person and you take a look, and you immediately see that you've got a very, very dire situation on your hands, isn't it a fact that the first think you want to do is to get help, to get medical professionals on the scene?
>
> A. What we teach is the first thing you want to do is make sure is the person okay and then the next -- well, first, we survey the scene make sure it's safe for me to go; we go to the person, is the person okay, and then I will call an ambulance.

(Tr. 455); see also Tr. 466 (if a civilian "is doing [CPR] correctly there is no reason for [an officer] to do it for her").

In the cases in which police officers have been convicted for Official Misconduct, their malfeasance has been clear and the intent to benefit obvious. See, e.g., People v. Nieves, 197 A.D.2d 542, 543 (2d Dept. 1993)(police officer permitted drug dealer to sell drugs in return for having "[a] reliable source"); People v. Hill, 161 A.D.2d 520 (1st Dept. 1990)(police attendant delayed processing arrests until arrestees agreed to pay him); People v. Cheswick, 166 A.D.2d 88, 90 (2d Dept. 1991)(police lieutenant "inexcusably failed to restrain his subordinates," who were mistreating a prisoner); People v. Flanagan, 132 A.D.3d 693, 694 (2d Dept. 2015)(police officer sought to prevent high school student from being arrested "due to [student's] father's connections in the police department"); People v. Heckt, 62 Misc.2d 287, 288 (Erie Cnty. Ct. 1969)(police officers "knowingly participated in illegal card games . . . and failed in the performance of their duty to make proper arrests"); People v. Lemma, 50 Misc.3d 34 (App. Term 2d Dept. 2015)(detective failed to exonerate robbery suspect whom he knew was innocent and incarcerated for the crime). Merely to state the facts of these cases is to recognize that this case is in a different league.

* * *

At its core, the People's case was premised on the notion that Peter Liang should have performed CPR on Mr. Gurley (even though it would have been useless). The People opened on the theory that Office Liang had been "carefully trained in CPR," and they called a Police Academy witness to extoll the rigors of that training. In closing, they emphasized that Ms. Butler "didn't have the training that [Officer] Liang had." (Tr. 1266). Three witnesses -- Officer Liang, Officer Landau, and Officer John Funk -- testified that the Police Academy training was seriously deficient. We know now that their testimony was true. See supra n.9. If

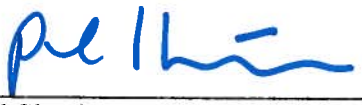
the People continue to press a "he-should-have-performed-CPR" theory in response to this motion, it would be to punish an officer for not performing a task that he was not trained to do.

III. CONCLUSION

For the reasons set forth above, Peter Liang's convictions for Manslaughter in the Second Degree and Official Misconduct should be set aside.

Dated: New York, New York
March 15, 2016

Respectfully submitted,



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POWERLESS AGAINST POLICE BRUTALITY: A FELON'S STORY

Tamara F. Lawson

POWERLESS AGAINST POLICE BRUTALITY: A FELON'S STORY

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I. INTRODUCTION

Imagine driving to the store with friends, but while en route, you are shot and beaten by the police so severely that random citizen witnesses intervene to stop the police brutality.[1] Next, envision recovering from

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1. *See* Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 386–89 (2001); *see also* Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (holding that although presence in a high-crime area alone is not enough to support particularized suspicion of criminal activity, a location's characteristics are relevant in determining whether the circumstances warrant further investigation); Whren v. United States, 517 U.S. 806, 810, 814, 819 (1996); *cf.* Alberty v. United States, 162 U.S. 499, 511 (1896) (discussing various motivations for persons to flee a crime scene not related to guilt). Driving down the street in some neighborhoods presents additional hidden dangers. Ronner, *supra* at 3865–98. Because traffic regulations are so expansive, they are difficult to follow perfectly, and thus, police officers may use the traffic code to single out nearly anyone they choose without the need for additional cause. *Whren*, 517 U.S. at 810. Whren asked the Court to adopt a subjective standard to determine the reasonableness of the police traffic stop, which the Court rejected, stating the "proposed standard may not use the word 'pretext,' but it is designed to combat nothing other than the perceived 'danger' of the pretextual stop." *Id.* at 810, 814–15. The Court determined that the traditional probable cause standard already applicable in Fourth Amendment jurisprudence created sufficient protections. *Id.* at 819. In *Alberty*, the Court stated:

> [I]t is not universally true that a man who is conscious that he has done a wrong ["]will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper,["] since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that ["]the wicked flee when no man pursueth, but the righteous are as bold as a lion.["] Innocent men sometimes hesitate to confront a jury; not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves.

Alberty, 162 U.S. at 511.

those injuries and awakening from a coma chained to your hospital bed informed that you are under arrest for attempted murder of a police officer.[2] Then, consider waiting over five years for the opportunity to tell your story to the court, believing justice will be served, but instead you discover that the trial is more influenced by the revelation of your prior criminal record[3] than the knowledge of the serious injuries that the police inflicted upon you.[4] These facts introduce the real police encounter experienced by Mr. Theodore Dukes, an ex-felon, in Miami-Dade County. This shooting incident stemmed from an investigation of Mr. Dukes for the misdemeanor of driving with an unauthorized license plate.[5]

The criminal and civil obstacles Mr. Dukes faced after his shooting represent a particularly troublesome scenario that many ex-felons experience in police brutality cases. Police brutality victims must confront two very challenging situations: (1) how to successfully overcome the government's criminal allegation that the suspect/victim aggressed the police, and (2) simultaneously preserve the ability to bring a civil rights violation as a plaintiff/victim against the police for the true brutality suffered. The victim's ex-felon status significantly increases the stakes regarding any potential punishment on the criminal side and greatly diminishes the likelihood of success or damage recovery on the civil side.

Prior felony convictions are regularly admitted under the authority of the Federal Rules of Evidence, specifically Rule 609,[6] based on the rationale that such information is relevant to the credibility of a testifying witness.[7] In criminal cases, a defendant/victim cannot be forced to testify,

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2. *See* sources cited *supra* note 1.

3. *See* FED. R. EVID. 609.

4. *See* Appellee's Answer Brief at 3–4, Dukes v. Miami-Dade County, 232 F. App'x 907 (11th Cir. 2007) (No. 06-11629-CC), 2006 WL 4596113 (listing injuries of plaintiff Dukes); *see also* R. Michael Smith, *Impeaching the Merits: Rule 609(a)(1) and Civil Plaintiffs*, 13 N. KY. L. REV. 441, 442–43 (1987) (quoting Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 561 (1984)) (indicating that juries are unlikely to find in favor of individuals they perceive to be "bad person[s]," and that a jury's knowledge of a party's prior conviction improperly taints its evaluation of the relevant case facts).

5. *See* FLA. STAT. § 320.02(1) (2013) (requiring all motor vehicles operating on the roads of the State of Florida to be registered with the State); *see also* Floyd D. Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721 *passim* (2004) (offering a variety of measures to curb racial discrimination in enforcing the laws); Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 30–35, 424–46 (1994) (showcasing the problems of race in each aspect of the justice system including prosecutorial decisions and police brutality).

6. FED. R. EVID. 609(a)(1)(A).

7. *Id.* advisory committee's note. The advisory committee noted:

thus the government's allegation must be proven beyond a reasonable doubt without reference to the defendant's criminal record[8] or mention of his or her decision not to testify. The Fifth Amendment provides this protection.[9] However, in a civil case, the Fifth Amendment protection does not apply and thus, a civil rights plaintiff/victim must testify and consequently ex-felon status is routinely revealed as a fact relevant to the credibility of his or her testimony.[10] In this context, ex-felon victims of police brutality must seriously evaluate the real impact that the revelation of past felony convictions may have on the success of any civil rights litigation against the police.

Notwithstanding the general veracity rationale underlying Rule 609,[11] this essay suggests that in the limited context of excessive force cases, jurors should be shielded from knowing the ex-felon status of the plaintiff/victim. The rationale for this proposed exception is two-fold: (1) the unfair prejudice suffered by the plaintiff/victim, and (2) the strong public policy need to deter police and therein ensure that a civil rights trial creates a legitimate threat of remedial award to the plaintiff for the wrongdoing by the police officer. As Rule 609 currently operates in excessive force cases, the prejudicial impact on the ex-felon-plaintiff/victim is too great and voids the intended purpose of the federal civil rights statutes by essentially distracting the jurors away from the material facts[12] of the police-citizen encounter into the minutiae of the

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> As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility . . . . The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense . . . .

Id. (citation omitted).

8. One common departure from the aforementioned general rule prohibiting the circumstantial use of character evidence in the form prior criminal history when the defendant is not testifying occurs in the special circumstance of evidence that has specialized relevance, other than propensity, under Federal Rule of Evidence 404(b), wherein other crimes, wrongs, or acts are used due to their proven specialized relevance provided that said other crime, wrong, or act are not unfairly prejudicial to the accused. FED. R. EVID. 404(b). Examples of special relevance under 404(b) are: motive, opportunity, and common plan or scheme. *Id.* Additionally, a pre-trial motion and hearing are typically conducted in advance to ensure proper fairness and curb any undue prejudice that could flow from the improper use of prior criminal history as character evidence against an accused. *Id.* 404(b), 403. Notably, this essay does not address any evidentiary issues related to 404(b) evidence and is strictly focused on prior criminal history that is revealed to the jury under Rule 609.

9. U.S. CONST. amend. V.

10. FED. R. EVID. 609(a)(1)(A).

11. *Id.*

12. FED. R. EVID. 403. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice,

plaintiff's prior and unrelated criminal convictions. The negative impact is further exploited when the plaintiff's prior conviction is for a violent felony. Due to the legal dynamics outlined throughout this essay, police officers know ex-felons cannot effectively complain about brutality, and correspondingly, ex-felons are rendered powerless and even more vulnerable to excessive force.

As you get to know Mr. Dukes' experience on the street with the police and in the courtroom seeking redress, you too may begin to question the efficacy of the process and whether it is appropriate for the jury to learn about Mr. Dukes' prior convictions, especially his prior murder conviction, since the police did not know about his record when they decided to shoot him.[13] Federal law provides a statutory civil remedy under § 1983[14] for incidents of police brutality like the one Mr. Dukes suffered. However, Mr. Dukes' story begs the question of whether the articulated remedy is effective or illusory when applied to ex-felons.[15]

II. MINOR CRIMINAL INVESTIGATION AND DISPROPORTIONATE DEADLY RESPONSE BY POLICE: EXCESSIVE FORCE OR SOMETHING ELSE?

The *Dukes* case is worthy of analysis not simply because of the serious gun shot injury Mr. Dukes suffered and his ex-felon status, but also because of the minor criminality that Mr. Dukes was alleged to have committed when the police first began to investigate him. Mr. Dukes was not being investigated for a violent crime.[16] He was driving down a street in Miami[17] and the police had no knowledge of his identity or about any of

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confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.*

13. *See* Scott v. Harris, 550 U.S. 372 *passim* (2007); Tennessee v. Garner, 471 U.S. 1 *passim* (1985).

14. *See* 42 U.S.C. § 1983 (2012). One stated purpose for the law is to deter police from violating constitutional rights of citizens and/or exhibiting excessive force. *Id.*

15. *See infra* text accompanying note 58. Felons are more likely to have negative encounters with law enforcement and are therefore more likely to experience police brutality. *Id.*

16. *See* Complaint at 4, Dukes v. Miami-Dade County, No. 05-22665-CIV (S.D. Fla. 2010). Any case involving a vehicle can turn into a violent crime if the police allege that the vehicle was in some way posing a threat to be used as a deadly weapon. *See id.* at 8, ¶ 35–36. Thus, it is imperative that traffic stops that turn into potentially deadly encounters be closely examined, particularly in cases wherein the suspect is acquitted on the charge against the police officer. *See id.* at 9, ¶ 39.

17. *Id.* at 4, ¶ 17 ("DUKES proceeded to drive eastbound on NW 62nd Street."). *See generally The American Dream in Liberty City, Miami*, AM. PUB. MEDIA, http://www.marketplace.org/topics/wealth-poverty/next-america/american-dream-liberty-city-miami (last visited Feb. 17, 2013) ("Liberty City is one of Miami's poorest neighborhoods. It's 95 percent African American and the median household income is about $18,000 a year."). This street is in the heart

his prior convictions. He was not speeding or driving dangerously; instead, he was targeted by the police for a traffic infraction because the vehicle's license plate[18] did not match the car. As alleged in his civil rights complaint, it was unknown to Mr. Dukes that he was being pulled over by the police because the police officers were in unmarked cars[19] and in plain clothes.[20] Mr. Dukes and his occupants perceived the encounter to be an attempted carjacking,[21] so initially Mr. Dukes did not stop.[22] While still behind the driver's seat, a bullet came through the passenger's side window, missing the passenger and striking Mr. Dukes in his chest.[23] After being shot, Mr. Dukes attempted to drive himself to the hospital.[24] At this point, he heard sirens and realized the carjackers were instead police officers,[25] and he pulled his car over to the side of road.[26] Mr. Dukes exited

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of the predominately black neighborhood, Liberty City. *The American Dream in Liberty City, Miami*, *supra*.

18. Complaint, *supra* note 16, at 4, ¶ 17 ("Unbeknownst to DUKES, [Officer] LLAMBES was following him and had made a determination that she was going to make a traffic stop for a license tag violation."); *see* FLA. STAT. § 320.02(1) (2013) (requiring all motor vehicles operating on the roads of the State of Florida be registered with the State).

19. Complaint, *supra* note 16, at 4–5, ¶ 18. The Complaint alleged:

> [Officer] LLAMBES radioed in to [Officer] GOLDBERG and [Officer] GUERRA to assist in the traffic stop. All these officers were on robbery detail and part of a specialized unit called the Robbery Interdiction Unit and none of them were in a marked vehicle. All of the vehicles that were driven by the officers conducting the stop on DUKES were normal rental vehicles without any police markings.

Id.

20. *Id.* at 5, ¶ 20. The Complaint alleged:

> As the officers were engaged in their confining maneuvers, all of the occupants of DUKES'[S] vehicle believed that they were about to be carjacked. The suspicions of DUKES and his passengers were confirmed when [Officer] GOLDBERG, in plain clothes, exited his vehicle with his gun drawn and pointing at DUKES'[S] vehicle.

Id.

21. *Id.*

22. *Id.* at 6, ¶ 25 ("At no time during the stop of DUKES did the officers identify themselves as such with the use of emergency equipment or other identifying materials that would have clearly indicated that they were officers, to the occupants of the DUKES vehicle.").

23. *Id.* at 5, ¶ 23 ("As DUKES began moving his vehicle, Officer GOLDBERG fired his weapon through the passenger side window. The round missed the passenger . . . but hit the driver DUKES in the chest.").

24. *Id.* at 6, ¶ 25 ("Still at this time, none of the occupants realized that their assailant was a police officer. . . .").

25. Complaint, *supra* note 16, at 6, ¶ 27. The Complaint alleged:

> As the vehicle approached NW 7th Avenue, the occupants for the first time noticed that there were vehicles following them and that the vehicles had blue lights flashing from their dashboard area. At no time prior to shooting DUKES, nor immediately after did any of the officers identify themselves as police officers to the occupants of the DUKES vehicle.

Id.

26. *Id.* ¶ 28. The Complaint alleged:

> Once the occupants realized that they were being followed by police and not carjackers, DUKES . . . [with the assistance of his passenger] turned the car onto NW

the vehicle with his hands up, indicating he was unarmed, yet the police slammed Mr. Dukes to the ground and began to beat him.[27] The officers were "stomping and kicking him in a frenzy of police brutality in full view of citizens who were observing the activity."[28] "The beating of Dukes continued and was of an extensive duration and so intense that numerous bystanders screamed for the officers to stop the beating[,] fearing that the officers would kill Dukes."[29] One bystander, who tried to intervene on Mr. Dukes' behalf and who pled to stop the police brutality, was arrested for allegedly interfering with police procedures.[30] At some point, Mr. Dukes lost consciousness and later awoke to find himself arrested and charged with a serious felony against the police.[31]

Medically, Mr. Dukes' physical survival under these facts was extraordinary. Legally, his case is more serious than the gunshot wound to the chest from which he recovered.[32] Mr. Dukes' story exemplifies a larger endemic problem in our justice system—the existence of police abuses and the lack of effective procedures, deterrents,[33] and remedies.[34] This essay dissects a specific type of police abuse—the type of police behavior that goes beyond mere unnecessary force or an unlawful search.[35] The focus is specifically on brutality[36] inflicted by police officers upon citizens in high-

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> 7th Avenue and pulled the car to the side of the road. DUKES . . . got out of the driver's side of the car and raised both his arms and hands in the surrender position, demonstrating that he was unarmed.

Id.

27. *Id.* at 6–7, ¶ 28–29.

28. *Id.* at 7, ¶ 29.

29. *Id.* ¶ 32.

30. *Id.* at 8, ¶ 33.

31. Complaint, *supra* note 16, at 8, ¶ 35.

32. *See generally* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1276 (1999) ("Police brutality is longstanding, pervasive, and alarmingly resilient."). Police brutality, when left unchecked, is a more serious injury than a mortal gunshot wound because it encourages continued abuses. *See id.*

33. *See* Herring v. United States, 555 U.S. 135, 147 (2009) (citing repeated holdings from the Court which state that in order to warrant exclusion, "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system"); United States v. Herrera, 444 F.3d 1238, 1253–54 (10th Cir. 2006) (holding that exclusion of evidence obtained in violation of the Fourth Amendment was proper in part because exclusion would deter similar police actions in the future).

34. *See* 42 U.S.C. § 1983 (2012); *see also* Behrens v. Pelletier, 516 U.S. 299, 306–07 (1996) (citing Mitchell v. Forsyth, 472 U.S. 511, 526, 530 (1985)) (noting that orders rejecting the qualified immunity defense at multiple stages of litigation is a final judgment subject to immediate appeal); Nolian v. Isbell, 207 F.3d 1253, 1257 (11th Cir. 2000) ("[T]he application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment.").

35. *See* Bandes, *supra* note 32, at 1276.

36. *See* Hodges v. Stanley, 712 F.2d 34, 36 (2d Cir. 1983) (stating that a police brutality

crime neighborhoods during encounters based on minimal criminal conduct, which is usually a traffic violation. In *Patterns of Injustice: Police Brutality in the Courts*,[37] Professor Susan Bandes defines police brutality as "police conduct that is not merely mistaken, but taken in bad faith, with the intent to dehumanize and degrade [the victim]."[38] In *Above the Law: Police and the Excessive Use of Force*,[39] Professors Jerome H. Skolnick and James J. Fyfe distinguish police misconduct from brutality by highlighting that police brutality is intentional and typically directed toward citizens of "marginal credibility and status."[40] Skolnick and Fyfe further acknowledge that racial minorities are labeled as a powerless social group.[41] Additionally, ex-felons fit the description of Skolnick and Fyfe's target group due to their lack of status, credibility, and political power, and thus, they are susceptible to police brutality in a way many other citizens are not. Racial minorities are disproportionately represented in the ex-felon population and based on lower socio-economic status disproportionately live in poor and high-crime neighborhoods;[42] therefore, black and brown ex-felons are particularly vulnerable to the police abuse of brutality.

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claim is sufficient to withstand a motion to dismiss if it alleges force that is "gratuitous and excessive").

37. *See* Bandes, *supra* note 32.

38. *Id.* at 1276.

39. JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE (1993).

40. *Id.* at 19 (pointing to the Rodney King beating as an example of the police selecting a victim of marginal status and credibility); *see infra* Part V.B (discussing Federal Rule of Evidence 609 and explaining the legal interpretation of a felon's creditability and status as a truth teller once he testifies during trial). *See generally* FED. R. EVID. 609 (allowing the prior criminal history of any testifying witness to be admissible in civil cases, including § 1983 civil rights cases).

41. *See* SKOLNICK & FYFE, *supra* note 39, at 19–20 (distinguishing between police brutality and unnecessary force).

42. *See* David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 101 (2007). *See generally United States-Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUM. RTS. WATCH, http://www.hrw.org/legacy/reports/2000/usa/Rcedrg00-01.htm#P149_24292 (last visited Feb. 20, 2013) ("In every state, the proportion of blacks in prison exceeds, sometimes by a considerable amount, their proportion in the general population."); *The American Dream in Liberty City, Miami*, *supra* note 17 (stating Liberty City is one of the poorest neighborhoods in Miami and is ninety-five percent African American).

> Young African-American men bear the brunt of the system's injustices during a period in which the nation has moved to a process of mass incarceration. From initial contacts with police, including stops, detentions, searches, and arrests, through prosecution at trial, and finally, at the sentencing phase, African Americans suffer from severe disproportional representation.

Rudovsky, *supra*.

In *Teaching Civil Rights Through the Basic Tax Course*,[43] Professor Dorothy Brown provides a narrative of an incident of police brutality she witnessed as a young child in New York City:

> One day . . . I was holding my mother's hand because I was not yet old enough to cross the street safely. As we were waiting, a police car was turning right. I recall seeing a black man in the back seat with his hands cuffed behind him and he was being beaten by a police officer. My eyes widened and my mouth fell open as I turned to my mother and asked, ["]Did you see that?["] She said, ["]Yes,["] and explained to me that it happens sometimes. I couldn't believe my eyes or my ears. I followed the car with my eyes as it made its turn; for a brief moment, the handcuffed man and I made eye contact. It seemed as if everything was going in slow motion. The light turned green, and we started walking. But no one spoke a word. I couldn't stop thinking about that man. I wanted to help him, but I didn't know how. That feeling of powerless would eventually cause me to run, not walk, away from my dream of becoming a civil rights attorney.[44]

It is a well-settled[45] rule, imbedded in American jurisprudence,[46] that beating a handcuffed suspect is a violation of the suspect's constitutional rights.[47] Young Dorothy Brown was not then aware of the contours of the constitutional law and how it clearly forbids beating a handcuffed suspect[48] as per se police brutality;[49] yet, she knew instinctively that it was wrong

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43. Dorothy A. Brown, *Teaching Civil Rights Through the Basic Tax Course*, 54 ST. LOUIS U. L.J. 809 (2010).

44. *Id.* at 810.

45. *See* Scott v. Harris, 550 U.S. 372 *passim* (2007); Tennessee v. Garner, 471 U.S. 1 *passim* (1985).

46. *See* 42 U.S.C § 1983 (2012); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 386–91 (1998) (discussing how many African Americans distrust the police because of a history of abuse); Asit S. Panwala, *Confronting Issues In Criminal Justice: Law Enforcement and Criminal Offenders: The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 646–47 (2003) (arguing that police select minorities and other marginalized members of society to be the victims of police brutality); Mitchell P. Schwartz, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1126 (2003) (noting that § 1983 provides a remedy to those deprived of their constitutional rights by a state actor). Section 1983 legislation provides citizens with the added benefit of enacted federal statutory remedies to punish police officers and municipalities with civil law sanctions for violations of a citizen's constitutional protections. *See* 42 U.S.C. § 1983. However, notwithstanding these clear guidelines and procedures, police brutality is still a common allegation made by minority suspects against police officers across the country. *See* Panwala, *supra* at 639–40.

47. *See* Phelps v. Coy, 286 F.3d 295, 301–02 (6th Cir. 2002) (finding that a beating of a subdued/handcuffed suspect by a police officer violated the suspect's constitutional rights).

48. *See 3 DeKalb Officers Accused of Beating Handcuffed Suspects*, WSBTV.COM (May 10, 2012, 1:40 PM), www.wsbtv.com/news/local/three-dekalb-police-officers-indicted/nN2JR.

49. *See generally* Vineyard v. County of Murray, Ga., 990 F.2d 1207, 1211 (11th Cir. 1993) (finding police officers guilty of committing police brutality on a handcuffed plaintiff).

and most significantly that no one was doing anything to stop it or correct the injustice of it. Instead, the police abused suspects with impunity, to the point where the community culture has become simply to absorb it as a painful, unchangeable fact. Notwithstanding the reality of brutality experienced by individuals like Mr. Dukes and the nameless man Professor Brown witnessed decades prior, laws prohibit excessive force by police officers. Suspects who have allegedly committed a crime are simultaneously protected by the Fourth Amendment[50] against unreasonable seizures,[51] and cloaked with the presumption of innocence[52] by the Fifth Amendment.[53] However, as Professor Brown's mother articulated to her young daughter Dorothy as they crossed the street, "[police brutality] happens sometimes." In fact, Mrs. Brown's response was purposefully truncated and mild for the benefit of her child's understanding because in reality, police brutality happens much more than "sometimes,"[54] especially in certain neighborhoods to certain people. Arguably, it happens most commonly to ex-felons because their objections to it are uniquely unsuccessful.

In addition to the harshness of the abuse suffered by the helpless

50. U.S. CONST. amend. IV (protecting citizens from "unreasonable seizure").

51. *See* Scott v. Harris, 550 U.S. 372, 381 (2007); Tennessee v. Garner, 471 U.S. 1, 7 (1985).

52. *See also* Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 558–60 (2009) (challenging Federal Rule of Evidence 609 on the basis of the lack of integrity of judgment of convictions and therein as unreliable hearsay evidence due to the racial bias and unreliability of the American criminal justice system). *Compare In re* Winship, 397 U.S. 358, 364 (1970) (finding the presumption of innocence can only be overcome by proof of the material elements of the charge beyond a reasonable doubt), *with* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (discussing an empirical study regarding post-conviction exonerations through DNA evidence), *and* Rudovsky, *supra* note 42, at 119–20 (noting that the Innocence Movement, including the Innocence Project and the Innocence Network, of the last twenty years has exposed the wrongful conviction and factual innocence of hundreds of convicted felons, including the disproportionate representation of the numbers of racial minorities).

