Law Enforcement Liability under Section 1983: 2022 in Review

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Favorable Termination Requirement for Malicious Prosecution under § 1983

***Thompson v. Clark,* 142 S.Ct. 1332 (2022)**

The common law recognizes a claim for malicious prosecution. The elements are:

> (1) initiation or continuation of a criminal proceeding against the plaintiff; (2) termination of the proceeding in the plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as motivation for the defendant's actions.

Section 1983 recognizes analogues to the common law. In ***Albright v. Oliver***, 510 U.S. 266 (1994), the Supreme Court addressed whether there is a **§ 1983** analogue to the common law tort of malicious prosecution. In ***Albright***, the Court held that the Due Process Clause of the Fourteenth Amendment did not provide protection against the baseless initiation of criminal charges. If such a right existed, it would be under the Fourth Amendment's protection against unreasonable seizures. But a majority of the Court did not actually recognize a right under the Fourth Amendment. The issue was not raised in the petition for certiorari in ***Albright*** and was not necessary to the Court's decision. *Police Misconduct: A Practitioner's Guide to Section 1983* ("Practitioner's Guide"), Chapter 6, Malicious Prosecution and Wrongful Conviction, II. Malicious Prosecution as Fourth Amendment, Unreasonable Seizure under § 1983, B. Supreme Court Decision in ***Albright***.

The issue of malicious prosecution does not arise if the plaintiff in the civil case was convicted of the criminal charges unless the conviction is overturned. In ***Thompson***, the plaintiff was investigated for child abuse. He was charged with resisting arrest and obstructing government administration. But the charges against him were dropped. He brought a **§ 1983** action, alleging malicious prosecution. The Supreme Court addressed only one of the four elements of a malicious prosecution claim: What is a favorable termination? Does the plaintiff have to show that the charges were dropped because he was innocent or just that they did not result in a conviction? The Court held 6 to 3 that the favorable termination requirement is met if the criminal case ends without a conviction. 142 S.Ct. at 1341.

But the three dissenters, Alito, Thomas, and Gorsuch, point out that ***Albright*** did not establish a Fourth Amendment right to be free from a malicious prosecution. Justice Alito distinguishes a Fourth Amendment claim from a common law malicious prosecution claim. Among them: a Fourth Amendment claim requires only "unreasonable" conduct. It does not require subjective "malicious" intent. 142 S.Ct. at 1347.

PRACTICE TIP: Here is the status of the law after ***Thompson v. Clark***. Nine Circuits recognize a Fourth Amendment right to be free from a criminal prosecution without probable cause. The First, Fourth, Fifth, Sixth, and Tenth Circuits require the plaintiff only to demonstrate a Fourth Amendment violation

(i.e., objectively unreasonable conduct); a prosecution without probable cause. But the Second, Third, Ninth, and Eleventh Circuits require the plaintiff to demonstrate a Fourth Amendment violation (a prosecution without probable cause, which is the objective standard), but also malicious intent, i.e., that law enforcement brought charges with subjective malice. As the dissent in ***Thompson v. Clark*** pointed out, that is inconsistent with the Court's objective reasonableness standard of the Fourth Amendment. Practitioner's Guide, C. Section 1983 Malicious Prosecution after ***Albright*** in the Circuits.

Failure to Give *Miranda* Warnings Not Actionable under § 1983

***Vega v. Tekoh*, 142 S.Ct. 2095 (2022)**

The Fifth Amendment protects against being a witness against oneself – especially coerced confessions. Someone is in custody. Police force a confession out of them. The confession is used against them in court. But the conviction is overturned based on the Fifth Amendment violation. The person can have a civil suit under **§ 1983** and recover damages. Practitioner's Guide, Chapter 12, First, Fifth, Sixth, Eighth Amendments, and Laws, III. Fifth Amendment: Failure to Give ***Miranda*** Warnings to Arrestee, A. Supreme Court Background.

However, ***Miranda v. Arizona***, 384 U.S 436 (1996), is procedural; a way of protecting against violations of the Fifth Amendment. ***Miranda*** requires police officers to inform a suspect that "he or she has the right to remain silent, that anything they say may be used against them in court, that they have the right to the presence of an attorney, and that if they cannot afford an attorney, one will be appointed prior to any questioning." 384 U.S. at 478-79.

In ***Vega v. Tekoh***, a deputy sheriff questioned Tekoh about assaulting a patient. Tekoh gave a signed statement. But he had not been given ***Miranda*** warnings. He was acquitted anyway. So, there was no conviction. Could he sue under **§ 1983**? Justice Alito, for a 6 to 3 majority, said no. ***Miranda*** is just a prophylactic rule, guarding against introduction of incriminating statements in criminal cases; a way of protecting against Fifth Amendment violations, but not a part of the Fifth Amendment. 142 S.Ct. at 2108**.**

Justice Kagan with Justices Breyer and Sotomayor dissented. ***Miranda*** is a right secured under the constitution and laws of the United States. Accordingly, a violation of its requirements can be enforced through a civil suit for damages under **§ 1983**. 142 S.Ct. at 2111**.**

PRACTICE TIP: Denial of Counsel Claims. Plaintiffs may complain, "The police didn't read me my rights." This may not be a separate claim in their complaint. But they will work it into their court testimony. The claim should be dismissed, not allowed as testimony, or the court should give the jury an instruction. The Fifth Amendment protects against self-incrimination. But if the arrestee is not going to be interrogated while in custody, they do not have to be advised of their right to remain silent or the right to have an attorney present. Asking their name and where they live is not custodial interrogation. And ***Vega v. Tekoh*** makes clear the failure to give ***Miranda*** warnings does not give rise to a civil action for damages under **§ 1983**. See Practitioner's Guide, Chapter 12, III. Fifth Amendment: Failure to Give ***Miranda*** Warnings to Arrestee, A. Supreme Court Background.