53. U.S. CONST. amend. V.

54. Rudovsky, *supra* note 42, at 102 ("Racial discrimination in policing is often manifested in the use of racial profiling . . . . For example, in *State v. Soto* . . . the court found that stops and searches on the Turnpike were disproportionately based on race."); *see* Stanley A. Goldman, *To Flee or Not to Flee – That is the Question: Flight as Furtive Gesture*, 37 IDAHO L. REV. 557, 569 (2001); *see also* Tamara F. Lawson, *Teaching Civil Rights: Mainstreaming Civil Rights in the Law School Curriculum: Criminal Law and Criminal Procedure*, 54 ST. LOUIS U. L.J. 837, 845–46 (2010) (indicating that police brutality in the African-American Community is a part of life, a common occurrence); Kevin Sack, *Despite Report After Report, Unrest Endures in Cincinnati*, N.Y. TIMES (Apr. 16, 2001), http://www.nytimes.com/2001/04/16/us/despite-report-after-report-unrest-endures-in-cincinnati.html?page wanted=all&src=pm (noting from 1995 until 2001, in Cincinnati, Ohio, fifteen African Americans have been fatally shot by police officers while no Caucasians have been shot). Police brutality against African-American felons transpires more in high-crime neighborhoods. Goldman, *supra* at 569.

suspect in Professor Brown's story, an equally striking aspect of her narrative and experience is how police brutality connects with an overarching feeling of powerlessness—not just the powerlessness felt physically by the victim who literally receive the blows, but also by the impotence experienced by the larger community that absorbs its reverberating impact.[55] One way to overcome powerlessness against police brutality is to take action. Do something about it. Object to it. Complain about it. Sue the police for doing it. This essay explores the real obstacles that victims of police brutality face when "they try to do something about it" in the form of suing the police and seeking legal remedies for cognizable civil rights violations.[56] It further highlights how the ordinary hardships of access to the courts are magnified when an ex-felon seeks legal remedies against the government for the tort of police brutality.

One unfortunate truth for individuals with prior criminal convictions is that their ability to challenge the injustice of excessive force is handicapped.[57] Ex-felons, as a group, are the most likely suspects to experience excessive force,[58] which automatically includes a

55. *See* Brown, *supra* note 43, at 810 (asserting that to some degree police brutality would not be as significant an issue if it only impacted individual victims). The idea of powerlessness is a strong and consistent theme for the individual victims of the brutality, as well as the members of the community of which it impacts. *Id.*

56. *See* 42 U.S.C. § 1983 (2012) (providing a legal remedy for deprivation of civil rights). *But see supra* text accompanying note 10 (highlighting the lack of adequate legal remedies for civil rights violations involving police brutality).

57. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396–97 (1989) (finding that in the case of police brutality, the Fourth Amendment deprivation analysis focuses on the unreasonableness of the seizure in the initial encounter—this determination is a fact-specific balancing test but allows some deference to officers who are making "split-second" decisions); FED. R. EVID. 609 ("Impeachment by Evidence of Conviction of Crime"); *see supra* Part II. Ex-felons are handicapped at various critical points of the process: the initial encounter, arrest decisions, charging decisions, plea bargain negotiations, presentation of evidence at trial and the decision to testify, sentencing ranges, and the amount of time of one's sentence that will actually be served. *Supra* Part II.

58. *See* Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010); *see also* In Soo Son & Dennis M. Rome, *The Prevalence and Visibility of Police Misconduct: A Survey of Citizens and Police Officers*, 7 POLICE Q. 179, 186 (2004), *available at* http://www.observatoriodeseguranca.org/files/179.pdf (reporting in a survey that African-American respondents reported nine times more physical abuse by police officers than white respondents); Panwala, *supra* note 46, at 646–47 (arguing that police select minorities and other marginalized members of society to be the victims of police brutality). Felons challenged the Washington State voter disenfranchisement act on the ground that, due to racial discrimination in the State's criminal justice system, they were denied voting rights in violation of Section Two of the Voting Rights Act. *Farrakhan*, 590 F.3d at 993. After significant findings of fact, the court found that the felons demonstrated that the felon disenfranchisement was attributable to racial discrimination in the criminal justice system. *Id.* at 1016.

disproportionate number of racial minorities and poor people,[59] but these same suspects are the least likely plaintiffs to win a civil judgment against the police for the constitutional violations they suffer.[60] This dynamic is no secret to law enforcement officers[61] and thus it creates a second-class status or a type of "open season" on ex-felons due to their inability to effectively complain about abuse.

It is somewhat unpopular, or even at times distasteful, to focus attention on the rights of felons, knowing that they, at one point in their lives, criminally violated another person's rights.[62] However, in the context of police brutality, it is imperative that all citizens, including ex-felons,[63]

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59. *See* LEONARD M. MOORE, BLACK RAGE IN NEW ORLEANS: POLICE BRUTALITY AND AFRICAN AMERICAN ACTIVISM FROM WORLD WAR II TO HURRICANE KATRINA 1 (2010); Jeffrey K. Liker, *Wage and Status Effects of Employment on Affective Well-Being Among Ex-Felons*, 47 AM. SOC. REV. 264, 265 (1982); Ruth D. Peterson & Lauren J. Krivo, *Race, Residence, and Violent Crime: A Structure of Inequality*, 57 U. KAN. L. REV. 903, 903 (2009) ("This . . . is seen in rates of violence that are much higher in predominantly minority neighborhoods, especially those comprised of blacks, compared to predominantly white neighborhoods."). Additionally, these urban centers represent the killing fields for African-American males at the hands of the police. MOORE, *supra* at 1. Racial minorities as well as poor people both have reduced access to justice. Peterson & Krivo, *supra* at 911–12. The problem is further compounded by the lack of employment opportunities for ex-felons, which often forces them into the poverty zone. Liker, *supra* at 265.

60. *See, e.g.*, Smith, *supra* note 4, at 442–43 (indicating that juries are unlikely to find in favor of individuals they perceive to be "bad person[s]" and that the jury's knowledge of a party's prior conviction improperly taints their evaluation of the relevant case facts); *see* Charlan Nemeth & Ruth Hyland Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors*, 90 J. SOC. PSYCHOL. 221, 222 (1973). As a general proposition, human nature impacts civil litigation in a way which rewards popularity and/or one's perception of who is good, liked, etc. Smith, *supra* note 4, at 442. In the end, it comes down to a matter of respect. Nemeth & Sosis, *supra* at 222. If there is a perception that the party lacks respect, it is likely to lose the lawsuit. *Id.*

61. *See, e.g.*, Kathryn E. Scarborough & Craig Hemmens, *Section 1983 Suits Against Law Enforcement in the Circuit Courts of Appeal*, 21 T. JEFFERSON L. REV. 1, 17 (1999) (showing that the police were more likely to prevail against plaintiffs in 1983 civil rights claims 44% of the time concerning excessive force, 51% of the time concerning false arrest, 44% of the time concerning illegal search and seizure, and 55% of the time concerning amendment violations); Ryan Gallagher, *Study: Police Abuse Goes Unpunished*, MEDILL REPORTS (Apr. 4, 2007), http://news.medill.northwestern.edu/chicago/news.aspx?id=6125 (according to a Chicago study, "citizens filed 10,149 complaints of alleged police abuse from 2002 to 2004 for actions including excessive force . . . [and] only 19 of those complaints, or less than two for every 1,000 complaints, resulted in meaningful discipline . . . .").

62. *See* Vincent G. Levy, *Enforcing International Norms in the United States After* Roper v. Simmons*: The Case of Juvenile Offenders Sentenced to Life Without Parole*, 45 COLUM. J. TRANSNAT'L L. 262, 308 (2006); Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 273–74 (2004).

63. *See* Panwala, *supra* note 46, at 639–40. However, it is undisputed that America's urban centers are becoming the killing fields. *Id.*

have an effective mechanism to challenge police abuses. Effective redress would create a real deterrent impact on police behavior, as well as adequately remedy the injuries suffered[64] by individual victims and the larger community.[65] Notably, young Dorothy felt powerless even though she was never physically touched by the police officer but rather observed the needlessly beating of a helpless suspect. The impact was so profound that she changed her desired interest from civil rights law to tax law because she feared civil rights legal work would be too painful.[66]

In Mr. Dukes' case, after fighting for his life[67] in the hospital and fighting for his liberty in criminal court,[68] he filed a civil rights lawsuit[69] against the police officers that shot and beat him, asserting his legal right to be free from excessive force.[70] He attempted to overcome his powerlessness and pursued all legal avenues available to him. Yet, Mr. Dukes represents a small percentage of victims of police brutality because he actually sued the police.[71] He fought back and was acquitted of the

64. *See* Wyatt v. Cole, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.") (citing Carey v. Piphus, 435 U.S. 247, 254–57 (1978)); Owen v. City of Independence, Mo., 445 U.S. 622, 651 (1980) ("[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.").

65. *See* Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 2–3 (2001). Professor Levenson discusses the limited tools offered by the justice system to victims of police brutality. *Id.* at 2. Understanding that police brutality not only has an impact on the individual victim, but "an impact on all citizenry," these affected communities fight for reforms in the justice systems. *Id.* at 3.

66. Brown, *supra* note 43, at 810.

67. *See* Alessandra Soler Meetze, *ACLU Sues Miami-Dade Police for Shooting Driver, Beating Passengers After Traffic Stop*, AM. CIV. LIBERTIES UNION OF FLA. (Oct. 7, 2005), http://www.aclufl.org/news_events/?action=viewRelease&emailAlertID=1380 (noting that Theodore Dukes spent seventeen days in the hospital following his beating, three of them in a coma).

68. Complaint, *supra* note 16, at 9, ¶ 39. Dukes vigorously litigated the attempted murder charge all the way to jury trial. *Id.* at 8–9, ¶¶ 35, 39. He was convicted of a misdemeanor and served one year. *Id.* at 9, ¶ 39.

69. *See* 42 U.S.C. § 1983 (2012); Hudson v. Michigan, 547 U.S. 586, 595–98 (2006) (holding that applying the exclusionary rule to knock-and-announce violations was unjustified; Justice Scalia notes police officers will not simply be able to violate one's civil rights because § 1983 provides an effective deterrent for abusive police behavior).

70. *See generally* Wertish v. Krueger, 433 F.3d 1062, 1066 (8th Cir. 2006) (discussing reasonable force in excessive force cases). When determining whether police used excessive force, courts use the objective reasonableness standard used in Fourth Amendment jurisprudence. *Id.* The objective reasonableness standard will include an examination of the particular circumstances of each individual case, including the severity of the crime, perceived threat to the officers, and whether the suspect is resisting or evading arrest. *Id.* (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

71. *See generally* Cato Institute, *2010 Quarterly Q3 Report*, THE CATO INST.'S NAT'L

criminal charges against him for attempted murder of a police officer.[72] He secured a civil rights lawyer to challenge the constitutionality of his seizure and to seek damages.[73] Further, as a civil plaintiff, he won all procedural challenges to his claims and interlocutory appeals by the government and therefore had an opportunity to present his case to a jury.[74] Mr. Dukes traversed many hurdles in pursuit of justice for the harm he suffered. Still, he could not erase his past criminal convictions or his ex-felon status, which unknowingly created the ultimate roadblock in his case.

POLICE MISCONDUCT REPORTING PROJECT, http://www.injusticeeverywhere.com/?page_id=3336 (last visited Apr. 11, 2011) (explaining that, although misconduct seems to be increasing, the number of convictions and civil lawsuits that are successfully brought by citizens has remained stagnant).

72. Complaint, *supra* note 16, at 9, ¶ 39. The Complaint alleges:

> DUKES was criminally charged with attempted murder of a police officer and fleeing and eluding a police officer. He was retained in custody for a period of nine months, without bond before he was able to procure a bond through the efforts of his criminal defense attorney. The state attorney after their review of the case filed an information charging aggravated battery, fleeing and eluding a police officer and resisting arrest without violence. Later the State Attorney's Office amended the Information a second time charging Dukes with aggravated assault on a police officer, fleeing and eluding a police officer and resisting without violence. After a criminal trial before his peers, [Dukes] was found not guilty on the charge of aggravated assault and guilty for fleeing a police officer. The trial judge sentenced DUKES to one year in jail.

Id.

73. *See generally Census Information*, CITY OF MIAMI PLAN. DEP'T, http://www.miamigov.com/Planning/pages/services/Census.asp (last visited Feb. 26, 2013) (showing the racial make up of various Miami area neighborhoods). The Miami area neighborhood of Liberty City is predominantly black, and the racial demographics are approximately 3% Hispanic, 95% black, 0.6% white, and 1.7% other. *Id.*

74. 28 U.S.C. § 1291 (2012) (vesting appellate courts of the United States with jurisdiction of all appeals from final orders of district courts). *See generally* AM. CIV. LIBERTIES UNION, http://www.aclu.org (last visited Feb. 15, 2013) (explaining the role of the ACLU and discussing topics of interest); Maxwell S. Kennerly, *A Trial Lawyer's Guide to Taser Lawsuits*, LITIG. & TRIAL: THE LAW BLOG OF PLAINTIFF'S ATT'Y MAX KENNERLY (June 25, 2012), http://www.litigationandtrial.com/2012/06/articles/attorney/civil-rights-l/a-trial-lawyers-guide-to-taser-lawsuits/ (acknowledging that many police brutality cases are disposed of before they ever reach the jury). Mr. Dukes was in a significantly small class of individuals that fought the criminal charges and won, and pursued a civil rights case and won all civil procedure attempts to terminate the claims. Kennerly, *supra*. Due to the government's ability to file interlocutory appeals, many plaintiffs' cases are dismissed during the appellate phase on grounds of *de minimus* force or reasonableness of the officer. 28 U.S.C. § 1291. However, Theodore Dukes, with the assistance of the ACLU, was able to litigate the case for five years in order to get his day in court and to present the case to a jury. AM. CIV. LIBERTIES UNION, *supra*.

III. THE CRIMINAL CASE AS AN OBSTACLE TO PURSUING A CIVIL RIGHTS VIOLATION AGAINST THE POLICE

A. THE CRIMINAL CHARGES

Nearly every case of police brutality presents a legal dynamic of related but separate civil and criminal cases. Once a citizen claims police abuse, there is almost always a contradictory allegation by the police accusing the citizen of being the initial aggressor and primary criminal actor against the police.[75] I am not referring to a criminal charge being filed against the police officer, since charges against police officers are not very common. Instead, the suspect/victim of police brutality is most commonly the individual upon whom the prosecutor aims his or her focus and against whom criminal allegations are most commonly made. Therefore, the typical first issue for a suspect/victim of police brutality to address is how to dispose of the active criminal case.[76]

Mr. Dukes' case was no exception. When he awoke from his coma, he was informed of his criminal charges and taken into custody right there in the hospital. Mr. Dukes' verbal reaction to being arrested was: "arrested for what? The police shot me. I didn't do anything."[77] Mr. Dukes soon learned that the pending charge against him was for attempted murder on a law enforcement officer[78] and that his case was marked "no bond."[79] Based

75. *See* Paul Craig Roberts, *America's Police Brutality Pandemic*, LEWROCKWELL.COM (Sept. 26, 2007), http://www.lewrockwell.com/roberts/roberts224.html. In nearly every case where a suspect alleges police brutality, the police also allege wrongdoing on the part of the suspect. *Id.* Most often the suspect is initially charged with some type of minor or major crime against the police officer. *Id.* Most common is the charge of battery on a police officer, resisting arrest, some form of fleeing or escaping the police, or some kind of threat of violence or crime making it reasonable for the officer to act with force). *Id.*

76. *See, e.g.*, Commonwealth v. French, 611 A.2d 175, 179 (Pa. 1992). It is important to note it is not a crime to defend oneself, even against a police officer. *Id.* However, the nuances of those defenses are factual questions that can only be explored much later in a case, typically at trial. *Id.*

77. *See* SKOLNICK & FYFE, *supra* note 39, at 2 (describing Paul King's account of trying to report the police brutality on his brother Rodney King and being told by the police "that Rodney was in 'big trouble,' since he had been caught in a high-speed chase and had put someone's life in danger, possibly a police officer's"); *see also The Arrest Record of Rodney King*, FAMOUS AM. TRIALS, http://law2.umkc.edu/faculty/projects/ftrials/lapd/kingarrests.html (last visited Feb. 20, 2013) (explaining how Rodney King's criminal charges were ultimately dismissed when the prosecution declined to prosecute).

78. *See* FLA. STAT. § 775.082(3)(b) (2011) (asserting the penalty for first-degree felonies is imprisonment for a term not exceeding life); FLA. STAT. § 782.04(2) (stating that the unlawful killing of another human being without any premeditated design to effect death is murder in the second degree and that a first-degree felony is punishable by a term of imprisonment not exceeding life, or as provided in section 775.082, Florida Statutes); FLA. STAT. § 782.065 (stating

on the severity of the charge and his corresponding no bail status,[80] Mr. Dukes had no ability to bond out of jail and ultimately remained in custody for nine months pending trial. Mr. Dukes had to defeat the criminal case before his constitutional violations could be addressed in civil court. Thus, although physically Mr. Dukes' wounds were healing and he was making progress, the criminal charges were a major setback in his legal prognosis. He had a serious criminal case to defend and a difficult federal civil rights case to mount–all while still in custody.

For an ex-felon, being charged with an offense against a law enforcement officer poses a significant threat to liberty for the foreseeable future. This type of charge could easily mean a return to prison, if the citizen is on probation or parole. Revocation of probation or parole could be triggered without full consideration of the true merits of the new charge.[81] Often times just the arrest itself is sufficient grounds for revocation of probation or parole.[82] Thus, defendants already "on paper,"[83]

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that when convicted of second-degree murder or attempted second-degree murder and the victim was defined as a law enforcement officer under the applicable statute, the penalty is life imprisonment without the possibility of release).

79. *See* 18 U.S.C. § 3142(e)–(j) (2006) (defining procedures and circumstances under which the courts may order detention of a defendant pending trial); FLA. STAT. § 907.041 (stating that Florida rules of procedures for pretrial release determinations "shall be governed by rules adopted by the Supreme Court"); *see also* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 649–50 (1996) (discussing main interests protected by the Sixth Amendment, including "an interest in avoiding prolonged pretrial detention"); *Annual Review of Criminal Procedure*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 209, 316 (2008) ("The Bail Reform Act allows courts to detain an arrestee pending trial if the government demonstrates by clear and convincing evidence after an adversarial hearing that no release conditions will reasonably assure the safety of the community."). "No bond" means that the arrestee is not eligible to bail out of jail by posting an appearance bond pending trial. *See* 18 U.S.C. § 3142(e), (g), (j). Only a few charges carry this "no bond" status because every arrestee has the presumption of innocence. *See id.* § 3142(e), (g), (j). Pre-trial incarceration should not be punitive but can be ordered based on public safety concerns under Sixth Amendment jurisprudence. *See Annual Review of Criminal Procedure*, *supra* at 315–17.

80. *See supra* notes 78–79 and accompanying text (explaining the severity of the charge of attempted murder and what "no bond" means).

81. *See* TODD R. CLEAR ET AL., AMERICAN CORRECTIONS 120 (2009).

82. *See* Genung v. Nuckolls, 292 So. 2d 587, 588–89 (Fla. 1974) (upholding a Florida statute, which states that a parole agreement or probation order shall immediately be temporarily revoked upon a subsequent felony arrest of felony parolee or probationer); *see also* LYNN S. BRANHAM, THE LAW AND POLICY OF SENTENCING AND CORRECTIONS: IN A NUTSHELL 168–69 (2005) (suggesting that if a parolee or probationer is convicted of a crime while on parole or probation, an assumption is made that he or she has violated the terms of his or her parole or probation); NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE § 19:11 (1999) (explaining the effect of an arrest for a probationer or parolee).

83. *See* MICHAEL J. RICH, MICHAEL LEO OWENS, MOSHE HASPEL & SAM MARIE ENGLE, PRISONER REENTRY IN ATLANTA: UNDERSTANDING THE CHALLENGES OF TRANSITION FROM PRISON TO COMMUNITY 19 (2008) (using the term "on paper" to refer to prisoners that have been

prior to an incident of police brutality, are at a further disadvantage to challenge police misconduct. Instead, the focus for individuals on parole or probation shifts from pursuing their constitutional rights regarding the excessive force to minimizing the collateral damage of the new criminal allegation and staying out of prison. Although Mr. Dukes had a significant criminal record, he did not have the additional obstacle of a suspended sentence trailing him; Mr. Dukes had served all of his time and was not on probation or parole for any crime at the time the police shot and beat him.[84]

However, Mr. Dukes' prior felony convictions were still a significant factor and would cause him to face increased punishment at sentencing. Criminal statutes articulate punishment in terms of a range of years. The sentencing judge has discretion to make the punishment lenient or harsh; and therefore, he or she can take into account the criminal defendant's prior felony convictions to arrive at a punishment commensurate not just with the instant charge, but proportional to the criminal defendant's current conduct and his criminal record as a whole.[85] Thus, when an ex-felon like Mr. Dukes is charged with a serious crime like attempted murder and the alleged victim is a law enforcement officer, it is reasonable for Dukes to expect to receive a severe sentence once the judge takes into account the totality of the new case and prior record. Mr. Dukes could have received a life sentence based on this charge. Even with a good plea negotiation it would be reasonable for Mr. Dukes to expect to do significant prison time.

B. THE PLEA OFFER: A GOOD DEAL OR TOO GOOD TO BE TRUE

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. [T]he citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[86]

When it came time to plea bargain with the prosecutor, Mr. Dukes was offered to plead guilty to the charge of attempted murder on a police officer and receive a sentence of credit for time served, which meant no

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released on parole or probation).

84. *See* FED. R. EVID. 609. The fact that he was not currently under an impending sentence at the time of the shooting would not prevent the revelation of his record. *Id.*

85. *See, e.g.*, Ewing v. California, 538 U.S. 11, 29 (2003); *see also* U.S. Dep't of Justice v. Julian, 486 U.S. 1, 3–4 (1988) (explaining that the Parole Commission typically produces a report outlining the criminal defendant's priors, as well as a recommendation regarding the severity of punishment that should be ordered).

86. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940); *see also* R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 6 (2005).

additional time in jail and a guarantee of no prison time at all. No, this is not a typo. Yes, the alleged victim in the criminal case was a police officer. Yes, the criminal charge was attempting to kill a police officer. Yes, the prosecutor was offering Mr. Dukes a deal: Get out of jail now just pretend no police brutality happened and admit it was your fault. Why would a prosecutor make such a favorable plea bargain with an ex-felon, who has a prior murder conviction and multiple drug felonies on his record and is now accused of attempting to kill a cop? It does not appear to be a balanced deal for both sides. Considering the allegations and the prior record, the plea offer appears extremely favorable to Mr. Dukes. Why would a prosecutor give Mr. Dukes such a sweet deal? How could Mr. Dukes do anything but accept it and thank his lucky stars that he was not going to prison for the rest of his life?

One potential reason why the prosecution may have offered Mr. Dukes an extremely favorable plea bargain was because Mr. Dukes' guilty plea would preclude him from filing a civil suit against the police for shooting and beating him.[87] Therefore, in order for Mr. Dukes to challenge the police brutality civilly, he would have to first risk spending the rest of his life in prison by rejecting the plea bargain, going to trial, and challenging the criminal charge. This was a serious decision Mr. Dukes had to make. For many ex-felons it would have been a no-brainer to take the plea;[88] it is a guaranteed win in criminal court and forget about suing the police. Maybe that is the reasoning the prosecutor was trying to induce by making a favorable offer. It is not common for a prosecutor to give a criminal defendant with a bad record a plea to a serious new felony charge and not require additional jail time or punishment.[89] The government must

87. *See* Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (describing the procedures required for recovering damages for an unconstitutional conviction or imprisonment).

88. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 91 (2003). Fisher asserts:

> As clear as their interest in plea bargaining may have been, prosecutors' power to bargain was well hidden. Tracking it has absorbed a good many pages. In contrast, criminal defendants had both a clear incentive and a clear capacity to plea bargain. Their incentive lay in the difference between the severe sentence that loomed should the jury convict at trial and the more lenient sentence promised by the prosecutor or judge in exchange for a plea. At first glance, the intensity of a defendant's desire to plead appears to have been a simple function of the power and inclination of the prosecutor or judge to widen this difference. And defendants' power to plead was even clearer and more constant: As the holders of the right to a jury trial, they held the power to waive it. Even when the defendant pled guilty to a capital charge and thereby assured his own execution, the "court ha[d] no power absolutely to refuse" his plea.

Id.

89. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 43 (2007) (explaining how the prosecutor is the one who controls the plea

not have had faith in its case or the strength of its evidence.[90] However, noticeably, the prosecutor did not offer Mr. Dukes a straight dismissal of the charges, but instead insisted on Dukes admitting guilt.

Notwithstanding the favorable terms of the plea deal, Mr. Dukes rejected it and proceeded to trial where he won on the alleged charge against the police officer and was released from jail. Based on the favorable verdict from the jury in the criminal case, Mr. Dukes was free to sue the police for wrongfully shooting him in violation of his civil rights. Further, the jurors in the criminal case never learned about Mr. Dukes' criminal record because the Fifth Amendment protects criminal defendants from being forced to testify; thus, Rule 609 could not trigger the revelation of his past convictions nor taint the criminal jury's deliberations on the material facts of the police-citizen encounter.

IV. GETTING A LAWYER TO SUE THE POLICE: EASIER SAID THAN DONE FOR AN EX-FELON

The topic of attaining a civil rights lawyer could be a separate law review article in itself, and many scholars have written on problems regarding fair access to the courts.[91] All these issues apply equally to Mr. Dukes' situation, plus the additional fact that Mr. Dukes' lack of access to civil remedies is exacerbated by his ex-felon status. Further, having been a victim of police brutality and initially charged with a crime, his financial means are further diminished because all of his family's resources were leveraged to successfully defend his criminal case and receive an acquittal. He had no funds to pay a civil rights attorney to sue the police. He could only pursue attorneys willing to take the case on a contingency fee basis. Lawyers who take contingency fee cases only get paid if they win money damages in the case. Thus, attorneys who perceive that the case will not win or that it will not trigger a lucrative settlement are unlikely to take the case at all.

Finding a willing attorney was a problem Mr. Dukes repeatedly encountered as he tried to obtain counsel to file his civil rights lawsuit. One by one, as Mr. Dukes retold his story to local plaintiffs' attorneys, each declined to take his case stating it was too hard because his prior

bargaining process and what charges are imposed on a defendant).