Plaintiffs may also complain, "The police didn't give me my phone call." Again, this may not be a separate claim in their complaint. But they will work it into their court testimony. The claim should be dismissed, the testimony should not be allowed, or the court should give the jury an instruction. An arrestee does not have a right to a lawyer under the Sixth Amendment until they have been officially charged with a crime, not just arrested. That means being brought before a judge and told of the charges. That is what triggers the Sixth Amendment right to counsel. There is no constitutional right to a phone call

upon arrest. But most law enforcement agencies will allow an arrestee to make a call. But that is to tell people where they are and to arrange transportation as much as it is to call a lawyer. That is a matter of courtesy, and it is a matter of practice; it is not a constitutional right. See Practitioner's Guide, Chapter 12, IV. B. Sixth Amendment: Denial of Counsel and Telephone Call to Arrestee.

Supreme Court Declines to Expand *Bivens* Remedy

***Egbert v. Boule,* 142 S.Ct. 1793 (2022)**

As discussed in the Practitioner's Guide, Federal officials are not subject to suit under § 1983. If a federal law enforcement officer has committed what would be a common law tort in that state – assault, battery, false arrest, abuse of process, malicious prosecution – counsel can file a claim against the United States under the Federal Tort Claims Act (FTCA). There is an administrative process. First, the plaintiff files a claim with the agency that employed the officer. If it is denied, he or she must file in federal court. These are not claims against the Federal Government for violations of federal law or the Constitution. They are claims against the Federal Government for what would be common law torts committed by its agents, that is, the law enforcement officer employees. The successful plaintiff can obtain attorney's fees. But they are limited to 20 percent of the settlement or 25 percent of the judgment. Practitioner's Guide, Chapter 15, Claims against State and Federal Officials, III. Suits against Federal Government and Federal Officials, B. Federal Tort Claims.

Because **§ 1983** does not apply to federal law enforcement officers, a plaintiff must bring an action under ***Bivens v. Six Unknown Named Agents***, 403 U.S. 388 (1971). In ***Bivens***, the Supreme Court created a damages remedy against federal officials who violated the Constitution. For most plaintiffs, that is against Federal law enforcement officers for garden-variety violations of the Fourth Amendment's prohibition against unreasonable searches and seizures, such as false arrest, excessive force. But the Supreme Court has been reluctant to expand the ***Bivens*** remedy beyond those "garden-variety" cases. III. Suits against Federal Government and Federal Officials, A. ***Bivens*** Action.

In ***Hernandez v. Mesa***, 140 S.Ct. 735 (2020), a U.S. Border Patrol Agent fatally shot a Mexican juvenile. The juvenile was on the Mexican side of the border. The Supreme Court applied a two-part test: Would this case mean applying ***Bivens*** in a new context? Yes. Second, would "special factors" counsel against extending ***Bivens*** to the new context? Yes. For one, the Constitution does not protect someone outside the jurisdiction of the United States. 140 S.Ct. at 750.

In ***Egbert v. Boule***, Boule owned a hotel near the Canadian border in Washington State. It was appropriately named the "Smuggler's Inn." Boule worked both sides. He helped with illegal border crossings for a fee, but he also turned some of his so-called "guests" over to the government. The case arose when he stepped between his Turkish guest and a federal border patrol agent. The agent threw Boule to the ground. Boule complained. Egbert, the border patrol agent, retaliated. He contacted the IRS and state agencies, which caused an audit and an investigation of Boule's activities.

Normally, ***Bivens*** would apply where a federal law enforcement agent uses excessive force in violation of the Fourth Amendment. But this case implicated immigration-related functions. So, there was a different result. On appeal to the Supreme Court, the 5-4 majority applied the two-part test. This was a new context and special factors were against extending ***Bivens*** to a First Amendment retaliation claim and a Fourth Amendment claim against an immigration agent. 142 S.Ct. at 1809.

Justice Gorsuch sided with the majority in a separate opinion. Exercising restraint, the Court should leave extending the reach of ***Bivens*** claims to the Congress. 142 S.Ct. at 1810.

PRACTICE TIP: Local Officers on Federal Task Forces**.** Counsel may have a case where it is necessary to decide whether a local official serving on a federal task force is subject to suit under **§ 1983** or federal law under the Federal Tort Claims act or ***Bivens***. In ***Brownback v. King***, 141 S.Ct. 740 (2021), Brownback, a local officer working with an FBI task force, tackled, choked, and punched King, a college student, in the head after mistaking him for a fugitive they were looking for. Justice Thomas wrote a unanimous opinion which held that dismissal of the FTCA claim barred plaintiff's re-filing as ***Bivens*** action. 141 S.Ct. at 750.