90. *Cf.* United States v. Rashad, 396 F.3d 398, 401 (D.C. Cir. 2005) (citing North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970)). A prosecutor is not required to disclose the reasons for the plea bargain. *Cf. id.* Courts are likewise given a great deal of discretion in determining whether to accept a guilty plea. *See id.*

91. *See generally* Harvard Law Association, *Developments in the Law: Access to Courts*, 122 HARV. L. REV. 1151 (2009) (discussing the broad range of topics regarding access to the courts).

criminal record would be an impediment to success at trial. As mentioned above, the jurors in the criminal case did not learn about Mr. Dukes' prior criminal convictions, but the Fifth Amendment does not protect civil plaintiffs the same way it protects criminal defendants. Civil plaintiffs can be forced to testify, and as testifying witnesses, their prior felony convictions are revealed. In Mr. Dukes' quest to find a lawyer, he was fortunate the American Civil Liberties Union, a nonprofit agency commonly referred to as the ACLU, agreed to take his case due to the sheer injustice of the facts.

For Mr. Dukes, obtaining a lawyer motivated to see justice served was good news. Mr. Dukes thought his civil rights trial date would be coming soon. However, due to the government's right to interlocutory appeal in excessive force cases, his trial date came five years later. The saying "justice delayed is justice denied" is another reality for plaintiffs who sue the police for excessive force. Delays in litigation most often favor the defendant and harm the plaintiff who still has the burden of proving the case. Extensive delays cause evidence to grow stale, in that witnesses often become unavailable, making it easier for the police to defend the case. The realities of the hardships that an ex-felon plaintiff/victim must endure to obtain a lawyer and to survive the procedural challenges[92] to the civil rights complaint and corresponding interlocutory appeals[93] are so monumental for the average person that these obstacles work to reinforce the feeling of powerlessness.

92. *See, e.g.*, FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56.

93. Plaintiffs like Mr. Dukes are powerless to complain about long delays in the litigation. Although this is a problem for many plaintiffs, it is a double-edged sword. There are many aspects to this issue because the government needs a way to fight against frivolous litigation. Thus, police officers are protected by qualified immunity, and further, the appeals rules for these types of cases are skewed to the benefit of the government in order to ferret out frivolous lawsuits. That is why when a plaintiff sues a police officer, the case is often prolonged through multiple interlocutory appeals whereas most cases are instead only appealed after a jury verdict. Any delays in litigation typically prejudice the plaintiff in the litigation. Since the plaintiff has the burden of proving all the requisite elements of the claim, delays usually make it harder to prove the case. In the area of police brutality, the many delays work to the benefit of the government-defendant. In Mr. Dukes' case, there was a five-year delay. Due to this five-year delay, several of the plaintiff's witnesses became unavailable and unable to testify in the civil rights trial.

V. THE CIVIL RIGHTS TRIAL: AN OPPORTUNITY FOR JUSTICE OR AN UNFAIRLY PREJUDICIAL ROUSE

A. MR. DUKES' DAY IN COURT

Getting one's day in court has symbolic meaning, legal meaning, as well as therapeutic jurisprudential significance. Symbolically, a jury trial celebrates the litigant's opportunity to tell his story. "A legal dispute can in fact be defined as a kind of narrative competition: Each side tells the story as well as it can from its own point of view . . . . And in every case the ultimate question addressed by his audience . . . is one of justice: . . . What is the best justice in this case?"[94] Therein, there is significant value placed in obtaining a jury trial, which is a luxury most victims of police brutality never experience. Legally, commencing a jury trial signifies that the plaintiff has a cognizable legal claim supported by a prima facie showing of support on the merits.[95] Beyond the symbolic and the legal meanings, a jury trial has the opportunity of being a therapeutic experience for the participants.

> The law consists of legal rules, legal procedures, and the roles and behaviors of legal actors, like lawyers and judges. Therapeutic jurisprudence proposes that we use the tools of the behavioral sciences to study the therapeutic and antitherapeutic impact of the law, and that we think creatively about improving the therapeutic functioning of the law without violating other important values . . . .[96]

Getting one's day in court can have many meanings, but without the possibility of being effective, it is ultimately meaningless.[97] An effective judicial process is one that has the chance to remedy the wrong. The remedy being sought is not solely money damages; instead, it is just as much, or more, about the dignity and fairness sought by the abused victim.

In addition to the many obstacles Mr. Dukes overcame to pursue his constitutional rights in civil court, the *Dukes* case is also significant

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94. JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 33–34 (2002).

95. *See* Mann v. Quality Old Time Serv., Inc., 120 Cal. App. 4th 90, 105 (2004).

96. BRUCE J. WINICK & DAVID B. WEXLER, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 7 (2003).

97. *See* AMY D. RONNER, LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE 21 (2010) (stating "[t]herapeutic Justice scholars agree that when individuals participate in a judicial proceeding, what influences them most is not the result, but their assessment of the fairness of the process itself"); *supra* notes 41–43 and accompanying text. Effectiveness should be broadly defined beyond just winning the case and should further include a deterrent effect to prevent future incidents of police brutality. *See supra* notes 41–43 and accompanying text.

because it has more in common than it is different from most cases of police brutality; Mr. Dukes encountered the police in a high-crime neighborhood,[98] the initial probable cause articulated for the encounter alleged minor criminality,[99] the response by the police was extreme and disproportionate to the threat,[100] and the suspect had a prior criminal record that the police were not aware of during the encounter on the street. Yet, in Mr. Dukes' litigation, his prior criminal history became particularly salient when used as leverage to extend his incarceration pending trial on the criminal charge, in the subsequent criminal plea offer with regard to possible sentencing risks, and at the actual civil rights trial to attack his credibility as a testifying witness. This essay begins to unpack the multi-faceted dilemma of whether an ex-felon can successfully assert claims against the police.

B. THE EX-FELON STATUS OF THE STORYTELLER UNFAIRLY INFLUENCES THE VALUE OF THE STORY

Skillful legal storytelling[101] and a credible storyteller[102] are key

98. *See Liberty City: Demographic Data by Zip Code*, ONBOARD, LLC., http://homes.point2.com/Neighborhood/US/Florida/Miami-Dade-County/Miami/Liberty-City-Demographics.aspx (last visited Feb. 20, 2013).

99. FLA. STAT. § 320.02(1) (2005). Dukes was stopped for a violation of section 320.02(1), Florida Statutes, for a failure to have a valid vehicle registration. *Id.*

100. *See* Whren v. United States, 517 U.S. 806 (1996). The initial police encounter in the Dukes case is reminiscent of the United States Supreme Court case *Whren v. United States*. *See id.* at 806. In *Whren*, the undercover police officers in Washington, D.C. initiated a stop for an observed traffic violation in direct contradiction with their police department policy. *Id.* at 808–09. The D.C. department policy permitted "plainclothes officers in unmarked vehicles to enforce traffic laws 'only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others.'" *Id.* at 815 (quoting Washington D.C. Metropolitan Police Department regulations). Ultimately, the Supreme Court held that traffic stops would fall under the same reasonableness standard as other searches and seizures, and it affirmed the district court's finding of no Fourth Amendment violation in the traffic stop of Whren. *Id.* at 819.

101. *See, e.g.*, Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC: JALWD 99, 99–100 (2012) (exploring the art of narrative and how effective storytelling can have a significant impact on the outcome of a legal argument using the example of several recent Affordable Care Act cases and the diverging judicial views when interpreting the same law; it presents the argument that plaintiffs' ability "to effectively tell their story" impacts the ultimate analysis of the law in dramatic ways). *See generally* LENORA LEDWON, LAW AND LITERATURE: TEXT AND THEORY (1996) (emphasizing that depending on how the story is told, and maybe even who tells the story, the outcome of the case can be dramatically different); Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analysis of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1 (2005) (explaining the importance of formulating an effective narrative through a critical analysis of the Rodney King trial, and emphasizing the role of social context in the eventual outcome of any case).

102. FED. R. EVID. 609(a)(1)(A).

components of a successful legal case. Police brutality cases are no exception. The importance of storytelling might even be heightened because the allegations are against a police officer, and for many jurors, police officers are inherently perceived as honest and credible witnesses, whereas the opposite could be true of the inherently perceived honesty and credibility of an ex-felon party-witness. However, setting inherent biases aside for a moment, the credibility of the storyteller is also set by the Federal Rules of Evidence. A credible storyteller would be a witness whose credibility has not been attacked by impeachment. Rule 609 is specifically designed to impeach credibility via the admissibility of prior criminal convictions. Thus, if the main plaintiff in the case is also a convicted felon, due to Rule 609, the case is doomed even before it is fully evaluated because of its impeached storyteller. The ex-felon plaintiff/victim of police brutality is extremely vulnerable to this dynamic, reinforcing the ex-felon's lack of power to complain about brutality. These rules work to essentially prove the unspoken alleged threat perceived by abused victims: "go ahead, tell your story, *who is going to believe you*?"

In addition to the unfair prejudice, the moral stigma that attaches to a criminal conviction[103] has no place in an excessive force case for public policy reasons, particularly in a case where the prior record of the plaintiff was not known when alleged excessive force occurred. Evidence of prior crimes that were unknown by the police at the time of the incident have a general, unfairly prejudicial impact that should rise to the level of exclusion in police brutality cases involving ex-felons because the mere revelation of their status as an ex-felon casts doubt on the entire substance of any civil rights violation they may allege. The impotence that Rule 609 creates for ex-felon victims of police brutality distorts the import of Rule 609, particularly when the prior convictions revealed are for violent crimes and not crimes related to dishonesty or false statement.[104]

However, due to the broad use of prior criminal convictions under the auspices of witness credibility, Mr. Dukes' story of police brutality was instantly distorted in a way that allowed the defense counsel for the police

103. *See* Terree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 37–38 (1988) (discussing the difference between a civil verdict and a criminal verdict on the parties involved as one of moral stigma).

104. FED. R. EVID. 609 advisory committee's note ("The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense."). *Compare id.* ("Uniform Rule 21 and Model Code Rule 106 permit only crimes involving 'dishonesty or false statement.'"), *with* HAW. R. EVID. 609 ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty.").

to argue in closing: "How dare a convicted murderer [like Mr. Dukes] come into this court and ask this jury for damages?" Simply because Mr. Dukes was previously convicted of second-degree murder, his story of being unconstitutionally shot by the police was immediately labeled less believable and less worthy of a damage award because of his status as an ex-felon and the moral blame that attached to his prior criminal conduct, which was completely irrelevant to the police shooting him on the night in question. If you recall, Mr. Dukes was shot by police officers that were in unmarked vehicles and in plain clothes conducting a traffic stop for an unauthorized license plate. These officers, who were charged with excessive force, did not act because of knowledge of Mr. Dukes' past crimes, because they did not know anything about his record, yet they are benefiting from the inherent negative bias that befalls a plaintiff/victim once his or ex-felon status is revealed. The unspoken subtext that is conveyed is that it is somehow less wrong to use excessive force if the victim of the brutality is an ex-felon. "Once jurors are convinced that a litigant, with a prior criminal conviction, is a bad person, there is a risk that they will evaluate the litigant's evidence less conscientiously and thus reach a verdict contrary to what their decision would have been absent the damaging convictions evidence."[105] This is a reality that lawyers in the field of civil rights are very familiar and also why it was a significant challenge for Mr. Dukes to get a lawyer to take his case knowing the damaging effect of his past criminal record.[106] Civil rights lawyers know:

> The jury is apt to engage in a comparative moral evaluation of parties and their witnesses and, in all likelihood, will view prior convictions as revelatory of conduct. The temptation is to reward the "good" litigant with a favorable verdict, or conversely, to punish the "bad" litigant with an unfavorable verdict.[107]

In the criminal trial, the jury did not learn of Mr. Dukes' prior second-degree murder conviction or about his multiple felony drug convictions. That evidence was shielded from them. The criminal jury was allowed to focus solely on the evidence from the material encounter with the police, and the jury found that Mr. Dukes did not assault the police, batter the police, or attempt to murder the police. Consequently, under the view of the criminal jury, Mr. Dukes was inappropriately shot by the police, notwithstanding the police officer's allegations against Mr. Dukes for criminal wrongdoing. However, in the civil rights trial, the civil jury was

105. Foster, *supra* note 103, at 22.

106. *See id.* Thus, due to these dynamics, lawyers are less inclined to take an ex-felon's case, cementing the powerlessness. *Id.*

107. *Id.* at 38.

not shielded from the knowledge of Mr. Dukes' prior criminal record and instead learned of his ex-felon status and found that the police shooting of Mr. Dukes was appropriate and did not violate his civil rights. In fairness, the drastically different outcomes of these cases based on the same facts could be due to the different technical legal questions posed in each: In the criminal case, it was asked whether Mr. Dukes committed a crime against the police officer, and in the civil rights case, it was asked whether the police officer unreasonably shot Mr. Dukes during the investigation of the license plate. There is the possibility that civil jurors simply found the shooting of Mr. Dukes, considering the totality of the circumstances, to be reasonable on its face. However, it is also quite possible that the jurors in the civil rights trial were unfairly influenced by their knowledge of Mr. Dukes' ex-felon status and viewed the same facts in a light less favorable to Mr. Dukes and more favorably to the police officers because of the stigma that attaches to an ex-felon, especially a prior murder conviction. On balance, one must consider whether it is fair to allow such an important legal and social issue such as police brutality to turn on the stigma of the storyteller. Or does public policy demand reform in this area?

C. PROPOSED REFORM OF FRE 609 IN EXCESSIVE FORCE CASES

A civil trial should be about conduct, not character.[108] Many have complained about the inherent unfairness of Federal Rule of Evidence 609 and its specific use of prior convictions against testifying witnesses.[109] As it stands, the rule allows the prior criminal history of any testifying witness to be admissible in civil cases, including § 1983 civil rights cases.[110] Opponents of the rule assert that the application of it is most unfair in the context of civil litigation generally.[111] This essay urges that a smaller subset of civil cases be examined under Rule 609, § 1983 excessive force cases. A viable argument can be made to exclude prior criminal convictions in all civil cases and adopt a federal rule similar to Hawaii's evidence rule regarding prior convictions and exclude all convictions in all

108. *Id.* at 37.

109. *See generally* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289 (2008) (considering the controversial practice of the "admission of prior convictions to impeach the credibility of defendants who testify"); Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1 (1999) (discussing the misuse of Federal Rule of Evidence 609).

110. FED. R. EVID. 609(a)(1)(A).

111. Foster, *supra* note 103, at 37.

civil cases except for convictions involving dishonesty.[112] However, even if the federal legislature is not prepared to ban prior criminal convictions in all civil cases, the need for the exclusion in civil rights cases is particularly acute. Federal Rule of Evidence 609, as it currently operates, essentially prohibits an entire class of plaintiffs from complaining about violations to their civil rights, rendering the ex-felon uniquely powerless against police brutality. The rippling effect of Rule 609 works to embolden police officers to act aggressively, beyond the confines of the Fourth Amendment, and to liberally use excessive force in neighborhoods that have a disproportionately high population of ex-felons, knowing they are essentially powerless to complain about the abuse. This phenomenon raises additional alarm because these neighborhoods, like Liberty City in Miami where Mr. Dukes was shot, are also disproportionately poor and consist of primarily minority residents, which sends a message of subordinate status for certain citizens vis-à-vis unlawful force by the government. Therefore, this essay suggests amending Rule 609 to include an exception to the rule:

> Proposed Amendment 609(a)(1)(A)(i): Excluded from admissibility are any of the civil rights plaintiff's prior criminal conviction(s) unknown to the police officer(s) at the time of the police encounter in question, unless the conviction is for a crime of dishonesty or false statement.

This specific type of proposed exception would go a long way towards achieving fairness for ex-felon victims of civil rights violations and eliminate at least one level of powerlessness that they currently endure.

VI. CONCLUSION

The enforcement of the federal civil rights statutes, 42 U.S.C. § 1983 specifically, is intended to deter excessive force by police and to provide a legal remedy to the victim. Ideally, the law would also have a positive therapeutic jurisprudence side effect by giving victims of excessive force a venue wherein their cases could be legitimately addressed. Justice and legal healing from the harm suffered are mostly unobtainable for ex-felons. Given the particular vulnerabilities of ex-felons such as their diminished social status and lack of credibility, political power, and financial resources, jurors are often unwilling to accept their version of events or award them damages. It becomes an insurmountable challenge for the average juror to accept the word of an ex-felon, possibly even a murderer or a drug dealer, when faced with a counter version of facts by a law

112. HAW. R. EVID. 609(a).

enforcement officer. Therefore, almost as an unconscious and simple default position, jurors conclude, when forced to choose a side that the police officer is without blame. The knowledge of the plaintiff's prior felony convictions unfairly skews the case in favor of the police, leaving the ex-felon plaintiff/victim impotent and without remedy—powerless as a practical matter.

This essay suggests that the prior felony convictions of the plaintiff/victim of excessive force are neither relevant nor material to civil rights litigation, and thus, the jury should be shielded from this information to avoid undue prejudice.[113] Shielding a jury from past, unrelated criminal convictions of the plaintiff/victim will help restore the value and intended purpose of § 1983 litigation, which is intended to prevent police brutality in the first place. This essay shines a spotlight on the unfairness lurking between the crevices of criminal law, evidence law, and civil rights law and the treacherous waters that an ex-felon victim of police brutality must attempt to successfully navigate. A change in evidentiary policy in excessive force cases is required in order to effectively deter police brutality. The proposed amendment to Rule 609 for civil rights plaintiffs is a needed step towards leveling the playing field and giving vulnerable ex-felons a voice to challenge brutality.

113. FED. R. EVID. 403. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.*

Julia Yoo will be addressing challenges unique to civil rights plaintiffs, the biggest hurdle being qualified immunity. She wrote the briefs in Bryan v. MacPherson, which are attached. In the first Ninth Circuit opinion, her firm prevailed when the court found that the officer used excessive force. In the second opinion, her firm lost because the en banc court found that even though the officer used unreasonable force, he was entitled to a dismissal because it was not clearly established at the time of the use of the Taser. The third case, Sheehan, further restricts the rights of civil rights plaintiffs based on qualified immunity.

Bryan v. MacPherson

United States Court of Appeals for the Ninth Circuit

October 9, 2009; June 18, 2010, Filed

No. 08-55622

Reporter
608 F.3d 614; 2010 U.S. App. LEXIS 12511

CARL BRYAN, Plaintiff-Appellee, v. BRIAN MACPHERSON; CORONADO POLICE DEPARTMENT; CITY OF CORONADO, a municipal corporation, Defendants-Appellants.

Subsequent History: Opinion withdrawn by, Rehearing denied by, Rehearing, en banc, denied by *Bryan v. Macpherson, 2010 U.S. App. LEXIS 24437 (9th Cir. Cal., Nov. 30, 2010)*
Superseded by *Bryan v. Macpherson, 2010 U.S. App. LEXIS 25895 (9th Cir. Cal., Nov. 30, 2010)*

Prior History: [**1] Appeal from the United States District Court for the Southern District of California. D.C. No. 3:06-CV-01487-LAB-CAB. Larry A. Burns, District Judge, Presiding.
Bryan v. McPherson, 590 F.3d 767, 2009 U.S. App. LEXIS 28413 (9th Cir. Cal., 2009)

Disposition: REVERSED.

Core Terms

taser, resistance, circumstances, confronted, feet, pain, arrest, officer's, intrusive, use force, warning, governmental interest, qualified immunity, excessive force, electrical, passive, probes, intermediate level, reasonable officer, non-lethal, factors, traffic, immediate threat, unarmed, shot, significant force, police officer, mentally ill, deploying, gibberish

Case Summary

Procedural Posture
Plaintiff driver filed an action against defendants, an officer, a police department, and a city, under *42 U.S.C.S. § 1983*, asserting excessive force in violation of the *Fourth Amendment*. On summary judgment, the United States District Court for the Southern District of California granted relief to the city and the police department, but denied the officer's request for relief based on qualified immunity. The officer appealed.

Overview
The officer deployed his taser against the driver during a traffic stop for a seat belt infraction. As a result, the driver fell face first to the ground, fracturing four teeth and suffering facial contusions. The appellate court concluded that a reasonable police officer with the officer's training on the taser would have foreseen the physical injuries suffered by the driver when confronting a shirtless individual standing on asphalt. The appellate court further concluded that the driver did not pose an immediate threat to the officer or others despite his unusual behavior, shouting expletives to himself, as he was only dressed in boxer shorts and tennis shoes and thus, obviously unarmed. The driver was also standing about 15 to 25 feet away from the officer and was not even facing the officer when he was shot. While based on, inter alia, the aforementioned, the appellate court concluded that the officer used excessive force, the appellate court also concluded that the officer was entitled to qualified immunity, because a reasonable officer in the officer's position could have made a reasonable mistake of law regarding the constitutionality of taser use at the time.

Outcome
The trial court's denial of summary judgment on the basis of qualified immunity was reversed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Torts > Public Entity Liability > Immunities > Qualified Immunity

HN1 A district court's denial of qualified immunity is reviewed de novo. Where disputed issues of material fact exist, an appellate court assumes the version of the material facts asserted by the non-moving party. All reasonable inferences must be drawn in favor of the non-moving party.

Civil Procedure > Appeals > Standards of Review > General

Overview

Torts > Public Entity Liability > Immunities > Qualified Immunity

HN2 In evaluating the denial of a police officer's assertion of qualified immunity, an appellate court asks two distinct questions. First, the appellate court must determine whether, taking the facts in the light most favorable to the non-moving party, the officer's conduct violated a constitutional right; and second, if a violation occurred, whether the right was clearly established in light of the specific context of the case. The appellate court may exercise its sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

HN3 Allegations of excessive force are examined under the *Fourth Amendment's* prohibition on unreasonable seizures. Courts ask whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them. Courts must balance the nature and quality of the intrusion on the individual's *Fourth Amendment* interests against the countervailing governmental interests at stake. Stated another way, courts must balance the amount of force applied against the need for that force.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

HN4 Force can be unreasonable even without physical blows or injuries.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

HN5 Tasers and stun guns fall into the category of non-lethal force. Non-lethal, however, is not synonymous with non-excessive; all force--lethal and non-lethal--must be justified by the need for the specific level of force employed. Nor is "non-lethal" a monolithic category of force. A blast of pepper spray and blows from a baton are not necessarily constitutionally equivalent levels of force simply because both are classified as non-lethal. Rather than relying on broad characterizations, courts must evaluate the nature of the specific force employed in a specific factual situation.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

HN6 Tasers constitute an intermediate or medium, though not insignificant, quantum of force.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

HN7 Courts evaluate the government's interest in the use of force by examining three core factors, the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. These factors, however, are not exclusive. Rather, courts examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in Graham. This analysis allows courts to determine objectively the amount of force that is necessary in a particular situation.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

HN8 The most important factor under Graham is whether the suspect posed an immediate threat to the safety of the officers or others. A simple statement by an officer that he fears for his safety or the safety others is not enough; there must be objective factors to justify such a concern.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

HN9 A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. Rather, the objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

HN10 Traffic violations generally will not support the use of a significant level of force.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

HN11 While the commission of a misdemeanor offense is not

to be taken lightly, it militates against finding the force used to effect an arrest reasonable where the suspect was also nonviolent and posed no threat to the safety of the officers or others.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

HN12 Before using force, police are required to consider what other tactics if any were available to effect an arrest.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

HN13 An officer's actions must be evaluated from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation. This does not mean, however, that a *Fourth Amendment* violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that courts can base their analysis on what officers actually felt or believed during an incident. Rather, the court must ask if the officers' conduct is "objectively reasonable" in light of the facts and circumstances confronting them without regard for an officer's subjective intentions.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Torts > Public Entity Liability > Excessive Force

Torts > Public Entity Liability > Immunities > Qualified Immunity

HN14 If an officer's use of force was premised on a reasonable belief that such force was lawful, the officer will be granted immunity from suit, notwithstanding the fact excessive force was deployed.

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Eugene G. Iredale, Julia Yoo of Law Offices of Eugene G. Iredale, San Diego, California, for the appellee.

Judges: Before: Harry Pregerson, Stephen Reinhardt and Kim McLane Wardlaw, Circuit Judges.

Opinion by: Kim McLane Wardlaw

Opinion

[*618] WARDLAW, Circuit Judge:

Early one morning in the summer of 2005, Officer Brian MacPherson deployed his taser against Carl Bryan during a traffic stop for a seatbelt infraction. Bryan filed this action under *42 U.S.C. § 1983*, asserting excessive force in violation of the *Fourth Amendment*. Officer MacPherson appeals the denial of his motion for summary judgment based on qualified immunity. We affirm the district court in part because, viewing the circumstances in the light most favorable to Bryan, Officer MacPherson's use of the taser was unconstitutionally excessive. However, we reverse in part because the violation of Bryan's constitutional rights was not clearly established [**2] at the time that Officer MacPherson fired his taser at Bryan on July 24, 2005.

I. FACTUAL AND PROCEDURAL BACKGROUND

Carl Bryan's California Sunday was off to a bad start. The twenty-one year old, having stayed the night with his younger brother and some cousins in Camarillo, which is in Ventura County, planned to drive his brother back to his parents' home in Coronado, which is in San Diego County. However, Bryan's cousin's girlfriend had accidently taken Bryan's keys to Los Angeles the previous day. Wearing the t-shirt and boxer shorts in which he had slept, Bryan rose early, traveled east with his cousins to Los Angeles, picked up his keys and returned to Camarillo to get his car and brother. He then began driving south towards his parents' home. While traveling on the 405 highway, Bryan and his brother were stopped by a California Highway Patrolman who issued Bryan a speeding ticket. This upset him greatly. He began crying and moping, ultimately removing his t-shirt to wipe his face. Continuing south without further incident, the two finally crossed the Coronado Bridge at about seven-thirty in the morning.

At that point, an already bad morning for Bryan took a turn for the worse. Bryan [**3] was stopped at an intersection when Officer MacPherson, who was stationed there to enforce seatbelt regulations, stepped in front of his car and signaled to Bryan that he was not to proceed. Bryan immediately realized that he had mistakenly failed to buckle his seatbelt after his earlier encounter with the police. Officer MacPherson approached the passenger window and asked Bryan whether he knew why he had been stopped. Bryan, knowing full well why and becoming increasingly angry at himself, simply stared straight ahead. Officer MacPherson requested that Bryan turn down his radio and pull over to the curb. Bryan complied with both requests, but as he pulled his car to the

curb, angry with himself over the prospects of another citation, he hit his steering wheel and yelled expletives to himself. Having pulled his car over and placed it in park, Bryan stepped out of his car.

There is no dispute that Bryan was agitated, standing outside his car, yelling gibberish and hitting his thighs, clad only in his boxer shorts and tennis shoes. It is also undisputed that Bryan did not verbally threaten Officer MacPherson and, according to Officer MacPherson, was standing twenty to twenty-five feet [**4] away and not attempting to flee. Officer MacPherson testified that he told Bryan to remain in the car, while Bryan testified that he did not hear Officer MacPherson tell him to do so. The one material dispute concerns whether Bryan made any movement toward [*619] the officer. Officer MacPherson testified that Bryan took "one step" toward him, but Bryan says he did not take any step, and the physical evidence indicates that Bryan was actually facing away from Officer MacPherson. Without giving any warning, Officer MacPherson shot Bryan with his taser gun. One of the taser probes embedded in the side of Bryan's upper left arm. The electrical current immobilized him whereupon he fell face first into the ground, fracturing four teeth and suffering facial contusions. Bryan's morning ended with his arrest [1] and yet another drive --this time by ambulance and to a hospital for treatment.

Bryan sued Officer MacPherson and the Coronado Police Department, its police chief, and [**5] the City of Coronado for excessive force in violation of *42 U.S.C. § 1983*, assault and battery, intentional infliction of emotional distress, a violation of *California Civil Code § 52.1*, as well as failure to train and related causes of action. On summary judgment, the district court granted relief to the City of Coronado and Coronado Police Department, but determined that Officer MacPherson was not entitled to qualified immunity at this stage of the proceedings. The court concluded that a reasonable jury could find that Bryan "presented no immediate danger to [Officer MacPherson] and no use of force was necessary." In particular, it found that a reasonable jury could find that Bryan was located between fifteen to twenty-five feet from Officer MacPherson and was not facing him or advancing toward him. The court also found that a reasonable officer would have known that the use of the taser would cause pain and, as Bryan was standing on asphalt, that a resulting fall could cause injury. Under the circumstances, the district court concluded it would have been clear to a reasonable officer that shooting Bryan with the taser was unlawful.

[1] Bryan was charged with resisting and opposing an officer in the performance of his duties in violation of *California Penal Code § 148*. Bryan was tried on this violation, but following a hung jury, the state dismissed the charges.

II. STANDARD OF REVIEW

HN1 The district court's denial [**6] of qualified immunity is reviewed de novo. *Blanford v. Sacramento County, 406 F.3d 1110, 1114 (9th Cir. 2005)*. Where disputed issues of material fact exist, we assume the version of the material facts asserted by the non-moving party. *See KRL v. Estate of Moore, 512 F.3d 1184, 1188-89 (9th Cir. 2008)*. All reasonable inferences must be drawn in favor of the non-moving party. *John v. City of El Monte, 515 F.3d 936, 941 (9th Cir. 2008)*.

III. DISCUSSION

HN2 In evaluating the denial of a police officer's assertion of qualified immunity, we ask two distinct questions. First, we must determine whether, taking the facts in the light most favorable to the non-moving party, the officer's conduct violated a constitutional right; and second, if a violation occurred, whether the right was "clearly established in light of the specific context of the case." *al-Kidd v. Ashcroft, 580 F.3d 949, 964 (9th Cir. 2009)* (citing *Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)*). We may "exercise [our] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009)*.

A. Did Officer MacPherson Employ Constitutionally Excessive [**7] Force?

HN3 Allegations of excessive force are examined under the *Fourth Amendment's* [*620] prohibition on unreasonable seizures. *Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)*; *Deorle v. Rutherford, 272 F.3d 1272, 1279 (9th Cir. 2001)*. We ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham, 490 U.S. at 397*. We must balance "'the nature and quality of the intrusion on the individual's *Fourth Amendment* interests' against the countervailing governmental interests at stake." *Id. at 396* (quoting *Tennessee v. Garner, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)*); *see also Scott v. Harris, 550 U.S. 372, 383, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*. Stated another way, we must "balance the amount of force applied against the need for that force." *Meredith v. Erath, 342 F.3d 1057, 1061 (9th Cir. 2003)*.

1. Nature and Quality of the Intrusion

We begin by analyzing the quantum of force--the type and amount of force--that Officer MacPherson used against

Bryan. [2] *See Deorle, 272 F.3d at 1279*; *Chew v. Gates, 27 F.3d 1432, 1440 (9th Cir. 1994)*. Officer MacPherson shot Bryan with a Taser X26 provided by the Coronado Police Department. The X26 uses compressed nitrogen to propel a pair of "probes"-- **[**8]** aluminum darts tipped with stainless steel barbs connected to the X26 by insulated wires--toward the target at a rate of over 160 feet per second. Upon striking a person, [3] the X26 delivers a 1200 volt, low ampere electrical charge through the wires and probes and into his muscles. [4] The impact is as powerful as it is swift. The electrical impulse instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless. *See Draper v. Reynolds, 369 F.3d 1270, 1273 n.3 (11th Cir. 2004)*; *Hickey v. Reeder, 12 F.3d 754, 757 (8th Cir. 1993)*. The tasered person also experiences an excruciating pain that radiates throughout the body. *See Lewis v. Downey, 581 F.3d 467, 475 (7th Cir. 2009)* ("[O]ne need not have personally endured a taser jolt to know the pain that must accompany it . . . ."); *Hickey, 12 F.3d at 757*.

Bryan vividly testified to experiencing both paralysis and intense pain throughout his body when he was tasered. In addition, Officer MacPherson's use of the X26 physically injured Bryan. As a result of the taser, Bryan lost muscular control and fell, uncontrolled, face first into the pavement. This fall shattered four of his front teeth and caused facial abrasions and swelling. **[**10]** Additionally, a barbed probe lodged in his flesh, requiring hospitalization so that a doctor could remove the probe with a scalpel. A reasonable police officer with Officer MacPherson's training on the X26 would have foreseen these **[*621]** physical injuries when confronting a shirtless individual standing on asphalt. We have held that ***HN4*** force can be unreasonable even without physical blows or injuries. *See, e.g., Headwaters Forest Def. v. County of Humboldt, 240 F.3d 1185, 1199 (9th Cir. 2000), vacated and remanded on other grounds 534 U.S. 801, 122 S. Ct. 24, 151 L. Ed. 2d 1 (2001)*; [5] *Tekle v. United States, 511 F.3d 839, 845 (9th Cir. 2007)*. The presence of non-minor physical injuries like those suffered by Bryan, however, is certainly relevant in evaluating the degree of the *Fourth Amendment* intrusion.

We, along with our sister circuits, have held that ***HN5*** tasers and stun guns fall into the category of non-lethal force. [6] *See, e.g., Lewis, 581 F.3d at 476*; *United States v. Ford, 507 F.3d 412, 413 (6th Cir. 2007)*; **[**11]** *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 969 n.8 (9th Cir. 2005)*. [7] Non-lethal, however, is not synonymous with non-excessive; all force--lethal and non-lethal--must be justified by the need for the specific level of force employed. *Graham, 490 U.S. at 395*; *see also Deorle, 272 F.3d at 1285* ("Less than deadly force, like deadly force, may not be used without sufficient reason; rather, it is subject to the *Graham* balancing test."). Nor is "non-lethal" a monolithic category of force. A blast of pepper spray and blows from a baton are not necessarily constitutionally equivalent levels of force simply because both are classified as non-lethal. Rather than relying on broad characterizations, we must evaluate the nature of the specific force employed in a specific factual situation. *See Chew, 27 F.3d at 1441* (stating that the *Graham* factors "are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure.").

The physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted. In *Headwaters*, we held that a jury could conclude that pepper spray was more than a "minimal intrusion" as it caused "intense pain . . ., an involuntary closing of the eyes, a

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[2] Although the taser used by Officer MacPherson was the X26 model, our holding applies to the use of all controlled electric devices that cause similar physiological effects.

[3] According to the manufacturer, the probes do not need to penetrate the skin of the intended target to result in a successful connection. The probes **[**9]** are capable of delivering their electrical charge through up to two inches of clothing. Here, Bryan was shirtless when confronted by Officer MacPherson. As a result, one probe penetrated his skin.

[4] Tasers have been described as delivering a 50,000 volt charge. *See, e.g., Brown v. City of Golden Valley, 574 F.3d 491, 495 n.3 (8th Cir. 2009)*. While technically accurate, this does not entirely describe the electrical impulse encountered by a taser victim. According to the manufacturer, this 50,000 volt charge is needed to ensure that the electrical current can "jump" through the air or victim's clothing, thus completing a circuit. The manufacturer maintains, however, that the full 50,000 volts do not enter the victim's body; rather, it represents that the X26 delivers a peak voltage of 1,200 volts into the body.

[5] On remand from the Supreme Court in light of its then-recent opinion in *Saucier*, the *Headwaters* panel reaffirmed its earlier excessive force analysis. *See Headwaters Forest Def. v. County of Humboldt, 276 F.3d 1125 (9th Cir. 2002)*.

[6] Lethal force" is force that creates a substantial risk of death or serious bodily injury. *See Smith v. City of Hemet, 394 F.3d 689, 705-07 (9th Cir. 2005)* (en banc).

[7] We recognize, however, **[**12]** that like any generally non-lethal force, the taser is capable of being employed in a manner to cause the victim's death. *See, e.g., Oliver v. Fiorino, 586 F.3d 898, 906 (11th Cir. 2009)*.

gagging reflex, and temporary paralysis of the larynx." *240 F.3d at 1200*. We rejected the district court's characterization of pepper spray's intrusiveness as "merely the infliction of transient pain without significant risk of physical injury." *Id. at 1199*. We similarly reject any contention that, because the taser results only in the "temporary" infliction of pain, it constitutes a non-intrusive level of force. The pain is intense, is felt throughout the body, and is administered by effectively commandeering the victim's muscles and nerves. Beyond the experience of pain, tasers result in "immobilization, **[**13]** disorientation, loss of balance, and weakness," even after the electrical current has ended. *Matta-Ballesteros v. Henman, 896 F.2d 255, 256 n.2 (7th Cir. 1990)*; *see also Beaver v. City of Federal Way, 507 F. Supp. 2d 1137, 1144 (W.D. Wash. 2007)* ("[A]fter being tased, a **[*622]** suspect may be dazed, disoriented, and experience vertigo."). Moreover, tasering a person may result in serious injuries when intense pain and loss of muscle control cause a sudden and uncontrolled fall.

The X26 thus intrudes upon the victim's physiological functions and physical integrity in a way that other non-lethal uses of force do not. While pepper spray causes an intense pain and acts upon the target's physiology, the effects of the X26 are not limited to the target's eyes or respiratory system. Unlike the police "nonchakus" we evaluated in *Forrester v. City of San Diego, 25 F.3d 804 (9th Cir. 1994)*, the pain delivered by the X26 is far more intense and is not localized, external, gradual, or within the victim's control. *Id. at 807, 805 n.5*. In light of these facts, we agree with the Fourth and Eighth Circuit's characterization of a taser shot as a "painful and frightening blow." *Orem v. Rephann, 523 F.3d 442, 448 (4th Cir. 2008)* **[**14]** (quoting *Hickey, 12 F.3d at 757*). We therefore conclude that ***HN6*** tasers like the X26 constitute an "intermediate or medium, though not insignificant, quantum of force," *Sanders v. City of Fresno, 551 F. Supp. 2d 1149, 1168 (E.D. Cal. 2008)*; *Beaver, 507 F. Supp. 2d at 1144* ("[T]he Court first finds that the use of a Taser constituted significant force.").

We recognize the important role controlled electric devices like the Taser X26 can play in law enforcement. The ability to defuse a dangerous situation from a distance can obviate the need for more severe, or even deadly, force and thus can help protect police officers, bystanders, and suspects alike. We hold only that the X26 and similar devices constitute an intermediate, significant level of force that must be justified by "'a strong government interest [that] *compels* the employment of such force.'" *Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1057 (9th Cir. 2003)* (quoting *Deorle, 272 F.3d at 1280 (9th Cir. 2001)*).

2. Governmental Interest in the Use of Force

Under *Graham v. Connor*, ***HN7*** we evaluate the government's interest in the use of force by examining three core factors, "the severity of the crime at issue, whether the **[**15]** suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *490 U.S. at 396*; *see also Deorle, 272 F.3d at 1280*. These factors, however, are not exclusive. Rather, we examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." *Franklin v. Foxworth, 31 F.3d 873, 876 (9th Cir. 1994)*. This analysis allows us to "determine objectively 'the amount of force that is necessary in a particular situation.'" *Deorle, 272 F.3d at 1280* (quoting *Graham, 490 U.S. at 396-97*). Viewing the facts in the light most favorable to Bryan, the totality of the circumstances here did not justify the deployment of the Taser X26.

HN8 The "most important" factor under *Graham* is whether the suspect posed an "immediate threat to the safety of the officers or others." *Smith v. City of Hemet, 394 F.3d 689, 702 (9th Cir. 2005)* (en banc) (quoting *Chew, 27 F.3d at 1441*). "A simple statement by an officer that he fears for his safety or the safety others is not enough; there must be objective factors to justify such a concern." *Deorle, 272 F.3d at 1281*. **[**16]** The district court correctly concluded that Bryan's volatile, erratic conduct could lead an officer to be wary. While Bryan's behavior created something of an unusual situation, this does not, by itself, justify the use of significant **[*623]** force. ***HN9*** "A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Id.* Rather, the objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public.

We agree with the district court that Bryan did not pose an immediate threat to Officer MacPherson or bystanders despite his unusual behavior. It is undisputed that Bryan was unarmed, and, as Bryan was only dressed in tennis shoes and boxer shorts, it should have been apparent that he was unarmed. *Cf. id. at 1281* ("Deorle was wearing no shirt or shoes, only a pair of cut-off jeans shorts. There was nowhere for him to secrete any weapons."). Although Bryan had shouted expletives to himself while pulling his car over and had taken to shouting gibberish, and more expletives, outside his car, at no point did he level a physical or verbal threat **[**17]** against Officer MacPherson. *See Smith, 394 F.3d at 702-03* (recognizing that although the victim was shouting expletives, there was no threat leveled against the officer). Bryan was standing, without advancing, fifteen to twenty-five feet away from Officer MacPherson between the door and body of the car. We reject Officer MacPherson's contention

that Bryan constituted a threat by taking a step in Officer MacPherson's direction. First, when explicitly asked if he "[took] a step out of the car" or a "step out away from the car," Bryan testified "no." There is, therefore, a genuine issue of fact on this point, one that, on this procedural posture, we must resolve in Bryan's favor and conclude that Bryan did not advance towards the officer. [8] Second, even if Bryan had taken a single step toward Officer MacPherson, this would not have rendered him an immediate threat justifying an intermediate level of force, as he still would have been roughly nineteen to twenty-four feet away from Officer MacPherson, by the officer's own estimate.

Not only was Bryan standing, unarmed, at a distance of fifteen to twenty-five feet, but the physical evidence demonstrates that Bryan was not even facing Officer MacPherson when he was shot: One of the taser probes lodged in the side of Bryan's arm, rather than in his chest, and the location of the blood on the pavement indicates that he fell away from the officer, rather than towards him. [9] An unarmed, stationary individual, facing away from an officer at a distance of fifteen to twenty-five feet is far from an "immediate threat" to that officer. Nor was Bryan's erratic, but nonviolent, behavior a potential threat to anyone else, as there is no indication that there were pedestrians nearby or traffic on the street at the time of the incident. [10] Finally, while confronting **[*624]** Bryan, Officer MacPherson had unholstered and charged his X26, placing him in a position to respond immediately to any **[**19]** change in the circumstances. The circumstances here show that Officer MacPherson was confronted by, at most, a disturbed and upset young man, not an immediately threatening one.

Officer MacPherson relies heavily on the Eleventh Circuit opinion in *Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004)*, which addressed the use of a taser during the arrest of an aggressive, argumentative individual. Although we do not adopt *Draper* as the law of **[**20]** this circuit, the present case is clearly distinguishable from the one before the Eleventh Circuit. Unlike Bryan, who was yelling gibberish and gave no sign of hearing or understanding Officer MacPherson's orders, it was undisputed in *Draper* that Draper heard and understood the officer's commands, and not only failed to comply, but engaged the officer in an increasingly heated argument. *Id. at 1273*. Four times the officer asked Draper to retrieve paperwork from the cab of his truck and four times Draper heard the officer, turned toward the truck to comply, but then turned around, walked back toward the officer and loudly accused the officer of "harassing" and "disrespecting" him, displaying a growing belligerence. *Id.* It was not until the fifth time that the officer requested the paperwork and Draper refused to comply, yelled at the officer, and paced toward him in agitation that the officer resorted to the taser. *Id.* The Eleventh Circuit determined that a verbal arrest command (when Draper had refused to comply with the first five commands) accompanied by an attempt to physically handcuff Draper "in these particular circumstances, may well have or would likely have escalated a tense **[**21]** and difficult situation into a serious physical struggle, in which either Draper or [the officer] would be seriously hurt." *Id. at 1278*.

Bryan never addressed, let alone argued with, Officer MacPherson once he left his car. In addition, whereas Bryan remained stationary at a distance of approximately twenty feet, or at most took a single step forward, Draper was located close to the officer and pacing in an agitated fashion while arguing with him. Id. Thus, the officer in *Draper* was confronting a belligerent, argumentative individual who was angrily pacing within feet of his position. Officer MacPherson, by contrast, was confronted with a half naked, unarmed, stationary, apparently disturbed individual shouting gibberish at a distance of approximately twenty feet. The only similarity to the factual circumstances in *Draper* is that both Draper and Bryan were stopped for a traffic violation, were loud, and were tasered by the police.

The severity of Bryan's purported offenses "provide[ ] little, if any, basis for [Officer MacPherson's] use of physical force." *Smith, 394 F.3d at 702*. It is undisputed that Bryan's initial "crime" was a mere traffic infraction--failing to wear a seatbelt--punishable **[**22]** by a fine. ***HN10*** Traffic violations generally will not support the use of a significant level of force. *See Deville v. Marcantel, 567 F.3d 156, 167 (5th Cir.*

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[8] Counsel for Officer MacPherson argued that there is no genuine issue regarding whether Bryan took a step towards Officer MacPherson on the basis of Bryan's response **[**18]** to the question of "Did you move your feet in any way?" Bryan answered, "I don't think so." There are, however, any number of ways one can move one's feet without taking a "step." Because Bryan specifically denied taking a step when expressly asked, we find a genuine issue exists as to this fact.

[9] Officer MacPherson's deposition testimony only bolsters this conclusion. He testified that Bryan fell "faced forward" onto the pavement while Bryan similarly testified that he fell straight forward.

[10] Officer MacPherson testified in his deposition that the intersection where he tasered Bryan does not have a lot of traffic on it early on Sunday mornings and that he did not remember the presence of any traffic on the specific morning in question. Other than Bryan, his younger brother, and Officer MacPherson, the record indicates that the only individuals near the scene were an individual playing tennis nearby and a jogger located across the street. Their declarations indicate that they were fifty to seventy-five feet and forty feet away, respectively.

2009) ("Deville was stopped for a minor traffic violation . . . making the need for force substantially lower than if she had been suspected of a serious crime."). Officer MacPherson also claims that he reasonably believed Bryan had committed three misdemeanors--resisting a police officer, failure to comply [*625] with a lawful order, and using or being under the influence of any controlled substance [11] -- and that these constitute "serious --and dangerous--criminal activity." We disagree with Officer MacPherson's assessment. ***HN11*** While "the commission of a misdemeanor offense is 'not to be taken lightly,' it militates against finding the force used to effect an arrest reasonable where the suspect was also nonviolent and 'posed no threat to the safety of the officers or others.'" *Headwaters, 240 F.3d at 1204* (quoting *Hammer v. Gross, 932 F.2d 842, 846 (9th Cir. 1991)*). None of the offenses for which Bryan was cited or of which he was suspected is inherently dangerous or violent, and as already discussed, Bryan posed little to no safety threat. [**23] *Cf. Parker v. Gerrish, 547 F.3d 1, 9 (1st Cir. 2008)* ("Though driving while intoxicated is a serious offense, it does not present a risk of danger to the arresting officer that is presented when an officer confronts a suspect engaged in an offense like robbery or assault."). Therefore, there was no substantial government interest in using significant force to effect Bryan's arrest for these misdemeanor violations that even the State of California has determined are minor. [12] *Cf. Miller v. Clark County, 340 F.3d 959, 964 (9th Cir. 2003)* (finding a felony to be "by definition a crime deemed serious by the state").

Officer MacPherson now argues that use of the taser was justified because he believed Bryan may have been mentally ill and thus subject to detention. To the contrary: if Officer MacPherson believed Bryan was mentally disturbed he should have made greater effort to take control of the situation through less intrusive means. As we have held, "[t]he problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense." *Deorle, 272 F.3d at 1282-83*. Although we have refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals, [**25] we have found that even "when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual." *Id. at 1283*. The same reasoning applies to intermediate levels of force. A mentally ill individual is in need of a doctor, not a jail cell, and in the usual case --where such an individual is neither a threat to himself nor to anyone else--the government's interest in deploying force to detain him is not as substantial as its interest in deploying that force to apprehend a dangerous criminal. Moreover, the purpose of detaining a mentally ill individual [*626] is not to punish him, but to help him. The government has an important interest in providing assistance to a person in need of psychiatric care; thus, the use of force that may be justified by that interest necessarily differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community. Thus, whether Officer MacPherson believed that Bryan had committed a variety [**26] of nonviolent misdemeanors or that Bryan was mentally ill, this *Graham* factor does not support the deployment of an intermediate level of force.

Turning to Bryan's "resistance," we note that Bryan in fact complied with every command issued by Officer MacPherson except the one he asserts he did not hear--to remain in the car. Even if Bryan failed to comply with the command to remain in his vehicle, such noncompliance does not constitute "active resistance" supporting a substantial use of force. Following the Supreme Court's instruction in *Graham*, we have drawn a distinction between passive and active resistance. *See Forrester, 25 F.3d at 805* (finding that protestor's "remaining seated, refusing to move, and refusing to bear weight" despite police orders to the contrary constituted "passive resistance"); *see also Headwaters, 276 F.3d at 1130-31* (finding that protestors, who were chained together with devices and refused to exit a building when ordered, passively resisted).

By shouting gibberish and hitting himself in the quadriceps, Bryan may not have been perfectly passive. "Resistance," however, should not be understood as a binary state, with resistance being either completely passive [**27] or active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is

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[11] *Cal. Veh. Code § 2800(a)* (making it a misdemeanor to willfully fail or refuse to comply with an order of a peace officer); *Cal. Health & Safety Code § 11550* (making it unlawful to "use, or be under the influence of any controlled substance"); *Cal. Penal Code § 148* (punishing every individual "who willfully resists, delays, or obstructs any public officer . . . in the discharge . . . of his or her office" with a fine up to $ 1000 or up to 1 year in a county jail).

[12] Our sister circuits have likewise concluded that misdemeanors are relatively minor and will generally not support [**24] the deployment of significant force. *See, e.g., Fogarty v. Gallegos, 523 F.3d 1147, 1160 (10th Cir. 2008)*; *Reese v. Herbert, 527 F.3d 1253, 1274 (11th Cir. 2008)*. In addition, we have previously suggested that felonies not involving violence provide limited support for the use of significant force under *Graham*. *See Meredith, 342 F.3d at 1063*; *Chew, 27 F.3d at 1442-43 & n.9*.

physically assaulting the officer. We must eschew ultimately unhelpful blanket labels and evaluate the nature of any resistance in light of the actual facts of the case. For example, in *Smith v. City of Hemet*, we confronted an individual who "continually ignored" officer commands to remove his hands from his pockets and to not re-enter his home. In addition, he "physically resisted . . . for only a brief time." *394 F.3d at 703*. Although Smith was not perfectly passive in the encounter, we stated that it did not appear "that Smith's resistance was particularly bellicose" and thus found that this factor provided little support for a use of significant force. *Id.* Even purely passive resistance can support the use of some force, but the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance.

Reviewing Bryan's conduct, we conclude that even if we were to consider his degree of compliance solely from the officer's subjective point of view, this case would be closer to the passive resistance we confronted **[**28]** in *Forrester* and *Headwaters* or the minor resistance in *Smith*, than it would be to truly active resistance. The only resistance Officer MacPherson testified to was a failure to comply with his order that Bryan remain in his car. Shouting gibberish and hitting one's quadriceps is certainly bizarre behavior, but such behavior is a far cry from actively struggling with an officer attempting to restrain and arrest an individual. *Compare Abdullahi v. City of Madison, 423 F.3d 763, 776 (7th Cir. 2005)* (involving an arrestee swinging a belt at an officer and "strenuously resist[ing]" as the police attempted to handcuff him); *McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1241-42 (11th Cir. 2003)* (involving an arrestee engaging and advancing on officers with a stick); *Jackson v. City of Bremerton, 268 F.3d 646, 653 (9th Cir. 2001)* (involving **[*627]** an individual interfering with an attempted arrest of an individual by engaging the officer in a "melee"). As in *Smith*, Bryan's "resistance" was not "particularly bellicose." *Smith, 394 F.3d at 703*. Indeed, when we view the facts in the light most favorable to Bryan, as we must at this stage of the proceedings, his conduct does not constitute resistance **[**29]** at all. [13]

Two additional considerations militate against finding Officer MacPherson's use of force reasonable. First, it is undisputed that Officer MacPherson failed to warn Bryan that he would be shot with the X26 if he did not comply with the order to remain in his car. [14] We recognized in *Deorle* that police officers normally provide such warnings where feasible, even when the force is less than deadly, and that the failure to give such a warning is a factor to consider. *See 272 F.3d at 1284*; *see also Jackson, 268 F.3d at 653* (finding that the officer's "safety interest" "increased further when the group was warned by police that a chemical irritant would be used if they did not move back . . . and the group refused to comply"). Here, it was feasible to give a warning that the use of force was imminent if Bryan did not **[**30]** comply. While a warning to Bryan may or may not have caused him to comply, there was "ample time to give that order or warning and no reason whatsoever not to do so." *Deorle, 272 F.3d at 1284*.

Second, we have held that ***HN12*** police are "required to consider '[w]hat other tactics if any were available' to effect the arrest." *Headwaters, 240 F.3d at 1204* (quoting *Chew, 27 F.3d at 1443*). [15] Officer MacPherson argues that there were no less intrusive alternatives available to apprehend Bryan. Objectively, however, there were clear, reasonable, and less intrusive alternatives. Officer MacPherson knew additional officers were en route to the scene. He was, or should have been, aware that the arrival of those officers would change the tactical calculus confronting him, likely opening up additional ways to resolve the situation without the need for an **[**31]** intermediate level of force. Thus, while by no means dispositive, that Officer MacPherson did not provide a warning before deploying the X26 and apparently did not consider less intrusive means of effecting Bryan's arrest factor significantly into our *Graham* analysis.

3. Balancing the Competing Interests

Our review of the *Graham* factors reveals that the government had, at best, a minimal interest in the use of force against Bryan. This interest is insufficient to justify the use of an intermediate level of force against an individual. We are

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[13] The jury may credit Bryan's testimony that he did not hear the officer's order to remain in the car. The evidence suggests that Bryan thought the officer would again approach from the passenger side of his car and that Bryan turned to face that way. That the officer was instead yards away in the other direction may have prevented Bryan from hearing the commands.

[14] Officer MacPherson now argues that he did warn Bryan. However, Officer MacPherson's own testimony belies this claim. Officer MacPherson has consistently testified that he repeatedly ordered Bryan to remain in his vehicle. This clearly constitutes a command, but it hardly warns him that if he failed to return to his car he would be shot with a taser.

[15] We do not challenge the settled principle that police officers need not employ the "least intrusive" degree of force possible. *See Gregory v. County of Maui, 523 F.3d 1103, 1107 (9th Cir. 2008)* (citing *Forrester, 25 F.3d at 807-08*). We merely recognize the equally settled principle that officers must *consider* less intrusive methods of effecting the arrest and that the presence of feasible alternatives is a *factor* to include in our analysis.

cognizant [*628] of the Supreme Court's command to evaluate ***HN13*** an officer's actions "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham, 490 U.S. at 396*. [**32] We also recognize the reality that "police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." *Id. at 397*. This does not mean, however, that a ***Fourth Amendment*** violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is "'objectively reasonable' in light of the facts and circumstances confronting them" without regard for an officer's subjective intentions. *Id.*

We thus conclude that the intermediate level of force employed by Officer MacPherson against Bryan was excessive in light of the governmental interests at stake. Bryan never attempted to flee. He was clearly unarmed and was standing, without advancing in any direction, next to his vehicle. Officer MacPherson was standing approximately twenty feet away observing Bryan's stationary, bizarre tantrum with his X26 [**33] drawn and charged. Consequently, the objective facts reveal a tense, but static, situation with Officer MacPherson ready to respond to any developments while awaiting backup. Bryan was neither a flight risk, a dangerous felon, nor an immediate threat. Therefore, there was simply "no immediate need to subdue [Bryan]" before Officer MacPherson's fellow officers arrived or less-invasive means were attempted. ***Deorle, 272 F.3d at 1282***; *see also, Blankenhorn v. City of Orange, 485 F.3d 463, 480 (9th Cir. 2007)* (" '[I]t is the need for force which is at the heart of the *Graham* factors'" (quoting ***Liston v. County of Riverside, 120 F.3d 965, 976 (9th Cir. 1997)))***. Officer MacPherson's desire to quickly and decisively end an unusual and tense situation is understandable. His chosen method for doing so violated Bryan's constitutional right to be free from excessive force.

B. Did Officer MacPherson Violate Bryan's Clearly Established Rights?

Having concluded that Officer MacPherson's actions violated Bryan's ***Fourth Amendment*** rights, we next must ask whether his conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*. [**34] ***HN14*** If an officer's use of force was "premised on a *reasonable* belief that such force was lawful," the officer will be granted immunity from suit, notwithstanding the fact excessive force was deployed. ***Deorle, 272 F.3d at 1285***; *see also Saucier, 533 U.S. at 202* (asserting that the qualified immunity analysis asks "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted"). We must, therefore, turn to the state of the law at the time Officer MacPherson tasered Bryan to determine whether Officer MacPherson reasonably could have believed his use of the taser against Bryan was constitutional. *See Saucier, 533 U.S. at 202*.

All of the factors articulated in *Graham*--along with our recent applications of *Graham* in ***Deorle*** and ***Headwaters*** -- placed Officer MacPherson on fair notice that an intermediate level of force was unjustified. *See Fogarty v. Gallegos, [*629] 523 F.3d 1147, 1162 (10th Cir. 2008)* ("Considering that under Fogarty's version of events each of the *Graham* factors lines up in his favor, this case is not so close that our precedents would fail to portend the constitutional unreasonableness of defendants' alleged actions."); *Boyd v. Benton County, 374 F.3d 773, 781 (9th Cir. 2004)* [**35] (asking whether "a reasonable officer would have had fair notice that the force employed was unlawful"). Officer MacPherson stopped Bryan for the most minor of offenses. There was no reasonable basis to conclude that Bryan was armed. He was twenty feet away and did not physically confront the officer. The facts suggest that Bryan was not even facing Officer MacPherson when he was shot. A reasonable officer in these circumstances would have known that it was unreasonable to deploy intermediate force.

We do not need to find closely analogous case law to show that a right is clearly established. ***Moreno v. Baca, 431 F.3d 633, 641 (9th Cir. 2005)***; *see also Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)* ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."); *Oliver, 586 F.3d at 907* (finding that a right can be clearly established where the officer's conduct "lies so obviously at the very core of what the ***Fourth Amendment*** prohibits that the unlawfulness of the conduct was readily apparent to [the officer], notwithstanding the lack of fact-specific case law"). However, as of July 24, 2005, there was no Supreme Court decision or decision [**36] of our court addressing whether the use of a taser, such as the Taser X26, in dart mode constituted an intermediate level of force. Indeed, before that date, the only statement we had made regarding tasers in a published opinion was that they were among the "variety of non-lethal 'pain compliance' weapons used by police forces." *San Jose Charter of Hells Angels Motorcycle Club, 402 F.3d at 969 n.8*. And, as the Eighth Circuit has noted, "[t]he Taser is a relatively new implement of force, and case law related to the Taser is developing." *Brown v. City of Golden Valley, 574 F.3d 491, 498 n.5 (8th Cir. 2009)*. Two other panels have

recently, in cases involving different circumstances, concluded that the law regarding tasers is not sufficiently clearly established to warrant denying officers qualified immunity. *Mattos v. Agarano, 590 F.3d 1082, 1089-90 (9th Cir. 2010)*; *Brooks v. City of Seattle, 599 F.3d 1018, 1031 n.18 (9th Cir. 2010)*.

Based on these recent statements regarding the use of tasers, and the dearth of prior authority, we must conclude that a reasonable officer in Officer MacPherson's position could have made a reasonable mistake of law regarding the constitutionality of the **[**37]** taser use in the circumstances Officer MacPherson confronted in July 2005. Accordingly, Officer MacPherson is entitled to qualified immunity. *See Ctr. for Bio-Ethical Reform v. Los Angeles County Sheriff Dept., 533 F.3d 780, 794 (9th Cir. 2008)*.

CONCLUSION

Viewing the facts, as we must, in the light most favorable to Bryan, we conclude, for the purposes of summary judgment, that Officer MacPherson used unconstitutionally excessive force. However, a reasonable officer confronting the circumstances faced by Officer MacPherson on July 24, 2005, could have made a reasonable mistake of law in believing the use of the taser was reasonable. Accordingly we **REVERSE** the district court's denial of summary judgment on the basis of qualified immunity.

REVERSED.

Bryan v. MacPherson

United States Court of Appeals for the Ninth Circuit

October 9, 2009; November 30, 2010, Filed

No. 08-55622

Reporter
630 F.3d 805; 2010 U.S. App. LEXIS 25895

CARL BRYAN, Plaintiff-Appellee, v. BRIAN MACPHERSON; CORONADO POLICE DEPARTMENT; CITY OF CORONADO, a municipal corporation, Defendants-Appellants.

Subsequent History: Motion denied by *Bryan v. MacPherson, 2011 U.S. Dist. LEXIS 13668 (S.D. Cal., Feb. 10, 2011)*

Prior History: [**1] Appeal from the United States District Court for the Southern District of California. D.C. No. 3:06-CV-01487-LAB-CAB. Larry A. Burns, District Judge, Presiding.
Bryan v. MacPherson, 608 F.3d 614, 2010 U.S. App. LEXIS 12511 (9th Cir. Cal., 2010)

Core Terms

taser, resistance, circumstances, confronted, feet, pain, arrest, officer's, intrusive, use force, warning, governmental interest, qualified immunity, excessive force, electrical, non-lethal, passive, probes, intermediate level, reasonable officer, factors, traffic, immediate threat, unarmed, shot, significant force, police officer, mentally ill, misdemeanor, deploying

Case Summary

Procedural Posture
Defendant police officer appealed a decision of the United States District Court for the Southern District of California, which denied his motion for summary judgment in plaintiff arrestee's action under *42 U.S.C.S. § 1983*, asserting excessive force in violation of the *Fourth Amendment*.

Overview
The officer deployed a Taser X26 against the arrestee during a traffic stop for a seatbelt infraction. The arrestee fell face first, fracturing four teeth and suffering facial contusions. The district court determined that the officer was not entitled to qualified immunity because a reasonable jury could find that the arrestee was located between 15 to 25 feet from the officer and was not facing him or advancing toward him, and that a reasonable officer would have known that the use of a taser would cause pain and, as the arrestee was standing on asphalt, that a resulting fall could cause injury. The court held that the use of the Taser X26 constituted an intermediate, significant level of force and that the use of such force by the officer was excessive in light of the governmental interests at stake. The arrestee never attempted to flee, was clearly unarmed, and was standing next to his vehicle. The officer, however, was entitled to qualified immunity because, based upon the dearth of prior authority, a reasonable officer in the officer's position could have made a reasonable mistake of law regarding the constitutionality of the taser use in the circumstances that he confronted.

Outcome
The court reversed the district court's denial of summary judgment.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN1 The district court's denial of qualified immunity is reviewed de novo.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN2 Where disputed issues of material fact exist, courts assume the version of the material facts asserted by the non-moving party. All reasonable inferences must be drawn in favor of the non-moving party.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN3 In evaluating the denial of a police officer's assertion of qualified immunity, a court of appeals asks two distinct

questions. First, it must determine whether, taking the facts in the light most favorable to the non-moving party, the officer's conduct violated a constitutional right; and second, if a violation occurred, whether the right was clearly established in light of the specific context of the case. It may exercise its sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN4 Allegations of excessive force are examined under the *Fourth Amendment's* prohibition on unreasonable seizures. A court asks whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them. The court must balance the nature and quality of the intrusion on the individual's *Fourth Amendment* interests against the countervailing governmental interests at stake. Stated another way, the court must balance the amount of force applied against the need for that force.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN5 Force can be unreasonable even without physical blows or injuries. The presence of non-minor physical injuries, however, is certainly relevant in evaluating the degree of the *Fourth Amendment* intrusion.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN6 Tasers and stun guns fall into the category of non-lethal force. Non-lethal, however, is not synonymous with non-excessive; all force--lethal and non-lethal--must be justified by the need for the specific level of force employed. Less than deadly force, like deadly force, may not be used without sufficient reason; rather, it is subject to the Graham balancing test. Nor is "non-lethal" a monolithic category of force. A blast of pepper spray and blows from a baton are not necessarily constitutionally equivalent levels of force simply because both are classified as non-lethal. Rather than relying on broad characterizations, a court must evaluate the nature of the specific force employed in a specific factual situation. The Graham factors are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN7 The Taser X26 and similar devices when used in dart-mode constitute an intermediate, significant level of force that must be justified by the governmental interest involved.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN8 Under Graham v. Connor, courts evaluate the government's interest in the use of force by examining three core factors, the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The factors, however, are not exclusive. Rather, courts examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in Graham. The analysis allows a court to determine objectively the amount of force that is necessary in a particular situation.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN9 The "most important" factor under Graham v. Connor is whether the suspect posed an immediate threat to the safety of the officers or others. A simple statement by an officer that he fears for his safety or the safety others is not enough; there must be objective factors to justify such a concern.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN10 A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. Rather, the objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN11 Traffic violations generally will not support the use of a significant level of force.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN12 While the commission of a misdemeanor offense is not to be taken lightly, it militates against finding the force used to effect an arrest reasonable where the suspect was also nonviolent and posed no threat to the safety of the officers or others.

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > Elements

HN13 *Cal. Veh. Code § 2800(a)* makes it a misdemeanor to willfully fail or refuse to comply with an order of a peace officer.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview

HN14 *Cal. Health & Safety Code § 11550* makes it unlawful to use, or be under the influence of any controlled substance.

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > Penalties

HN15 *Cal. Penal Code § 148* punishes every individual who willfully resists, delays, or obstructs any public officer in the discharge of his or her office with a fine up to $1000 or up to 1 year in a county jail.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN16 The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. Although there are not two tracks of excessive force analysis, one for the mentally ill and one for serious criminals, even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted with a mentally ill individual. The same reasoning applies to intermediate levels of force. The government's interest in deploying force to detain a mentally ill individual is not as substantial as its interest in deploying that force to apprehend a dangerous criminal. The government has an important interest in providing assistance to a person in need of psychiatric care; thus, the use of force that may be justified by that interest necessarily differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN17 Even purely passive resistance can support the use of some force, but the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN18 Police officers normally provide such warnings where feasible, even when the force is less than deadly, and that the failure to give such a warning is a factor to consider.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN19 Police are required to consider what other tactics if any were available to effect the arrest.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN20 Police officers need not employ the least intrusive degree of force possible. However, officers must consider less intrusive methods of effecting the arrest. The presence of feasible alternatives is a factor to include in an analysis.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN21 An officer's actions should be evaluated from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation. This does not mean, however, that a *Fourth Amendment* violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that courts can base their analysis on what officers actually felt or believed during an incident. Rather, they must ask if the officers' conduct is objectively reasonable in light of the facts and circumstances confronting them without regard for an officer's subjective intentions.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN22 If an officer's use of force was premised on a reasonable belief that such force was lawful, the officer will be granted immunity from suit, notwithstanding the fact excessive force was deployed.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Civil Rights Law > ... > Scope > Law Enforcement Officials > Excessive Force

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN23 Officials can still be on notice that their conduct violates established law even in novel factual circumstances. A right can be clearly established where the officer's conduct lies so obviously at the very core of what the *Fourth Amendment* prohibits that the unlawfulness of the conduct was readily apparent to the officer, notwithstanding the lack of factspecific case law.

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Judges: Before: *Kim McLane Wardlaw*, Circuit Judge.

Opinion by: Opinion by Judge Wardlaw

Opinion

[*821] WARDLAW, Circuit Judge:

Early one morning in the summer of 2005, Officer Brian MacPherson deployed his taser against Carl Bryan during a traffic stop for a seatbelt infraction. Bryan filed this action under *42 U.S.C. § 1983*, asserting excessive force in violation of the *Fourth Amendment*. Officer MacPherson appeals the denial of his motion for summary judgment based on qualified immunity. We affirm the district court in part because, viewing the circumstances in the light most favorable to Bryan, Officer MacPherson's use of the taser was unconstitutionally excessive. However, we reverse in part because the violation of Bryan's [*822] constitutional rights was not clearly established at the time that Officer MacPherson fired [**2] his taser at Bryan on July 24, 2005.

I. FACTUAL AND PROCEDURAL BACKGROUND

Carl Bryan's California Sunday was off to a bad start. The twenty-one year old, having stayed the night with his younger brother and some cousins in Camarillo, which is in Ventura County, planned to drive his brother back to his parents' home in Coronado, which is in San Diego County. However, Bryan's cousin's girlfriend had accidently taken Bryan's keys to Los Angeles the previous day. Wearing the t-shirt and boxer shorts in which he had slept, Bryan rose early, traveled east with his cousins to Los Angeles, picked up his keys and returned to Camarillo to get his car and brother. He then began driving south towards his parents' home. While traveling on the 405 highway, Bryan and his brother were stopped by a California Highway Patrolman who issued Bryan a speeding ticket. This upset him greatly. He began crying and moping, ultimately removing his t-shirt to wipe his face. Continuing south without further incident, the two finally crossed the Coronado Bridge at about seven-thirty in the morning.

At that point, an already bad morning for Bryan took a turn for the worse. Bryan was stopped at an intersection when Officer [**3] MacPherson, who was stationed there to enforce seatbelt regulations, stepped in front of his car and signaled to Bryan that he was not to proceed. Bryan immediately realized that he had mistakenly failed to buckle his seatbelt after his

earlier encounter with the police. Officer MacPherson approached the passenger window and asked Bryan whether he knew why he had been stopped. Bryan, knowing full well why and becoming increasingly angry at himself, simply stared straight ahead. Officer MacPherson requested that Bryan turn down his radio and pull over to the curb. Bryan complied with both requests, but as he pulled his car to the curb, angry with himself over the prospects of another citation, he hit his steering wheel and yelled expletives to himself. Having pulled his car over and placed it in park, Bryan stepped out of his car.

There is no dispute that Bryan was agitated, standing outside his car, yelling gibberish and hitting his thighs, clad only in his boxer shorts and tennis shoes. It is also undisputed that Bryan did not verbally threaten Officer MacPherson and, according to Officer MacPherson, was standing twenty to twenty-five feet away and not attempting to flee. Officer MacPherson **[**4]** testified that he told Bryan to remain in the car, while Bryan testified that he did not hear Officer MacPherson tell him to do so. The one material dispute concerns whether Bryan made any movement toward the officer. Officer MacPherson testified that Bryan took "one step" toward him, but Bryan says he did not take any step, and the physical evidence indicates that Bryan was actually facing away from Officer MacPherson. Without giving any warning, Officer MacPherson shot Bryan with his taser gun. One of the taser probes embedded in the side of Bryan's upper left arm. The electrical current immobilized him whereupon he fell face first into the ground, fracturing four teeth and suffering facial contusions. Bryan's morning ended with his arrest [1] and yet another drive —this time by ambulance and to a hospital for treatment.

[*823] Bryan sued Officer MacPherson and the Coronado Police Department, its police chief, and the City of Coronado for excessive force in violation **[**5]** of *42 U.S.C. § 1983*, assault and battery, intentional infliction of emotional distress, a violation of *California Civil Code § 52.1*, as well as failure to train and related causes of action. On summary judgment, the district court granted relief to the City of Coronado and Coronado Police Department, but determined that Officer MacPherson was not entitled to qualified immunity at this stage of the proceedings. The court concluded that a reasonable jury could find that Bryan "presented no immediate danger to [Officer MacPherson] and no use of force was necessary." In particular, it found that a reasonable jury could find that Bryan was located between fifteen to twenty-five feet from Officer MacPherson and was not facing him or advancing toward him. The court also found that a reasonable officer would have known that the use of the taser would cause pain and, as Bryan was standing on asphalt, that a resulting fall could cause injury. Under the circumstances, the district court concluded it would have been clear to a reasonable officer that shooting Bryan with the taser was unlawful.

II. STANDARD OF REVIEW

HN1 The district court's denial of qualified immunity is reviewed de novo. *Blanford v. Sacramento County, 406 F.3d 1110, 1114 (9th Cir. 2005)*. **[**6]** ***HN2*** Where disputed issues of material fact exist, we assume the version of the material facts asserted by the non-moving party. *See KRL v. Estate of Moore, 512 F.3d 1184, 1188-89 (9th Cir. 2008)*. All reasonable inferences must be drawn in favor of the non-moving party. *John v. City of El Monte, 515 F.3d 936, 941 (9th Cir. 2008)*.

III. DISCUSSION

HN3 In evaluating the denial of a police officer's assertion of qualified immunity, we ask two distinct questions. First, we must determine whether, taking the facts in the light most favorable to the non-moving party, the officer's conduct violated a constitutional right; and second, if a violation occurred, whether the right was "clearly established in light of the specific context of the case." *al-Kidd v. Ashcroft, 580 F.3d 949, 964 (9th Cir. 2009)* (citing *Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)*). We may "exercise [our] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009)*.

A. Did Officer MacPherson Employ Constitutionally Excessive Force?

HN4 Allegations of excessive force are **[**7]** examined under the *Fourth Amendment's* prohibition on unreasonable seizures. *Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)*; *Deorle v. Rutherford, 272 F.3d 1272, 1279 (9th Cir. 2001)*. We ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham, 490 U.S. at 397*. We must balance " 'the nature and quality of the intrusion on the individual's *Fourth Amendment* interests' against the countervailing governmental interests at stake." *Id. at 396* (quoting *Tennessee v. Garner, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)*); *see also Scott v. Harris, 550 U.S. 372, 383, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*. Stated another way, we must "balance the amount of force applied against the need for that **[*824]** force." *Meredith v.*

[1] Bryan was charged with resisting and opposing an officer in the performance of his duties in violation of *California Penal Code § 148*. Bryan was tried on this violation, but following a hung jury, the state dismissed the charges.

Erath, 342 F.3d 1057, 1061 (9th Cir. 2003).

1. Nature and Quality of the Intrusion

We begin by analyzing the quantum of force—the type and amount of force—that Officer MacPherson used against Bryan. [2] *See Deorle, 272 F.3d at 1279*; *Chew v. Gates, 27 F.3d 1432, 1440 (9th Cir. 1994)*. Officer MacPherson shot Bryan with a Taser X26 provided by the Coronado Police Department. **[**8]** The X26 uses compressed nitrogen to propel a pair of "probes"— aluminum darts tipped with stainless steel barbs connected to the X26 by insulated wires—toward the target at a rate of over 160 feet per second. Upon striking a person, [3] the X26 delivers a 1200 volt, low ampere electrical charge through the wires and probes and into his muscles. [4] The impact is as powerful as it is swift. The electrical impulse instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless. *See Draper v. Reynolds, 369 F.3d 1270, 1273 n.3 (11th Cir. 2004)*; *Hickey v. Reeder, 12 F.3d 754, 757 (8th Cir. 1993)*. The tasered person also experiences an excruciating pain that radiates throughout the body. *See Lewis v. Downey, 581 F.3d 467, 475 (7th Cir. 2009)* ("[O]ne need not have personally endured a taser jolt to know the pain that must accompany it . . . ."); *Hickey, 12 F.3d at 757*.

Bryan vividly testified to experiencing both paralysis and intense pain throughout his body when he was tasered. In addition, Officer MacPherson's use of the X26 physically injured Bryan. As a result of the taser, Bryan lost muscular control and fell, uncontrolled, face first into the pavement. This fall shattered **[**10]** four of his front teeth and caused facial abrasions and swelling. Additionally, a barbed probe lodged in his flesh, requiring hospitalization so that a doctor could remove the probe with a scalpel. A reasonable police officer with Officer MacPherson's training on the X26 would have foreseen these physical injuries when confronting a shirtless individual standing on asphalt. We have held that ***HN5*** force can be unreasonable even without physical blows or injuries. *See, e.g., Headwaters Forest Def. v. County of Humboldt, 240 F.3d 1185, 1199 (9th Cir. 2000), vacated and remanded on other grounds 534 U.S. 801, 122 S. Ct. 24, 151 L. Ed. 2d 1 (2001)*; [5] *Tekle v. United States, 511 F.3d 839, 845 (9th Cir. 2007)*. The presence of non-minor physical injuries like those suffered by Bryan, however, is **[*825]** certainly relevant in evaluating the degree of the *Fourth Amendment* intrusion.

We, along with our sister circuits, have held that ***HN6*** tasers and stun guns fall into the category of **[**11]** non-lethal force. [6] *See, e.g., Lewis, 581 F.3d at 476*; *United States v. Fore, 507 F.3d 412, 413 (6th Cir. 2007)*; *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 969 n.8 (9th Cir. 2005)*. [7] Non-lethal, however, is not synonymous with non-excessive; all force—lethal and non-lethal—must be justified by the need for the specific level of force employed. *Graham, 490 U.S. at 395*; *see also Deorle, 272 F.3d at 1285* ("Less than deadly force, like deadly force, may not be used without sufficient reason; rather, it is subject to the *Graham* balancing test."). Nor is "non-lethal" a monolithic category of force. A blast of pepper spray and blows from a baton are not necessarily constitutionally equivalent levels of force simply because both are classified as non-lethal. Rather than relying on broad characterizations, we must evaluate the nature of the specific force employed in a specific factual situation. *See Chew, 27 F.3d at 1441* (stating that the *Graham* factors "are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure.").

The physiological effects, the high levels of pain, and

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[2] Although the taser used by Officer MacPherson was the X26 model, our holding applies to the use of all controlled electric devices that cause similar physiological effects.

[3] According to the manufacturer, the probes do not need to penetrate the skin of the **[**9]** intended target to result in a successful connection. The probes are capable of delivering their electrical charge through up to two inches of clothing. Here, Bryan was shirtless when confronted by Officer MacPherson. As a result, one probe penetrated his skin.

[4] Tasers have been described as delivering a 50,000 volt charge. *See, e.g., Brown v. City of Golden Valley, 574 F.3d 491, 495 n.3 (8th Cir. 2009)*. While technically accurate, this does not entirely describe the electrical impulse encountered by a taser victim. According to the manufacturer, this 50,000 volt charge is needed to ensure that the electrical current can "jump" through the air or victim's clothing, thus completing a circuit. The manufacturer maintains, however, that the full 50,000 volts do not enter the victim's body; rather, it represents that the X26 delivers a peak voltage of 1,200 volts into the body.

[5] On remand from the Supreme Court in light of its then-recent opinion in *Saucier*, the *Headwaters* panel reaffirmed its earlier excessive force analysis. *See Headwaters Forest Def. v. County of Humboldt, 276 F.3d 1125 (9th Cir. 2002)*.

[6] "Lethal force" is force that creates a substantial risk of death or serious bodily **[**12]** injury. *See Smith v. City of Hemet, 394 F.3d 689, 705-07 (9th Cir. 2005)* (en banc).

[7] We recognize, however, that like any generally non-lethal force, the taser is capable of being employed in a manner to cause the victim's death. *See, e.g., Oliver v. Fiorino, 586 F.3d 898, 906 (11th Cir. 2009)*.

foreseeable risk of physical injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted. In *Headwaters*, we held that a jury could conclude that pepper spray was more than a "minimal intrusion" as it caused "intense pain . . ., an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx." *240 F.3d at 1200*. We rejected the district court's characterization of pepper spray's intrusiveness as "merely the infliction of transient pain without significant risk of physical injury." *Id. at 1199*. We similarly reject any contention that, because the taser results only in the "temporary" infliction of pain, it constitutes a non-intrusive level of force. The pain is intense, is felt throughout the body, and is administered by effectively **[**13]** commandeering the victim's muscles and nerves. Beyond the experience of pain, tasers result in "immobilization, disorientation, loss of balance, and weakness," even after the electrical current has ended. *Matta-Ballesteros v. Henman, 896 F.2d 255, 256 n.2 (7th Cir. 1990)*; *see also Beaver v. City of Federal Way, 507 F. Supp. 2d 1137, 1144 (W.D. Wash. 2007)* ("[A]fter being tased, a suspect may be dazed, disoriented, and experience vertigo."). Moreover, tasering a person may result in serious injuries when intense pain and loss of muscle control cause a sudden and uncontrolled fall.

The X26 thus intrudes upon the victim's physiological functions and physical integrity in a way that other non-lethal uses of force do not. While pepper spray causes an intense pain and acts upon the target's physiology, the effects of the X26 are not limited to the target's eyes or respiratory system. Unlike the police "nonchakus" we evaluated in *Forrester v. City of San Diego, 25 F.3d 804 (9th Cir. 1994)*, the pain delivered by the X26 is far more intense and is not localized, external, gradual, or within the victim's control. *Id. at 807, 805 n.5*. **[*826]** In light of these facts, we agree with the Fourth and Eighth **[**14]** Circuit's characterization of a taser shot as a "painful and frightening blow." *Orem v. Rephann, 523 F.3d 442, 448 (4th Cir. 2008)* (quoting *Hickey, 12 F.3d at 757*). We therefore conclude that tasers like the X26 constitute an "intermediate or medium, though not insignificant, quantum of force," *Sanders v. City of Fresno, 551 F. Supp. 2d 1149, 1168 (E.D. Cal. 2008)*; *Beaver, 507 F. Supp. 2d at 1144* ("[T]he Court first finds that the use of a Taser constituted significant force.").

We recognize the important role controlled electric devices like the Taser X26 can play in law enforcement. The ability to defuse a dangerous situation from a distance can obviate the need for more severe, or even deadly, force and thus can help protect police officers, bystanders, and suspects alike. We hold only that ***HN7*** the X26 and similar devices when used in dart-mode constitute an intermediate, significant level of force that must be justified by the governmental interest involved.

2. Governmental Interest in the Use of Force

HN8 Under *Graham v. Connor*, we evaluate the government's interest in the use of force by examining three core factors, "the severity of the crime at issue, whether the suspect poses an immediate **[**15]** threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *490 U.S. at 396*; *see also Deorle, 272 F.3d at 1280*. These factors, however, are not exclusive. Rather, we examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." *Franklin v. Foxworth, 31 F.3d 873, 876 (9th Cir. 1994)*. This analysis allows us to "determine objectively 'the amount of force that is necessary in a particular situation.' " *Deorle, 272 F.3d at 1280* (quoting *Graham, 490 U.S. at 396-97*). Viewing the facts in the light most favorable to Bryan, the totality of the circumstances here did not justify the deployment of the Taser X26.

HN9 The "most important" factor under *Graham* is whether the suspect posed an "immediate threat to the safety of the officers or others." *Smith v. City of Hemet, 394 F.3d 689, 702 (9th Cir. 2005)* (en banc) (quoting *Chew, 27 F.3d at 1441*). "A simple statement by an officer that he fears for his safety or the safety others is not enough; there must be objective factors to justify such a concern." *Deorle, 272 F.3d at 1281*. The **[**16]** district court correctly concluded that Bryan's volatile, erratic conduct could lead an officer to be wary. While Bryan's behavior created something of an unusual situation, this does not, by itself, justify the use of significant force. "***HN10*** A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Id.* Rather, the objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public.

We agree with the district court that Bryan did not pose an immediate threat to Officer MacPherson or bystanders despite his unusual behavior. It is undisputed that Bryan was unarmed, and, as Bryan was only dressed in tennis shoes and boxer shorts, it should have been apparent that he was unarmed. *Cf. id. at 1281* ("Deorle was wearing no shirt or shoes, only a pair of cut-off jeans shorts. There was nowhere for him to secrete any weapons."). Although Bryan had shouted expletives to himself while pulling his car over and had **[*827]** taken to shouting gibberish, and more expletives, outside his car, at no point did he level a physical or verbal threat **[**17]** against Officer MacPherson. *See Smith, 394 F.3d at 702-03* (recognizing that although the victim was shouting expletives, there was no threat leveled against the

officer). Bryan was standing, without advancing, fifteen to twenty-five feet away from Officer MacPherson between the door and body of the car. We reject Officer MacPherson's contention that Bryan constituted a threat by taking a step in Officer MacPherson's direction. First, when explicitly asked if he "[took] a step out of the car" or a "step out away from the car," Bryan testified "no." There is, therefore, a genuine issue of fact on this point, one that, on this procedural posture, we must resolve in Bryan's favor and conclude that Bryan did not advance towards the officer. [8] Second, even if Bryan had taken a single step toward Officer MacPherson, this would not have rendered him an immediate threat justifying an intermediate level of force, as he still would have been roughly nineteen to twenty-four feet away from Officer MacPherson, by the officer's own estimate.

Not only was Bryan standing, unarmed, at a distance of fifteen to twenty-five feet, but the physical evidence demonstrates that Bryan was not even facing Officer MacPherson when he was shot: One of the taser probes lodged in the side of Bryan's arm, rather than in his chest, and the location of the blood on the pavement indicates that he fell away from the officer, rather than towards him. [9] An unarmed, stationary individual, facing away from an officer at a distance of fifteen to twenty-five feet is far from an "immediate threat" to that officer. Nor was Bryan's erratic, but nonviolent, behavior a potential threat to anyone else, as there is no indication that there were pedestrians nearby or traffic on the street at the time of the incident. [10] Finally, while confronting Bryan, Officer MacPherson had unholstered and charged his X26, placing him in a position to respond immediately to any **[**19]** change in the circumstances. The circumstances here show that Officer MacPherson was confronted by, at most, a disturbed and upset young man, not an immediately threatening one.

Officer MacPherson relies heavily on the Eleventh Circuit opinion in *Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004)*, which addressed the use of a taser during the arrest of an aggressive, argumentative individual. Although we do not adopt *Draper* as the law of **[**20]** this circuit, the present case is clearly distinguishable from the **[*828]** one before the Eleventh Circuit. Unlike Bryan, who was yelling gibberish and gave no sign of hearing or understanding Officer MacPherson's orders, it was undisputed in *Draper* that Draper heard and understood the officer's commands, and not only failed to comply, but engaged the officer in an increasingly heated argument. *Id. at 1273*. Four times the officer asked Draper to retrieve paperwork from the cab of his truck and four times Draper heard the officer, turned toward the truck to comply, but then turned around, walked back toward the officer and loudly accused the officer of "harassing" and "disrespecting" him, displaying a growing belligerence. *Id.* It was not until the fifth time that the officer requested the paperwork and Draper refused to comply, yelled at the officer, and paced toward him in agitation that the officer resorted to the taser. *Id.* The Eleventh Circuit determined that a verbal arrest command (when Draper had refused to comply with the first five commands) accompanied by an attempt to physically handcuff Draper "in these particular circumstances, may well have or would likely have escalated a tense **[**21]** and difficult situation into a serious physical struggle, in which either Draper or [the officer] would be seriously hurt." *Id. at 1278*.

Bryan never addressed, let alone argued with, Officer MacPherson once he left his car. In addition, whereas Bryan remained stationary at a distance of approximately twenty feet, or at most took a single step forward, Draper was located close to the officer and pacing in an agitated fashion while arguing with him. Id. Thus, the officer in *Draper* was confronting a belligerent, argumentative individual who was angrily pacing within feet of his position. Officer MacPherson, by contrast, was confronted with a half naked, unarmed, stationary, apparently disturbed individual shouting gibberish at a distance of approximately twenty feet. The only similarity to the factual circumstances in *Draper* is that both Draper and Bryan were stopped for a traffic violation, were loud, and were tasered by the police.

The severity of Bryan's purported offenses "provide[ ] little, if any, basis for [Officer MacPherson's] use of physical force." *Smith, 394 F.3d at 702*. It is undisputed that Bryan's initial "crime" was a mere traffic infraction—failing to wear a

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[8] Counsel for Officer MacPherson argued that there is no genuine issue regarding whether Bryan took a step towards Officer MacPherson on the basis of Bryan's response **[**18]** to the question of "Did you move your feet in any way?" Bryan answered, "I don't think so." There are, however, any number of ways one can move one's feet without taking a "step." Because Bryan specifically denied taking a step when expressly asked, we find a genuine issue exists as to this fact.

[9] Officer MacPherson's deposition testimony only bolsters this conclusion. He testified that Bryan fell "faced forward" onto the pavement while Bryan similarly testified that he fell straight forward.

[10] Officer MacPherson testified in his deposition that the intersection where he tasered Bryan does not have a lot of traffic on it early on Sunday mornings and that he did not remember the presence of any traffic on the specific morning in question. Other than Bryan, his younger brother, and Officer MacPherson, the record indicates that the only individuals near the scene were an individual playing tennis nearby and a jogger located across the street. Their declarations indicate that they were fifty to seventy-five feet and forty feet away, respectively.

seatbelt—punishable [**22] by a fine. ***HN11*** Traffic violations generally will not support the use of a significant level of force. *See* Deville v. Marcantel, 567 F.3d 156, 167 (5th Cir. 2009) ("Deville was stopped for a minor traffic violation . . . making the need for force substantially lower than if she had been suspected of a serious crime."). Officer MacPherson also claims that he reasonably believed Bryan had committed three misdemeanors—resisting a police officer, failure to comply with a lawful order, and using or being under the influence of any controlled substance [11] — and that these constitute "serious —and dangerous—criminal activity." We disagree with Officer MacPherson's assessment. ***HN12*** While "the commission of a misdemeanor offense is 'not to be taken lightly,' it militates against finding the force used to effect an arrest reasonable where the suspect was also nonviolent and 'posed no threat to the safety of the officers [*829] or others.' " Headwaters, 240 F.3d at 1204 (quoting Hammer v. Gross, 932 F.2d 842, 846 (9th Cir. 1991)). None of the offenses for which Bryan was cited or of which he was suspected is inherently dangerous or violent, and as already discussed, Bryan posed little to no safety threat. *Cf.* [**23] Parker v. Gerrish, 547 F.3d 1, 9 (1st Cir. 2008) ("Though driving while intoxicated is a serious offense, it does not present a risk of danger to the arresting officer that is presented when an officer confronts a suspect engaged in an offense like robbery or assault."). Therefore, there was no substantial government interest in using significant force to effect Bryan's arrest for these misdemeanor violations that even the State of California has determined are minor. [12] *Cf.* Miller v. Clark County, 340 F.3d 959, 964 (9th Cir. 2003) (finding a felony to be "by definition a crime deemed serious by the state").

Officer MacPherson now argues that use of the taser was justified because he believed Bryan may have been mentally ill and thus subject to detention. To the contrary: if Officer MacPherson believed Bryan was mentally disturbed he should have made greater effort to take control of the situation through less intrusive means. As we have held, ***HN16*** "[t]he problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense." Deorle, 272 F.3d at 1282-83. Although we have refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals, [**25] we have found that even "when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual." Id. at 1283. The same reasoning applies to intermediate levels of force. A mentally ill individual is in need of a doctor, not a jail cell, and in the usual case —where such an individual is neither a threat to himself nor to anyone else—the government's interest in deploying force to detain him is not as substantial as its interest in deploying that force to apprehend a dangerous criminal. Moreover, the purpose of detaining a mentally ill individual is not to punish him, but to help him. The government has an important interest in providing assistance to a person in need of psychiatric care; thus, the use of force that may be justified by that interest necessarily differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community. Thus, whether Officer MacPherson believed that Bryan had committed a variety of [**26] nonviolent misdemeanors or that Bryan was mentally ill, this Graham factor does not support the deployment of an intermediate level of force.

Turning to Bryan's "resistance," we note that Bryan in fact complied with every command issued by Officer MacPherson except the one he asserts he did not hear—to remain in the car. Even if Bryan failed to comply with the command to remain [*830] in his vehicle, such noncompliance does not constitute "active resistance" supporting a substantial use of force. Following the Supreme Court's instruction in *Graham*, we have drawn a distinction between passive and active resistance. *See* Forrester, 25 F.3d at 805 (finding that protestor's "remaining seated, refusing to move, and refusing to bear weight" despite police orders to the contrary constituted "passive resistance"); *see also* Headwaters, 276 F.3d at 1130-31 (finding that protestors, who were chained together with devices and refused to exit a building when ordered, passively resisted).

By shouting gibberish and hitting himself in the quadriceps,

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[11] ***HN13*** Cal. Veh. Code § 2800(a) (making it a misdemeanor to willfully fail or refuse to comply with an order of a peace officer); ***HN14*** Cal. Health & Safety Code § 11550 (making it unlawful to "use, or be under the influence of any controlled substance"); ***HN15*** Cal. Penal Code § 148 (punishing every individual "who willfully resists, delays, or obstructs any public officer . . . in the discharge . . . of his or her office" with a fine up to $1000 or up to 1 year in a county jail).

[12] Our sister circuits have likewise concluded that misdemeanors are relatively minor and will generally not support the [**24] deployment of significant force. *See, e.g.*, Fogarty v. Gallegos, 523 F.3d 1147, 1160 (10th Cir. 2008); Reese v. Herbert, 527 F.3d 1253, 1274 (11th Cir. 2008). In addition, we have previously suggested that felonies not involving violence provide limited support for the use of significant force under *Graham*. *See* Meredith, 342 F.3d at 1063; Chew, 27 F.3d at 1442-43 & n.9.

Bryan may not have been perfectly passive. "Resistance," however, should not be understood as a binary state, with resistance being either completely passive or **[**27]** active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer. We must eschew ultimately unhelpful blanket labels and evaluate the nature of any resistance in light of the actual facts of the case. For example, in *Smith v. City of Hemet*, we confronted an individual who "continually ignored" officer commands to remove his hands from his pockets and to not re-enter his home. In addition, he "physically resisted . . . for only a brief time." *394 F.3d at 703*. Although Smith was not perfectly passive in the encounter, we stated that it did not appear "that Smith's resistance was particularly bellicose" and thus found that this factor provided little support for a use of significant force. *Id.* ***HN17*** Even purely passive resistance can support the use of some force, but the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance.

Reviewing Bryan's conduct, we conclude that even if we were to consider his degree of compliance solely from the officer's subjective point of view, this case would be closer to the passive resistance we confronted **[**28]** in *Forrester* and *Headwaters* or the minor resistance in *Smith*, than it would be to truly active resistance. The only resistance Officer MacPherson testified to was a failure to comply with his order that Bryan remain in his car. Shouting gibberish and hitting one's quadriceps is certainly bizarre behavior, but such behavior is a far cry from actively struggling with an officer attempting to restrain and arrest an individual. *Compare Abdullahi v. City of Madison, 423 F.3d 763, 776 (7th Cir. 2005)* (involving an arrestee swinging a belt at an officer and "strenuously resist[-ing]" as the police attempted to handcuff him); *McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1241-42 (11th Cir. 2003)* (involving an arrestee engaging and advancing on officers with a stick); *Jackson v. City of Bremerton, 268 F.3d 646, 653 (9th Cir. 2001)* (involving an individual interfering with an attempted arrest of an individual by engaging the officer in a "melee"). As in *Smith*, Bryan's "resistance" was not "particularly bellicose." *Smith, 394 F.3d at 703*. Indeed, when we view the facts in the light most favorable to Bryan, as we must at this stage of the proceedings, his conduct does not constitute resistance **[**29]** at all. [13]

[13] The jury may credit Bryan's testimony that he did not hear the officer's order to remain in the car. The evidence suggests that Bryan thought the officer would again approach from the passenger side of his car and that Bryan turned to face that way. That the officer was instead yards away in the other direction may have prevented Bryan from hearing the commands.

[*831] Two additional considerations militate against finding Officer MacPherson's use of force reasonable. First, it is undisputed that Officer MacPherson failed to warn Bryan that he would be shot with the X26 if he did not comply with the order to remain in his car. [14] We recognized in *Deorle* that ***HN18*** police officers normally provide such warnings where feasible, even when the force is less than deadly, and that the failure to give such a warning is a factor to consider. *See 272 F.3d at 1284*; *see also Jackson, 268 F.3d at 653* (finding that the officer's "safety interest" "increased further when the group was warned by police that a chemical irritant would be used if they did not move back . . . and the group refused to comply"). Here, it was feasible to give a warning that the use of force was imminent if Bryan did not comply. **[**30]** While a warning to Bryan may or may not have caused him to comply, there was "ample time to give that order or warning and no reason whatsoever not to do so." *Deorle, 272 F.3d at 1284*.

Second, we have held that ***HN19*** police are "required to consider '[w]hat other tactics if any were available' to effect the arrest." *Headwaters, 240 F.3d at 1204* (quoting *Chew, 27 F.3d at 1443*). [15] Officer MacPherson argues that there were no less intrusive alternatives available to apprehend Bryan. Objectively, however, there were clear, reasonable, and less intrusive alternatives. Officer MacPherson knew additional officers were en route to the scene. He was, or should have been, aware that the arrival of those officers would change the tactical calculus confronting him, likely opening up additional ways to resolve the situation without the need for an intermediate **[**31]** level of force. Thus, while by no means dispositive, that Officer MacPherson did not provide a warning before deploying the X26 and apparently did not consider less intrusive means of effecting Bryan's arrest factor significantly into our *Graham* analysis.

3. Balancing the Competing Interests

Our review of the *Graham* factors reveals that the government

[14] Officer MacPherson now argues that he did warn Bryan. However, Officer MacPherson's own testimony belies this claim. Officer MacPherson has consistently testified that he repeatedly ordered Bryan to remain in his vehicle. This clearly constitutes a command, but it hardly warns him that if he failed to return to his car he would be shot with a taser.

[15] We do not challenge the settled principle that ***HN20*** police officers need not employ the "least intrusive" degree of force possible. *See Gregory v. County of Maui, 523 F.3d 1103, 1107 (9th Cir. 2008)* (citing *Forrester, 25 F.3d at 807-08*). We merely recognize the equally settled principle that officers must *consider* less intrusive methods of effecting the arrest and that the presence of feasible alternatives is a *factor* to include in our analysis.

had, at best, a minimal interest in the use of force against Bryan. This interest is insufficient to justify the use of an intermediate level of force against an individual. We are cognizant of the Supreme Court's command to evaluate ***HN21*** an officer's actions "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham, 490 U.S. at 396*. We also recognize **[**32]** the reality that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id. at 397*. This does not mean, however, that a *Fourth Amendment* violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we **[*832]** can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is " 'objectively reasonable' in light of the facts and circumstances confronting them" without regard for an officer's subjective intentions. *Id.*

We thus conclude that the intermediate level of force employed by Officer MacPherson against Bryan was excessive in light of the governmental interests at stake. Bryan never attempted to flee. He was clearly unarmed and was standing, without advancing in any direction, next to his vehicle. Officer MacPherson was standing approximately twenty feet away observing Bryan's stationary, bizarre tantrum with his X26 drawn and charged. **[**33]** Consequently, the objective facts reveal a tense, but static, situation with Officer MacPherson ready to respond to any developments while awaiting backup. Bryan was neither a flight risk, a dangerous felon, nor an immediate threat. Therefore, there was simply "no immediate need to subdue [Bryan]" before Officer MacPherson's fellow officers arrived or less-invasive means were attempted. *Deorle, 272 F.3d at 1282*; *see also, Blankenhorn v. City of Orange, 485 F.3d 463, 480 (9th Cir. 2007)* (" '[I]t is the need for force which is at the heart of the *Graham* factors' " (quoting *Liston v. County of Riverside, 120 F.3d 965, 976 (9th Cir. 1997)*)). Officer MacPherson's desire to quickly and decisively end an unusual and tense situation is understandable. His chosen method for doing so violated Bryan's constitutional right to be free from excessive force.

B. Did Officer MacPherson Violate Bryan's Clearly Established Rights?

Having concluded that Officer MacPherson's actions violated Bryan's *Fourth Amendment* rights, we next must ask whether his conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*. **[**34]** ***HN22*** If an officer's use of force was "premised on a *reasonable* belief that such force was lawful," the officer will be granted immunity from suit, notwithstanding the fact excessive force was deployed. *Deorle, 272 F.3d at 1285*; *see also Saucier, 533 U.S. at 202* (asserting that the qualified immunity analysis asks "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted"). We must, therefore, turn to the state of the law at the time Officer MacPherson tasered Bryan to determine whether Officer MacPherson reasonably could have believed his use of the taser against Bryan was constitutional. *See Saucier, 533 U.S. at 202*.

All of the factors articulated in *Graham*—along with our recent applications of *Graham* in *Deorle* and *Headwaters* — placed Officer MacPherson on fair notice that an intermediate level of force was unjustified. *See Fogarty v. Gallegos, 523 F.3d 1147, 1162 (10th Cir. 2008)* ("Considering that under Fogarty's version of events each of the *Graham* factors lines up in his favor, this case is not so close that our precedents would fail to portend the constitutional unreasonableness of defendants' alleged actions."); *Boyd v. Benton County, 374 F.3d 773, 781 (9th Cir. 2004)* **[**35]** (asking whether "a reasonable officer would have had fair notice that the force employed was unlawful"). Officer MacPherson stopped Bryan for the most minor of offenses. There was no reasonable basis to conclude that Bryan was armed. He was twenty feet away and did not physically confront the officer. The facts suggest that Bryan was not even facing Officer **[*833]** MacPherson when he was shot. A reasonable officer in these circumstances would have known that it was unreasonable to deploy intermediate force.

We do not need to find closely analogous case law to show that a right is clearly established. *Moreno v. Baca, 431 F.3d 633, 641 (9th Cir. 2005)*; *see also Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)* (***HN23*** [O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."); *Oliver, 586 F.3d at 907* (finding that a right can be clearly established where the officer's conduct "lies so obviously at the very core of what the *Fourth Amendment* prohibits that the unlawfulness of the conduct was readily apparent to [the officer], notwithstanding the lack of factspecific case law"). However, as of July 24, 2005, there was **[**36]** no Supreme Court decision or decision of our court addressing whether the use of a taser, such as the Taser X26, in dart mode constituted an intermediate level of force. Indeed, before that date, the only statement we had made regarding tasers in a published opinion was that they were among the "variety of non-lethal 'pain compliance' weapons used by police forces." *San Jose Charter of Hells Angels Motorcycle Club, 402 F.3d at 969 n.8*. And, as the Eighth Circuit has noted, "[t]he Taser is a relatively new implement of force, and case law related to the

Taser is developing." *Brown v. City of Golden Valley, 574 F.3d 491, 498 n.5 (8th Cir. 2009)*. Two other panels have recently, in cases involving different circumstances, concluded that the law regarding tasers is not sufficiently clearly established to warrant denying officers qualified immunity. *Mattos v. Agarano, 590 F.3d 1082, 1089-90 (9th Cir. 2010)*; *Brooks v. City of Seattle, 599 F.3d 1018, 1031 n.18 (9th Cir. 2010)*.

Based on these recent statements regarding the use of tasers, and the dearth of prior authority, we must conclude that a reasonable officer in Officer MacPherson's position could have made a reasonable mistake of law **[**37]** regarding the constitutionality of the taser use in the circumstances Officer MacPherson confronted in July 2005. Accordingly, Officer MacPherson is entitled to qualified immunity. *See Ctr. for Bio-Ethical Reform v. Los Angeles County Sheriff Dept., 533 F.3d 780, 794 (9th Cir. 2008)*.

CONCLUSION

Viewing the facts, as we must, in the light most favorable to Bryan, we conclude, for the purposes of summary judgment, that Officer MacPherson used unconstitutionally excessive force. However, a reasonable officer confronting the circumstances faced by Officer MacPherson on July 24, 2005, could have made a reasonable mistake of law in believing the use of the taser was reasonable. Accordingly we **REVERSE** the district court's denial of summary judgment on the basis of qualified immunity.

REVERSED.

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City & Cnty. of San Francisco v. Sheehan

Supreme Court of the United States

March 23, 2015, Argued; May 18, 2015, Decided

No. 13-1412

Reporter
135 S. Ct. 1765; 191 L. Ed. 2d 856; 2015 U.S. LEXIS 3200; 83 U.S.L.W. 4303; 25 Fla. L. Weekly Fed. S 254

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, et al., Petitioners v. TERESA ***SHEEHAN***

Subsequent History: On remand at *Sheehan v. City & Cnty. of San Francisco, 2015 U.S. App. LEXIS 12096 (9th Cir., July 14, 2015)*

Prior History: [***1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
***Sheehan** v. City & County of San Francisco, 743 F.3d 1211, 2014 U.S. App. LEXIS 3321 (9th Cir. Cal., 2014)*

Disposition: Certiorari dismissed in part; *743 F. 3d 1211*, reversed in part and remanded.

Core Terms

disability, accommodation, arrest, door, violent, qualified immunity, officers', mentally ill, questions, armed, public entity, applies, weapon, police officer, deadly, knife, first question, circumstances, confrontation, improvidently, services, kill, cases, qualified individual, second question, requires, training, illness, merits, subdue

Case Summary

Overview

HOLDINGS: [1]-Where an arrestee, who was suffering from a mental illness, alleged that a city violated the Americans with Disabilities Act of 1990, *42 U.S.C.S. § 12101 et seq.*, when officers subdued her in a manner that did not reasonably accommodate her disability, the Supreme Court dismissed the question presented as improvidently granted because the city chose to rely on a different argument that was not passed on below; [2]-Regarding the officers' decision to reopen the arrestee's door rather than attempt to accommodate her disability, the officers were entitled to qualified immunity as to her *Fourth Amendment* claim because the officers' failure to accommodate her illness did not violate clearly established law since competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales.

Outcome

First question dismissed as improvidently granted, judgment reversed in part, and case remanded for further proceedings. 6-2 decision; 1 concurrence in part and dissent in part.

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN1 Where a case arises in a summary judgment posture, a court views the facts in the light most favorable to the nonmoving party.

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > Scope

HN2 Title II of the Americans with Disabilities Act of 1990, *42 U.S.C.S. § 12101 et seq.*, commands that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. *42 U.S.C.S. § 12132*.

Civil Procedure > US Supreme Court Review > General Overview

HN3 The Supreme Court does not ordinarily decide questions that were not passed on below.

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > Scope

HN4 42 U.S.C.S. § 12132 provides that a public entity may not exclude a qualified individual with a disability from participating in, and may not deny that individual the benefits of, the services, programs, or activities of a public entity. 42 U.S.C.S. § 12132. This language would apply to an arrest if an arrest is an activity in which the arrestee participates or from which the arrestee may benefit. This same provision also commands that no qualified individual with a disability shall be subjected to discrimination by any public entity. 42 U.S.C.S. § 12132. This part of the statute would apply to an arrest if the failure to arrest an individual with a mental disability in a manner that reasonably accommodates that disability constitutes discrimination. 42 U.S.C.S. § 12132.

Civil Rights Law > ... > Protection of Disabled Persons > Americans With Disabilities Act > Scope

HN5 Only public entities are subject to Title II of the Americans with Disabilities Act of 1990, 42 U.S.C.S. § 12101 et seq.

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > Federal Court Decisions

HN6 Because certiorari jurisdiction exists to clarify the law, its exercise is not a matter of right, but of judicial discretion. Sup. Ct. R. 10.

Civil Procedure > US Supreme Court Review > General Overview

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN7 Because of the importance of qualified immunity to society as a whole, the Supreme Court often corrects lower courts when they wrongly subject individual officers to liability.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN8 Public officials are immune from suit under 42 U.S.C.S. § 1983 unless they have violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent placed the statutory or constitutional question beyond debate. This exacting standard gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exigent Circumstances

HN9 Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exigent Circumstances

HN10 Where two entries are part of a single, continuous search or seizure, the officers are not required to justify the continuing emergency with respect to the second entry.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN11 The *Fourth Amendment* standard is reasonableness, and it is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others. This is true even when, judged with the benefit of hindsight, the officers may have made some mistakes. The United States Constitution is not blind to the fact that police officers are often forced to make split-second judgments.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Civil Procedure > US Supreme Court Review > General Overview

HN12 In the qualified immunity context, where a defendant devotes scant briefing to the constitutional question, the Supreme Court, of course, can decide the constitutional question anyway.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN13 Graham holds only that the objective reasonableness test applies to excessive-force claims under the *Fourth Amendment*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN14 The Supreme Court has repeatedly told courts, and the United States Court of Appeals for the Ninth Circuit in particular, not to define clearly established law at a high level of generality. Qualified immunity is no immunity at all if clearly established law can simply be defined as the right to

be free from unreasonable searches and seizures.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN15 Even if officers misjudge the situation, an arrestee cannot establish a *Fourth Amendment* violation based merely on bad tactics that result in a deadly confrontation that could have been avoided. Courts must not judge officers with the 20/20 vision of hindsight.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN16 Even if an officer acts contrary to her training, that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as a reasonable officer could have believed that his conduct was justified, a plaintiff cannot avoid summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless. In close cases, a jury does not automatically get to second-guess these life and death decisions, even though a plaintiff has an expert and a plausible claim that the situation could better have been handled differently.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN17 In the qualified immunity context, a robust consensus of cases of persuasive authority may itself clearly establish the federal right a respondent alleges.

Lawyers' Edition Display

Decision

[856]** Police officers held entitled to qualified immunity from *42 U.S.C.S. § 1983* action by mentally ill arrestee seeking recovery for injuries, as *Fourth Amendment* right to accommodation of arrestee's disability, regardless of whether existing, was not clearly established at the time of arrest.

Summary

Overview: HOLDINGS: [1]-Where an arrestee, who was suffering from a mental illness, alleged that a city violated the Americans with Disabilities Act of 1990, *42 U.S.C.S. § 12101 et seq.*, when officers subdued her in a manner that did not reasonably accommodate her disability, the Supreme Court dismissed the question presented as improvidently granted because the city chose to rely on a different argument that was not passed on below; [2]-Regarding the officers' decision to reopen the arrestee's door rather than attempt to accommodate her disability, the officers were entitled to qualified immunity as to her *Fourth Amendment* claim because the officers' failure to accommodate her illness did not violate clearly established law since competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales.

Outcome: First question dismissed as improvidently granted, judgment reversed in part, and case remanded for further proceedings. 6-2 decision; 1 concurrence in part and dissent in part.

Headnotes

APPEAL §1283.5 > SUMMARY JUDGMENT -- VIEW OF FACTS > Headnote:

LEdHN[1] [1]

Where a case arises in a summary judgment posture, a court views the facts in the light most favorable to the nonmoving party. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

CIVIL RIGHTS §4.8 > AMERICANS WITH DISABILITIES ACT > Headnote:

LEdHN[2] [2]

Title II of the Americans with Disabilities Act of 1990, *42 U.S.C.S. § 12101 et seq.*, commands that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. *42 U.S.C.S. § 12132*. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

APPEAL §1104 > QUESTIONS NOT PASSED ON BELOW > Headnote:

LEdHN[3] [3]

The Supreme Court does not ordinarily decide questions that were not passed on below. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

CIVIL RIGHTS §4.8 > INDIVIDUAL WITH DISABILITY -- ARREST > Headnote:

LEdHN[4] [4]

42 U.S.C.S. § 12132 provides that a public entity may not exclude a qualified individual with a disability from participating in, and may not deny that individual the benefits of, the services, programs, or activities of a public entity. 42 U.S.C.S. § 12132. This language would apply to an arrest if an arrest is an activity in which the arrestee participates or from which the arrestee may benefit. This same provision also commands that no qualified individual with a disability shall be subjected to discrimination by any public entity. 42 U.S.C.S. § 12132. This part of the statute would apply to an arrest if the failure to arrest an individual with a mental disability in a manner that reasonably accommodates that disability constitutes discrimination. 42 U.S.C.S. § 12132. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

CIVIL RIGHTS §4.8 > AMERICANS WITH DISABILITIES ACT -- PUBLIC ENTITIES > Headnote:

LEdHN[5] [5]

Only public entities are subject to Title II of the Americans with Disabilities Act of 1990, 42 U.S.C.S. § 12101 et seq. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

APPEAL §910.1 > CERTIORARI -- DISCRETION > Headnote:

LEdHN[6] [6]

Because certiorari jurisdiction exists to clarify the law, its exercise is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

APPEAL §1646 > QUALIFIED IMMUNITY -- CORRECTING LOWER COURTS > Headnote:

LEdHN[7] [7]

Because of the importance of qualified immunity to society as a whole, the Supreme Court often corrects lower courts when they wrongly subject individual officers to liability. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

PUBLIC OFFICERS §56 > 42 U.S.C.S. 1983 -- QUALIFIED IMMUNITY > Headnote:

LEdHN[8] [8]

Public officials are immune from suit under 42 U.S.C.S. § 1983 unless they have violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent placed the statutory or constitutional question beyond debate. This exacting standard gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

SEARCH AND SEIZURE §25.2 > WARRANTLESS ENTRY > Headnote:

LEdHN[9] [9]

Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

SEARCH AND SEIZURE §25.2 > SECOND WARRANTLESS ENTRY > Headnote:

LEdHN[10] [10]

Where two entries are part of a single, continuous search or seizure, the officers are not required to justify the continuing emergency with respect to the second entry. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

SEARCH AND SEIZURE §5 SEARCH AND SEIZURE §25.2 > REASONABLENESS -- DANGER > Headnote:

LEdHN[11] [11]

The *Fourth Amendment* standard is reasonableness, and it is reasonable for police to move quickly if delay would gravely endanger their lives or the lives of others. This is true even when, judged with the benefit of hindsight, the officers may have made some mistakes. The United States Constitution is not blind to the fact that police officers are often forced to make split-second judgments. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

COURTS §135 > QUALIFIED IMMUNITY -- DECISION > Headnote:

LEdHN[12] [12]

In the qualified immunity context, where a defendant devotes scant briefing to the constitutional question, the Supreme Court, of course, can decide the constitutional question anyway. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

SEARCH AND SEIZURE §11 > EXCESSIVE FORCE -- TEST > Headnote:

LEdHN[13] [13]

Graham holds only that the objective reasonableness test applies to excessive-force claims under the *Fourth Amendment*. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

PUBLIC OFFICERS §56 > QUALIFIED IMMUNITY -- CLEARLY ESTABLISHED LAW > Headnote:

LEdHN[14] [14]

The Supreme Court has repeatedly told courts, and the United States Court of Appeals for the Ninth Circuit in particular, not to define clearly established law at a high level of generality. Qualified immunity is no immunity at all if clearly established law can simply be defined as the right to be free from unreasonable searches and seizures. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

ARREST §1 > POLICE TACTICS > Headnote:

LEdHN[15] [15]

Even if officers misjudge the situation, an arrestee cannot establish a *Fourth Amendment* violation based merely on bad tactics that result in a deadly confrontation that could have been avoided. Courts must not judge officers with the 20/20 vision of hindsight. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

PUBLIC OFFICERS §56SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > QUALIFIED IMMUNITY -- REASONABLE BELIEF > Headnote:

LEdHN[16] [16]

Even if an officer acts contrary to her training, that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as a reasonable officer could have believed that his conduct was justified, a plaintiff cannot avoid summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless. In close cases, a jury does not automatically get to second-guess these life and death decisions, even though a plaintiff has an expert and a plausible claim that the situation could better have been handled differently. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

EVIDENCE §904.2 > ESTABLISHING FEDERAL RIGHT > Headnote:

LEdHN[17] [17]

In the qualified immunity context, a robust consensus of cases of persuasive authority may itself clearly establish the federal right a respondent alleges. (Alito, J., joined by Roberts, Ch. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ.)

Syllabus

[860]** **[*1767]** Respondent ***Sheehan*** lived in a group home for individuals with mental illness. After ***Sheehan*** began acting erratically and threatened to kill her social worker, the City and County of San Francisco (San Francisco) dispatched police officers Reynolds and Holder to help escort ***Sheehan*** to a facility for temporary evaluation and treatment. When the officers first entered ***Sheehan***'s room, she grabbed a knife and **[*1768]** threatened to kill them. They retreated and closed the door. Concerned about what ***Sheehan*** might do behind the closed door, and without considering if they could accommodate her disability, the officers reentered her room. ***Sheehan***, knife in hand, again confronted them. After pepper spray proved ineffective, the officers shot ***Sheehan*** multiple times. ***Sheehan*** later sued petitioner San Francisco for, among other things, violating Title II of the Americans with Disabilities Act of 1990 (ADA) by arresting her without accommodating her disability. See *42 U. S. C. §12132*. She also sued petitioners Reynolds and Holder in their personal capacities under *42 U. S. C. §1983*, claiming that they **[***2]** violated her *Fourth Amendment* rights. The District Court granted summary judgment because it concluded that officers making an arrest are not required to determine whether their actions would comply with the ADA before protecting themselves and others, and also that Reynolds and Holder did not violate the Constitution. Vacating in part, the Ninth Circuit held that the ADA applied and that a jury must decide whether San Francisco should have accommodated ***Sheehan***. The court also held that Reynolds and Holder are not entitled to qualified immunity because it is clearly established that, absent an objective need for immediate entry, officers cannot forcibly enter the home of an armed, mentally ill person who has been acting irrationally and has threatened anyone who enters.

Held:

1. The question whether §12132 "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody," Pet. for Cert. i, is dismissed as improvidently granted. Certiorari was granted on the understanding that San Francisco would argue that Title II of the ADA does not apply when an officer faces an armed and dangerous individual. Instead, San Francisco [***3] merely argues that ***Sheehan*** was not "qualified" for an accommodation, §12132, because she "pose[d] a direct threat to the health [**861] or safety of others," which threat could not "be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services," 28 CFR §§35.139(a), 35.104. This argument was not passed on by the court below. The decision to dismiss this question as improvidently granted, moreover, is reinforced by the parties' failure to address the related question whether a public entity can be vicariously liable for damages under Title II for an arrest made by its police officers. Pp. ____ - ____, 191 L. Ed. 2d, at 865-867.

2. Reynolds and Holder are entitled to qualified immunity from liability for the injuries suffered by ***Sheehan***. Public officials are immune from suit under 42 U. S. C. §1983 unless they have "violated a statutory or constitutional right that was ' " 'clearly established' " ' at the time of the challenged conduct," Plumhoff v. Rickard, 572 U.S. ____, ____, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069, an exacting standard that "gives government officials breathing room to make reasonable but mistaken judgments," Ashcroft v. al-Kidd, 563 U.S. ____, ____, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1160. The officers did not violate the *Fourth Amendment* when they opened ***Sheehan***'s door the first time, and there is no doubt that they could have opened her door the second time without [***4] violating her rights had ***Sheehan*** not been disabled. Their use of force was also reasonable. The only question therefore is whether they violated the *Fourth Amendment* when they decided to reopen ***Sheehan***'s door rather than attempt to accommodate her disability. Because any such *Fourth Amendment* right, even assuming it exists, was not clearly established, Reynolds and [*1769] Holder are entitled to qualified immunity. Likewise, an alleged failure on the part of the officers to follow their training does not itself negate qualified immunity where it would otherwise be warranted. Pp. ____ - ____, 191 L. Ed. 2d, at 867-872.

Certiorari dismissed in part; 743 F. 3d 1211, reversed in part and remanded.

Counsel: Christine Van Aken argued the cause for petitioners.

Ian H. Gershengorn argued the cause for petitioners as amicus curiae, by special leave of court.

Leonard Feldman argued the cause for respondent.

Judges: Alito, J., delivered the opinion of the Court, in which ROBERTS, C. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ., joined. Scalia, J., filed an opinion concurring in part and dissenting in part, in which Kagan, J., joined. Breyer, J., took no part in the consideration or decision of the case.

Opinion by: Alito

Opinion

JUSTICE Alito delivered the opinion of the Court.

We granted certiorari to consider two questions relating to the manner in which San Francisco police officers arrested a woman who was suffering from a mental illness and had become violent. After reviewing the parties' submissions, [***5] we dismiss the first question as improvidently granted. We decide the second question and hold that the officers are entitled to qualified immunity because they did not violate any clearly established *Fourth Amendment* rights.

I

Petitioners are the City and County of San Francisco, California (San Francisco), and two police officers, Sergeant Kimberly Reynolds and Officer Kathrine Holder. Respondent is Teresa ***Sheehan***, a woman who suffers [**862] from a schizoaffective disorder. ***HN1 LEdHN LEdHN[1]*** [1] Because this case arises in a summary judgment posture, we view the facts in the light most favorable to ***Sheehan***, the nonmoving party. See, *e.g.*, Plumhoff v. Rickard, 572 U.S. ____, ____, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1062 (2014).

In August 2008, ***Sheehan*** lived in a group home for people dealing with mental illness. Although she shared common areas of the building with others, she had a private room. On August 7, Heath Hodge, a social worker who supervised the counseling staff in the building, attempted to visit ***Sheehan*** to conduct a welfare check. Hodge was concerned because ***Sheehan*** had stopped taking her medication, no longer spoke with her psychiatrist, and reportedly was no longer changing her clothes or eating. See 743 F. 3d 1211, 1218 (CA9 2014); App. 23-24.

Hodge knocked on ***Sheehan***'s door but received no answer. He then used a key to enter her [***6] room and found ***Sheehan*** on her bed. Initially, she would not respond [*1770]

to questions. But she then sprang up, reportedly yelling, "Get out of here! You don't have a warrant! I have a knife, and I'll kill you if I have to." Hodge left without seeing whether she actually had a knife, and ***Sheehan*** slammed the door shut behind him. See *743 F. 3d, at 1218*.

Sheehan, Hodge realized, required "some sort of intervention," App. 96, but he also knew that he would need help. Hodge took steps to clear the building of other people and completed an application to have ***Sheehan*** detained for temporary evaluation and treatment. See *Cal. Welf. & Inst. Code Ann. §5150* (West 2015 Cum. Supp.) (authorizing temporary detention of someone who "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled"). On that application, Hodge checked off boxes indicating that ***Sheehan*** was a "threat to others" and "gravely disabled," but he did not mark that she was a danger to herself. *743 F. 3d, at 1218*. He telephoned the police and asked for help to take ***Sheehan*** to a secure facility.

Officer Holder responded to police dispatch and headed toward the group home. When she arrived, Holder reviewed the temporary-detention application and spoke with [***7] Hodge. Holder then sought assistance from Sergeant Reynolds, a more experienced officer. After Reynolds arrived and was brought up to speed, Hodge spoke with a nurse at the psychiatric emergency services unit at San Francisco General Hospital who said that the hospital would be able to admit ***Sheehan***.

Accompanied by Hodge, the officers went to ***Sheehan***'s room, knocked on her door, announced who they were, and told ***Sheehan*** that "we want to help you." App. 36. When ***Sheehan*** did not answer, the officers used Hodge's key to enter the room. ***Sheehan*** reacted violently. She grabbed a kitchen knife with an approximately 5-inch blade and began approaching the officers, yelling something along the lines of "I am going to kill you. I don't need help. Get out." *Ibid.* See also *id.*, at 284 ("[Q.] Did you tell them I'll kill you if you don't get out of here? A. Yes"). The officers—who did not have their weapons drawn—"retreated and ***Sheehan*** closed the door, leaving ***Sheehan*** in her room and the officers and Hodge in the hallway." *743 F. 3d, at 1219*. The officers called for backup and sent Hodge downstairs to let in reinforcements when they arrived.

[**863] The officers were concerned that the door to ***Sheehan***'s room was closed. They worried that [***8] ***Sheehan***, out of their sight, might gather more weapons—Reynolds had already observed other knives in her room, see App. 228—or even try to flee through the back window, *id.*, at 227. Because ***Sheehan***'s room was on the second floor, she likely would have needed a ladder to escape. Fire escapes, however, are common in San Francisco, and the officers did not know whether ***Sheehan***'s room had such an escape. (Neither officer asked Hodge about a fire escape, but if they had, it seems he "probably" would have said there was one, *id.*, at 117). With the door closed, all that Reynolds and Holder knew for sure was that ***Sheehan*** was unstable, she had just threatened to kill three people, and she had a weapon. [1]

[*1771] Reynolds and Holder had to make a decision. They could wait for backup—indeed, they already heard sirens. Or they could quickly reenter the room and try to subdue ***Sheehan*** before more time elapsed. Because Reynolds believed that the situation "required [their] immediate attention," *id.*, at 235, the officers chose reentry. In making that decision, they did not pause to consider whether ***Sheehan***'s disability should be accommodated. See *743 F. 3d, at 1219*. The officers obviously knew that ***Sheehan*** was unwell, but in Reynolds' words, that was "a secondary issue" given that they were "faced with a violent woman who had already threatened to kill her social worker" and "two uniformed police officers." App. 235.

The officers ultimately decided that Holder—the larger officer—should push the door open while Reynolds used pepper spray on ***Sheehan***. With pistols drawn, the officers moved in. When ***Sheehan***, knife in hand, saw them, she again yelled for [***10] them to leave. She may also have again said that she was going to kill them. ***Sheehan*** is "not sure" if she threatened death a second time, *id.*, at 284, but "concedes that it was her intent to resist arrest and to use the knife," *743 F. 3d, at 1220*. In any event, Reynolds began pepper-spraying ***Sheehan*** in the face, but ***Sheehan*** would not drop the knife. When ***Sheehan*** was only a few feet away, Holder shot her twice, but she did not collapse. Reynolds then fired multiple shots. [2] After ***Sheehan*** finally fell, a third officer (who had

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[1] The officers also may have feared that another person was with ***Sheehan***. Reynolds testified that the officers had not been "able to do a complete assessment of the entire room." App. 38. ***Sheehan***, by contrast, testified during a deposition that the officers "could see . . . that no one else was in the room." *Id.*, at 279. Before the Ninth Circuit, ***Sheehan*** conceded that some of her deposition testimony "smacks of irrationality that begs the question whether any of it is credible." Brief for Appellant in No. 11-16401 (CA9), p. 41; [***9] see also Reply Brief in No. 11-16401, p. 17 (explaining that "the inherent inconsistences in her testimony cast suspicion over all of it"). We need not decide whether there is a genuine dispute of fact here because the officers' other, independent concerns make this point immaterial.

[2] There is a dispute regarding whether ***Sheehan*** was on the ground for the last shot. This dispute is not material: "Even if ***Sheehan*** was on the ground, she was certainly not subdued." ***743 F. 3d 1211, 1230 (CA9 2014)***.

just arrived) kicked the knife out of her hand. ***Sheehan*** survived.

Sometime later, San Francisco prosecuted ***Sheehan*** for assault with a deadly weapon, assault on a peace officer with a deadly weapon, and making criminal threats. The jury acquitted ***Sheehan*** of making threats but was unable to reach a verdict on the assault counts, and prosecutors decided not to retry her.

[864]** ***Sheehan*** then brought suit, alleging, among other things, that San Francisco violated the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, *42 U. S. C. §12101 et seq.*, by subduing **[***11]** her in a manner that did not reasonably accommodate her disability. She also sued Reynolds and Holder in their personal capacities under Rev. Stat. §1979, *42 U. S. C. §1983*, for violating her *Fourth Amendment* rights. In support of her claims, she offered testimony from a former deputy police chief, Lou Reiter, who contended that Reynolds and Holder fell short of their training by not using practices designed to minimize the risk of violence when dealing with the mentally ill.

The District Court granted summary judgment for petitioners. Relying on *Hainze v. Richards, 207 F. 3d 795 (CA5 2000)*, the court held that officers making an arrest are not required "to first determine whether their actions would comply with the ADA before protecting themselves and others." App. to Pet. for Cert. 80. The court also held that the officers did not violate the *Fourth Amendment*. The court wrote that the officers "had no way of knowing whether [***Sheehan***] might escape through a back window or fire escape, whether she might hurt herself, or whether there was anyone else in her room whom she might hurt." *Id.*, at 71. In addition, the court observed that Holder **[*1772]** did not begin shooting until it was necessary for her to do so in order "to protect herself" and that "Reynolds used deadly force only after she found that **[***12]** pepper spray was not enough force to contain the situation." *Id.*, at 75, 76-77.

On appeal, the Ninth Circuit vacated in part. Relevant here, the panel held that because the ADA covers public "services, programs, or activities," *§12132*, the ADA's accommodation requirement should be read to "to encompass 'anything a public entity does,'" *743 F. 3d, at 1232*. The Ninth Circuit agreed "that exigent circumstances inform the reasonableness analysis under the ADA," *ibid.*, but concluded that it was for a jury to decide whether San Francisco should have accommodated ***Sheehan*** by, for instance, "respect[ing] her comfort zone, engag[ing] in non-threatening communications and us[ing] the passage of time to defuse the situation rather than precipitating a deadly confrontation." *Id., at 1233*.

As to Reynolds and Holder, the panel held that their initial entry into ***Sheehan***'s room was lawful and that, after the officers opened the door for the second time, they reasonably used their firearms when the pepper spray failed to stop ***Sheehan***'s advance. Nonetheless, the panel also held that a jury could find that the officers "provoked" ***Sheehan*** by needlessly forcing that second confrontation. *Id., at 1216, 1229*. The panel further found that it was clearly established that an officer cannot "forcibly enter the home **[***13]** of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." *Id., at 1229*. Dissenting in part, Judge Graber would have held that the officers were entitled to qualified immunity.

San Francisco and the officers petitioned for a writ of certiorari and asked us to review two questions. We granted the petition. *574 U.S. ___, 135 S. Ct. 702, 190 L. Ed. 2d 434 (2014)*.

II

HN2 LEdHN[2] [2] Title II of the ADA commands **[**865]** that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *42 U. S. C. §12132*. The first question on which we granted review asks whether this provision "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. When we granted review, we understood this question to embody what appears to be the thrust of the argument that San Francisco made in the Ninth Circuit, namely that "'Title II *does not apply* to an officer's on-the-street responses to reported disturbances **[***14]** or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.'" Brief for Appellees in No. 11-16401 (CA9), p. 36 (quoting *Hainze, supra, at 801*; emphasis added); see also Brief for Appellees in No. 11-16401, at 37 (similar).

As San Francisco explained in its reply brief at the certiorari stage, resolving its "question presented" "does not require a fact-intensive 'reasonable accommodation' inquiry," since "the only question for this Court to resolve is whether any accommodation of an armed and violent individual is reasonable or required under Title II of the ADA." Reply to Brief in Opposition 3.

Having persuaded us to grant certiorari, San Francisco chose to rely on a different argument than what it pressed below. In

[*1773] its brief in this Court, San Francisco focuses on the statutory phrase "qualified individual," §12132, and a regulation declaring that Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety [***15] of others." 28 CFR §35.139(a) (2014). Another regulation defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services." §35.104. Putting these authorities together, San Francisco argues that "a person who poses a direct threat or significant risk to the safety of others is not qualified for accommodations under the ADA," Brief for Petitioners 17. Contending that ***Sheehan*** clearly posed a "direct threat," San Francisco concludes that she was therefore not "qualified" for an accommodation.

Though, to be sure, this "qualified" argument does appear in San Francisco's certiorari petition, San Francisco never hinted at it in the Ninth Circuit. ***HN3 LEdHN[3]*** [3] The Court does not ordinarily decide questions that were not passed on below. More than that, San Francisco's new argument effectively concedes that the relevant provision of the ADA, 42 U. S. C. §12132, *may* "requir[e] law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. This is so because there may be circumstances in which any "significant [***16] risk" presented by "an armed, violent, and mentally ill suspect" can be "eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services."

[**866] The argument that San Francisco now advances is predicated on the proposition that the ADA governs the manner in which a qualified individual with a disability is arrested. ***HN4 LEdHN[4]*** [4] The relevant provision provides that a public entity may not "exclud[e]" a qualified individual with a disability from "participat[ing] in," and may not "den[y]" that individual the "benefits of[,] the services, programs, or activities of a public entity." §12132. This language would apply to an arrest if an arrest is an "activity" in which the arrestee "participat[es]" or from which the arrestee may "benefi[t]."

This same provision also commands that "no qualified individual with a disability shall be . . . subjected to discrimination by any [public] entity." *Ibid.* This part of the statute would apply to an arrest if the failure to arrest an individual with a mental disability in a manner that reasonably accommodates that disability constitutes "discrimination." *Ibid.*

Whether the statutory language quoted above applies to arrests is an important question that would benefit from briefing [***17] and an adversary presentation. But San Francisco, the United States as *amicus curiae*, and ***Sheehan*** all argue (or at least accept) that §12132 applies to arrests. No one argues the contrary view. As a result, we do not think that it would be prudent to decide the question in this case.

Our decision not to decide whether the ADA applies to arrests is reinforced by the parties' failure to address a related question: whether a public entity can be liable for damages under Title II for an arrest made by its police officers. ***HN5 LEdHN[5]*** [5] Only public entities are subject to Title II, see, *e.g.*, Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 208, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998), and the parties agree that such an entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent [*1774] conduct of its employees. See Tr. of Oral Arg. 10-12, 22. But we have never decided whether that is correct, and we decline to do so here, in the absence of adversarial briefing.

HN6 LEdHN[6] [6] Because certiorari jurisdiction exists to clarify the law, its exercise "is not a matter of right, but of judicial discretion." Supreme Court Rule 10. Exercising that discretion, we dismiss the first question presented as improvidently granted. See, *e.g.*, Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 360, n. 1, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (partial dismissal); Parker v. Dugger, 498 U.S. 308, 323, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991) (same).

III

The second question presented is whether [***18] Reynolds and Holder can be held personally liable for the injuries that ***Sheehan*** suffered. We conclude they are entitled to qualified immunity. [3]

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[3] Not satisfied with dismissing question one, which concerns *San Francisco's* liability, our dissenting colleagues would further punish San Francisco by dismissing question two as well. See post, at ___, 191 L. Ed. 2d, at 872 (opinion of Scalia, J.) (arguing that deciding the second question would "reward" San Francisco and "spar[e it] the significant expense of defending the suit, and satisfying any judgment, against the individual petitioners"). But question two concerns the *liability of the individual officers*. Whatever contractual obligations San Francisco may (or may not) have to represent and indemnify the officers are not our concern. At a minimum, these officers have a personal interest in the correctness of the judgment below, which holds that they may have violated the Constitution. Moreover, when we granted the petition, we determined that both questions independently merited review. ***HN7 LEdHN[7]*** [7] Because of the importance of qualified immunity "to society as a

HN8 LEdHN[8] [8] Public officials are immune from suit under 42 U. S. C. §1983 unless they have "violated a statutory or **[**867]** constitutional right that was clearly established at the time of the challenged conduct." *Plumhoff, 572 U.S., at ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069* (internal quotation marks omitted). An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it," *ibid.*, meaning that "existing precedent . . . placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd, 563 U.S. ___, ___, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1159 (2011)*. This exacting standard "gives government officials breathing room to make reasonable but mistaken judgments" by "protect[ing] all but the plainly incompetent or those who knowingly violate the law." *Id., at ___, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1160*.

In this case, although we disagree with the Ninth Circuit's ultimate conclusion on the question of qualified immunity, we agree with its analysis in many respects. For instance, there is no doubt that the officers did not violate any federal right when they opened ***Sheehan***'s door the first time. See *743 F. 3d, at 1216, 1223*. Reynolds and Holder knocked on the door, announced that they were police officers, and informed ***Sheehan*** that **[***20]** they wanted to help her. When ***Sheehan*** did not come to the door, they entered her room. This was not unconstitutional. ***HN9 LEdHN[9]*** [9] "[L]aw enforcement **[*1775]** officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City v. Stuart, 547 U. S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)*. See also *Kentucky v. King, 563 U.S. ___, ___, 131 S. Ct. 1849, 179 L. Ed. 2d 865, 875 (2011)*.

Nor is there any doubt that had ***Sheehan*** not been disabled, the officers could have opened her door the second time without violating any constitutional rights. For one thing, ***HN10 LEdHN[10]*** [10] "because the two entries were part of a single, continuous search or seizure, the officers [were] not required to justify the continuing emergency with respect to the second entry." *743 F. 3d, at 1224* (following *Michigan v. Tyler, 436 U. S. 499, 511, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978)*. In addition, Reynolds and Holder knew that ***Sheehan*** had a weapon and had threatened to use it to kill three people. They also knew that delay could make the situation more dangerous. ***HN11 LEdHN[11]*** [11] The *Fourth Amendment* standard is reasonableness, and it is reasonable for police to move quickly if delay "would gravely endanger their lives or the lives of others." *Warden, Md. Penitentiary v. Hayden, 387 U. S. 294, 298-299, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967)*. This is true even when, judged with the benefit of hindsight, the officers may have made "some mistakes." *Heien v. [**868] North Carolina, 574 U.S. ___, ___, 135 S. Ct. 530, 190 L. Ed. 2d 475, 482 (2014)*. The Constitution is not blind to "the fact that police officers are often forced to make split-second **[***21]** judgments." *Plumhoff, supra, at ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1066*.

We also agree with the Ninth Circuit that after the officers opened ***Sheehan***'s door the second time, their use of force was reasonable. Reynolds tried to subdue ***Sheehan*** with pepper spray, but ***Sheehan*** kept coming at the officers until she was "only a few feet from a cornered Officer Holder." *743 F. 3d, at 1229*. At this point, the use of potentially deadly force was justified. See *Scott v. Harris, 550 U. S. 372, 384, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*. Nothing in the *Fourth Amendment* barred Reynolds and Holder from protecting themselves, even though it meant firing multiple rounds. See *Plumhoff, supra, at ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1068*.

The real question, then, is whether, despite these dangerous circumstances, the officers violated the *Fourth Amendment* when they decided to reopen ***Sheehan***'s door rather than attempting to accommodate her disability. Here we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder, devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a *Fourth Amendment* violation, the right was not clearly established. ***HN12 LEdHN[12]*** [12] This Court, of course, could decide the constitutional question anyway. See *Pearson v. Callahan, 555 U. S. 223, 242, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)* (recognizing discretion). But because this question has not been adequately briefed, we decline to do so. See *id., at 239, 129 S. Ct. 808, 172 L. Ed. 2d 565*. Rather, we simply decide whether **[***22]** the officers' failure to accommodate ***Sheehan***'s illness violated clearly established law. It did not.

To begin, nothing in our cases suggests the constitutional rule applied by the Ninth Circuit. The Ninth Circuit focused on *Graham v. Connor, 490 U. S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)*, but ***HN13 LEdHN[13]*** [13] *Graham* holds only that the "'objective reasonableness'" test applies to

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whole," *Harlow v. Fitzgerald, 457 U. S. 800, 814, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*, the Court often corrects lower courts when they wrongly subject individual officers to liability. See, **[***19]** *e.g., Carroll v. Carman, 574 U.S. ___, 135 S. Ct. 348, 190 L. Ed. 2d 311 (2014)* (*per curiam*); *Wood v. Moss, 572 U.S. ___, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014)*; *Plumhoff* v. *Rickard*, 572 U.S. ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014); *Stanton v. Sims, 571 U.S. ___, 134 S. Ct. 3, 187 L. Ed. 2d 341 (2013)* (*per curiam*); *Reichle v. Howards, 566 U.S. ___, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012)*.

excessive-force claims under the *Fourth Amendment*. See *id., at 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443*. That is far too general a proposition to control this case. ***HN14 LEdHN[14]*** [14] "We have repeatedly **[*1776]** told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *al-Kidd, supra, at ___, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1160* (citation omitted); cf. *Lopez v. Smith, 574 U.S. ___, ___, 135 S. Ct. 1, 190 L. Ed. 2d 1, 5 (2014)* (*per curiam*). Qualified immunity is no immunity at all if "clearly established" law can simply be defined as the right to be free from unreasonable searches and seizures.

Even a cursory glance at the facts of *Graham* confirms just how different that case is from this one. That case did not involve a dangerous, obviously unstable person making threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction, see *Graham, supra, at 388-389, 109 S. Ct. 1865, 104 L. Ed. 2d 443*, and responding to the perilous situation Reynolds and Holder confronted. *Graham* ***[***23]*** is a nonstarter.

Moving beyond *Graham*, the Ninth Circuit also turned to two of its own **[**869]** cases. But even if "a controlling circuit precedent could constitute clearly established federal law in these circumstances," *Carroll v. Carman, 574 U.S. ___, ___, 135 S. Ct. 348, 190 L. Ed. 2d 311, 314 (2014)* (*per curiam*), it does not do so here.

The Ninth Circuit first pointed to *Deorle v. Rutherford, 272 F. 3d 1272 (CA9 2001)*, but from the very first paragraph of that opinion we learn that *Deorle* involved an officer's use of a beanbag gun to subdue "an emotionally disturbed" person who "was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense." *Id., at 1275*. The officer there, moreover, "observed Deorle at close proximity for about five to ten minutes before shooting him" in the face. See *id., at 1281*. Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page. Unlike Deorle, ***Sheehan*** was dangerous, recalcitrant, law-breaking, and out of sight.

The Ninth Circuit also leaned on *Alexander v. City and County of San Francisco, 29 F. 3d 1355 (CA9 1994)*, another case involving mental illness. There, officials from San Francisco attempted to enter Henry Quade's home "for the primary purpose of arresting him" even though they lacked an arrest **[***24]** warrant. *Id., at 1361*. Quade, in response, fired a handgun; police officers "shot back, and Quade died from gunshot wounds shortly thereafter." *Id., at 1358*. The panel concluded that a jury should decide whether the officers used excessive force. The court reasoned that the officers provoked the confrontation because there were no "exigent circumstances" excusing their entrance. *Id., at 1361*.

Alexander too is a poor fit. As Judge Graber observed below in her dissent, the Ninth Circuit has long read *Alexander* narrowly. See *743 F. 3d, at 1235* (Graber, J., concurring in part and dissenting in part) (citing *Billington v. Smith, 292 F. 3d 1177 (CA9 2002)*). Under Ninth Circuit law, [4] an entry that otherwise complies **[*1777]** with the *Fourth Amendment* is not rendered unreasonable because it provokes a violent reaction. See *id., at 1189-1190*. Under this rule, qualified immunity necessarily applies here because, as explained above, competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales. Indeed, ***HN15 LEdHN[15]*** [15] even if Reynolds and Holder misjudged the situation, ***Sheehan*** cannot "establish a *Fourth Amendment* violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Id., at 1190*. Courts must not judge officers with "the 20/20 vision **[***25]** of hindsight.'" *Ibid.* (quoting *Graham, 490 U. S., at 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443*).

When *Graham*, *Deorle*, and *Alexander* are viewed together, the central error in the Ninth Circuit's reasoning is apparent. The panel majority concluded **[**870]** that these three cases "would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." *743 F. 3d, at 1229*. But even assuming that is true, *no precedent clearly established that there was not "an objective need for immediate entry" here*. No matter how carefully a reasonable **[***26]** officer read *Graham*, *Deorle*, and *Alexander* beforehand, that officer could not know that reopening ***Sheehan***'s door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor. Without that "fair notice," an officer is entitled to qualified immunity. See, *e.g.*, *Plumhoff, 572 U.S.,*

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[4] Our citation to Ninth Circuit cases should not be read to suggest our agreement (or, for that matter, disagreement) with them. The Ninth Circuit's "provocation" rule, for instance, has been sharply questioned elsewhere. See *Livermore v. Lubelan, 476 F. 3d 397, 406-407 (CA6 2007)*; see also, *e.g.*, *Hector v. Watt, 235 F. 3d 154, 160 (CA3 2001)* ("[I]f the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause"). Whatever their merits, all that matters for our qualified immunity analysis is that they do not clearly establish any right that the officers violated.

at ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069.

Nor does it matter for purposes of qualified immunity that ***Sheehan***'s expert, Reiter, testified that the officers did not follow their training. According to Reiter, San Francisco trains its officers when dealing with the mentally ill to "ensure that sufficient resources are brought to the scene," "contain the subject" and "respect the suspect's "comfort zone," "use time to their advantage," and "employ non-threatening verbal communication and open-ended questions to facilitate the subject's participation in communication." Brief for Respondent 7. Likewise, San Francisco's policy is "'to use hostage negotiators'" when dealing with "'a suspect [who] resists arrest by barricading himself.'" *Id.*, at 8 (quoting San Francisco Police Department General Order 8.02, §II(B) (Aug. 3, 1994), online at *http://www.sf-police.org* (as visited May 14, 2015, and available in Clerk [***27] of Court's case file)).

HN16 LEdHN[16] [16] Even if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as "a reasonable officer could have believed that his conduct was justified," a plaintiff cannot "avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." *Billington, supra, at 1189*. Cf. *Saucier v. Katz, 533 U. S. 194, 216, n. 6, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)* (Ginsburg, J., concurring in judgment) ("'[I]n close cases, a jury does not automatically get to second-guess these life and death decisions, even though a plaintiff has an expert and a plausible claim that the situation could better have been handled differently'" (quoting [*1778] *Roy v. Inhabitants of Lewiston, 42 F. 3d 691, 695 (CA1 1994)*)). Considering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified.

Finally, to the extent that ***HN17 LEdHN[17]*** [17] a "robust consensus of cases of persuasive authority" could itself clearly establish the federal right respondent alleges, *al-Kidd, 563 U.S., at ___, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1159*, no such consensus exists here. If anything, the [***28] opposite may be true. See, *e.g.*, *Bates v. Chesterfield County, 216 F. 3d 367, 372 (CA4 2000)* ("Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and [**871] the general public"); *Sanders v. Minneapolis, 474 F. 3d 523, 527 (CA8 2007)* (following *Bates, supra*); *Menuel v. Atlanta, 25 F. 3d 990 (CA11 1994)* (upholding use of deadly force to try to apprehend a mentally ill man who had a knife and was hiding behind a door).

In sum, we hold that qualified immunity applies because these officers had no "fair and clear warning of what the Constitution requires." *al-Kidd, supra, at ___, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1162* (Kennedy, J., concurring). Because the qualified immunity analysis is straightforward, we need not decide whether the Constitution was violated by the officers' failure to accommodate ***Sheehan***'s illness.

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For these reasons, the first question presented is dismissed as improvidently granted. On the second question, we reverse the judgment of the Ninth Circuit. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE Breyer took no part in the consideration or decision of this case.

Concur by: Scalia(In Part)

Dissent by: Scalia(In Part)

Dissent

JUSTICE Scalia, with whom JUSTICE Kagan joins, concurring in part and dissenting in part.

The first question presented (QP) in the petition for certiorari was "Whether Title II [***29] of the Americans with Disabilities Act [(ADA)] requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. The petition assured us (quite accurately), and devoted a section of its argument to the point, that "The Circuits Are In Conflict On This Question." *Id.*, at 18. And petitioners faulted the Ninth Circuit for "holding that the ADA's reasonable accommodation requirement applies to officers facing violent circumstances," a conclusion that was "in direct conflict with the categorical prohibition on such claims adopted by the Fifth and Sixth Circuits." *Ibid.* Petitioners had expressly advocated for the Fifth and Sixth Circuits' position in the Court of Appeals. See Appellees' Answering Brief in No. 11-16401 (CA9), pp. 35-37 ("[T]he ADA does not apply to police officers' responses to violent individuals who happen to be mentally ill, where officers have not yet brought the violent situation under control").

Imagine our surprise, then, when the petitioners' principal brief, reply brief, and oral argument had nary a word to say about that subject. Instead, petitioners bluntly announced [***30] in their principal brief that they "do not assert that the actions of individual police officers [in

arresting violent and armed disabled persons] are never subject to scrutiny under Title II," and proclaimed that "[t]he only ADA issue here is *what* Title II requires of individual officers who are facing an armed and dangerous suspect." Brief for Petitioners 34 (emphasis added). In other words, the issue is not (as the petition had asserted) [*1779] *whether* Title II applies to arrests of violent, mentally ill individuals, but rather *how* it applies under the circumstances of this case, where the plaintiff threatened officers with a weapon. We were thus deprived of the opportunity to consider, and settle, a [**872] controverted question of law that has divided the Circuits, and were invited instead to decide an ADA question that has relevance only if we assume the Ninth Circuit correctly resolved the antecedent, unargued question on which we granted certiorari. The Court is correct to dismiss the first QP as improvidently granted.

Why, one might ask, would a petitioner take a position on a Circuit split that it had no intention of arguing, or at least was so little keen to argue that it cast the argument aside [***31] uninvited? The answer is simple. Petitioners included that issue to induce us to grant certiorari. As the Court rightly observes, there are numerous reasons why we would not have agreed to hear petitioners' first QP if their petition for certiorari presented it in the same form that it was argued on the merits. See *ante, at ___ - ___, 191 L. Ed. 2d, at 864-866*. But it is also true that there was little chance that we would have taken this case to decide only the second, fact-bound QP—that is, whether the individual petitioners are en-titled to qualified immunity on respondent's *Fourth Amendment* claim.

This Court's *Rule 10*, entitled "Considerations Governing Review on Certiorari," says that certiorari will be granted "only for compelling reasons," which include the existence of conflicting decisions on issues of law among federal courts of appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort. The Rule concludes: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The second QP implicates, at most, the latter. It is unlikely that we would have granted certiorari [***32] on that question alone.

But (and here is what lies beneath the present case) when we do grant certiorari on a question for which there is a "compelling reason" for our review, we often also grant certiorari on attendant questions that are not independently "certworthy," but that are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration. In other words, by promising argument on the Circuit conflict that their first question presented, petitioners got us to grant certiorari not only on the first question but also on the second.

I would not reward such bait-and-switch tactics by proceeding to decide the independently "uncertworthy" second question. And make no mistake about it: Today's judgment is a reward. It gives the individual petitioners all that they seek, and spares San Francisco the significant expense of defending the suit, and satisfying any judgment, against the individual petitioners. * I would not encourage future litigants to seek review premised on arguments they never plan to press, secure in the knowledge that once they find a toehold on this Court's docket, we will consider whatever workaday [***33] arguments they choose to present in their merits briefs.

There is no injustice in my vote to dismiss both questions as improvidently [**873] granted. To be sure, *ex post*—after the [*1780] Court has improvidently decided the uncertworthy question—it appears that refusal to reverse the judgment below would have left a wrong unrighted. *Ex ante*, however—before we considered and deliberated upon the second QP but after petitioners' principal brief made clear that they would not address the Circuit conflict presented by the first QP—we had no more assurance that this question was decided incorrectly than we do for the thousands of other uncertworthy questions we refuse to hear each Term. *Many* of them have undoubtedly been decided wrongly, but we are not, and for well over a century have not been, a court of error correction. The fair course—the just course—is to treat this now-nakedly [***34] uncertworthy question the way we treat all others: by declining to decide it. In fact, there is in this case an even greater reason to decline: to avoid being snookered, and to deter future snookering.

Because I agree with the Court that "certiorari jurisdiction exists to clarify the *law*," *ante, at ___, 191 L. Ed. 2d, at 866* (emphasis added), I would dismiss both questions presented as improvidently granted.

References

U.S.C.S., *Constitution, Amendment 4*; *42 U.S.C.S. § 1983*

5 Antieau on Local Government Law § 77.04 (Matthew Bender)

27 Moore's Federal Practice § 641.51 (Matthew Bender)

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* San Francisco will still be subject to liability under the ADA if the trial court determines that the facts demanded accommodation. The Court of Appeals vacated the District Court's judgment that the ADA was inapplicable to police arrests of violent and armed disabled persons, and remanded for the accommodation determination.

L Ed Digest, Public Officers § 56; Search and Seizure § 25.2

L Ed Index, Arrest; Qualified Immunity; Search and Seizure

When does local government or local governmental agency become liable, under *42 U.S.C.S. § 1983*, for alleged violation of civil rights--Supreme Court cases. *178 L. Ed. 2d 905*.

Supreme Court's view as to what constitutes reasonable accommodation or modification, for purposes of Americans with Disabilities Act of 1990, as amended (ADA) (*42 U.S.C.S. § 12101 et seq.*). *152 L. Ed. 2d 1141*.

When will Supreme Court dismiss writ of certiorari as improvidently granted. *126 L. Ed. 2d 745*.

Supreme Court's views as to application or applicability of doctrine of qualified immunity in action under *42 U.S.C.S. § 1983*, or in Bivens action, seeking damages for alleged civil rights violations. *116 L. Ed. 2d 965*.

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I’m Chinese American and I Think This Weekend’s Peter Liang Protests Were a Problem, and an Opportunity

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Steph Yin Journalist and educator

ASSOCIATED PRESS

I’m a proud Chinese American, but today I am disappointed by those in my community who rallied this weekend in support of Peter Liang, the NYPD officer who killed Akai Gurley and was recently convicted of second-degree manslaughter. My parents and many of their friends attended these rallies or have spoken up in support of Liang. They have stayed silent and very far away from any Black Lives Matter protests, but they find the time to pay attention and show up when it is a member of their community.

Chinese Americans are arguing that it is unjust that Liang got convicted while the many white cops who have killed unarmed Black people before him walked free. White cops such as Daniel Pantaleo, who killed Eric Garner with a chokehold, andDarren Wilson, who shot Michael Brown, are regularly acquitted of these killings. In the case of Peter Liang, there are more

ambiguities. At least as the official account goes, he did not see Akai Gurley before his gun accidentally discharged and his bullet ricocheted off a wall and fatally struck Gurley. I share my parents' outrage that white cops who much more clearly targeted unarmed Black folks have somehow gotten non-indictments. I think there are clear disparities between the way Liang was treated versus the way Pantaleo was treated, particularly as Pantaleo was a veteran cop who should have known better.

But that doesn't change the fact that Akai Gurley died needlessly because of a rotten system that Liang was part of. This is a system in which police routinely conduct unwarranted public housing patrols just to look for suspicious activity, which is what Liang was doing when he shot Gurley. The facts are that Liang had his gun on the trigger when there was no imminent threat — he was there proactively, not in response to an event — and when he did find out that Gurley was shot, he did not immediately provide medical care. I hope that Liang's conviction is a precedent, and that we will continue to convict, instead of letting cops who kill off the hook. This is not the first time that a cop has killed a Black person during a public housing patrol and it will likely not be the last time, if we maintain the status quo. The status quo is that an unarmed Black person is killed by cops and George Zimmerman types every 28 hours in this country. Peter Liang killed someone — a father, son a brother — and he should be held accountable.

I asked my dad to imagine that Akai Gurley were his son, killed for nothing more than trying to enter an apartment. He immediately responded, without stopping to actually consider my question, "but imagine if Peter Liang were your son." That he was willing to consider Liang but not Gurley as his son is indicative of a broader trend I see among many (East) Asian Americans. They are angry when they see injustice against people who look like them, but not when they see injustice against Black, Latinx, and Muslim/ South Asian communities. Other people of color are dehumanized to them. Even when the injustice is stacked a human life versus a possible 15 years in prison.

I think many Asian Americans are focusing on Peter Liang as an individual instead of as part of a system that's broken. The system is made of people like Liang who, accidentally or not, feel the need to have their guns out in the absence of provocation. It's also a system in which Black folks can face life sentences for nonviolent drug crimes, while cops walk free (or serve much shorter sentences) for taking innocent lives. Where is the outrage over that discrepancy?

Many Asian Americans fail to see this systematic violence as related to them, when in fact history has taught us that white supremacy is a revolving door that deems different groups of marginalized folks as "unsafe" based on what benefits white people at the time. White people will always find new reasons to profile people of color as criminals, spies, terrorists, and so forth, and Asian Americans are not immune. When the tide of favorability turns against us, I would hope that other people of color would stand in solidarity — just as Asian American folks need to stand in solidarity now. The flawed logic of protesting one type of racism while implicitly condoning another, far more violent type of racism is bewildering to me. I saw people in the Liang rallies this weekend holding signs that quoted Martin Luther King Jr. and bore sentences like "injustice anywhere is a threat to justice everywhere." That they failed to see the irony in this escapes me.

My parents see Peter Liang as a victim of the mounting pressures of Black Lives Matter. They are calling him a "scapegoat," particularly as Akai Gurley's death happened just four months after Eric Garner's death. When I look at this situation, I see a potential for change — change that happens case by case through activists fighting for change, through the criminal justice system, and through precedents. Liang's conviction is a step towards justice.

In the midst of tragedy, one small thing I am glad about is that this has opened up a dialogue between my parents and me — a dialogue they are usually immediately resistant towards having. I hope that my Chinese American

friends will also use this opportunity as a way to start conversations with family members. I’m a proud Chinese American, and I think it’s our responsibility to challenge our silence and call attention to our role in this fight.