King had argued unsuccessfully below that he could pursue the local officer alternatively under **§ 1983**. In opposition to the plaintiff's cross-petition for cert., https://www.courthousenews.com/wp-content/uploads/2020/03/king-cross-pet.pdf, the U.S. Department of Justice argued that Brownback was operating under a Memorandum of Understanding with the FBI that made him a deputy U.S. Marshal. So, he was not acting under color of state law, as required for **§ 1983.** https://www.supremecourt.gov/DocketPDF/19/19-718/132683/20200211155351647_19-718%20King.pdf Because ***Brownback*** was decided on its facts and not on a per se rule, the facts in a different case may lead to the conclusion that the local officer was still to be considered a state official under **§ 1983.**

Per Curiam Decisions on Qualified Immunity

The Supreme Court's last full merits decision on qualified immunity was ***District of Columbia v. Wesby***, 138 S.Ct. 577 (2018). ***Wesby*** involved arrests for trespassing in a vacant house. The Court granted qualified immunity, saying existing case law did not put the officers on notice that they could not arrest for unlawful entry. The next case after ***Wesby*** was ***City of Escondido v. Emmons***, 139 S.Ct. 500 (2019), a per curiam decision. An individual who was not under arrest pushed past an officer and the officer took him to the ground. On those facts, the use of force would appear to be unreasonable and unnecessary. But the Supreme Court said the Ninth Circuit considered the case at too high a level of generality. On remand, the Supreme Court directed the Ninth Circuit to cite case law that would have put the officer on notice that his conduct violated the Fourth Amendment. 139 S.Ct. at 504.

Last term, the Supreme Court issued two per curiam decisions on qualified immunity, without clarifying its jurisprudence. In ***Rivas-Villegas v. Cortesluna***, 142 S.Ct. 4 (2021), an officer placed his knee on a person's back for eight seconds while taking him into custody. The person was armed. Few police officers would find that unreasonable, but the Ninth Circuit denied qualified immunity. The Supreme Court reversed, saying that the Ninth Circuit had not cited a case that was sufficiently similar. The Supreme Court granted qualified immunity. 142 S.Ct. at 9.

In ***City of Tahlequah v. Bond***, 142 S.Ct. 9 (2021), police fatally shot a man who raised a hammer over his head and appeared to be ready to assault the officers. The Tenth Circuit did not cite a case that the shooting was clearly prohibited. The Supreme Court granted qualified immunity again for the officers. 142 S.Ct. at 12.

PRACTICE TIP: Admissibility of Training and Operating Procedures on Entitlement to Qualified Immunity. On the issue of whether officer conduct was "objectively reasonable" under the Fourth Amendment, individual department policies are generally not admissible because they may be more, or less, stringent than the constitutional standard. ***See, e.g***., ***Whren v. United States***, 517 U.S. 806, 815-16 (1996); ***Thompson v. City of Chicago***, 472 F.3d 444, 454-55 (7th Cir. 2006). But where there is "general acceptance" of basic principles, adherence or non-compliance with consensus policies is admissible through expert testimony. **See Fed. R. Evid**. **702**; ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S.579, 588 (1993); ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 152 (1999).

Under the current state of the law, the Supreme Court will only consider case law in determining an officer's entitlement to qualified immunity (i.e., whether an officer violated "clearly established rights" of which a reasonable officer would have known). So, in ***Frasier v. Evans***, 992 F.3d 1003 (10th Cir. 2021), cert. denied, ***Frasier v. Evans,*** 142 S.Ct. 427 (2021), the Tenth Circuit concluded, "[W]hatever training the officers received concerning the First Amendment was irrelevant to the clearly-established-law inquiry." 992 F.3d at 119. A number of briefs were filed in support of the Supreme Court granting certiorari. For example, a group of law professors noted that, in ***Hope v. Pelzer*****,** 536 U.S. 730 (2002), the Court cited not only to existing law but also to state regulations and guidance from the U.S. Department of Justice, which would have put the corrections officer defendant on notice that his conduct was clearly prohibited. 536 U.S. 741-42. See Brief of Legal Scholars, available at https://www.scotusblog.com/case-files/cases/frasier-v-evans/.

Under the logic of this argument, training materials and written policies would help to determine whether a law enforcement officer was on notice of the constitutional limits of his or her conduct, and therefore whether he/she should be entitled to qualified immunity. On the other hand, if training and policies are not consistent with legal precedent, an office could not rely on them to defeat liability.

POLICE LIABILITY UNDER SECTION 1983: THE YEAR IN REVIEW

Covering Highlights from the 2020-21 Supreme Court Term
and How Police Reform after George Floyd and
Breonna Taylor Will Affect the Practitioner

Wayne C. Beyer, Esq.

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Police Liability under Section 1983: the Year in Review:

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Introduction

Sections I and II of these materials are reproduced from the 2020-2021 supplement for the author's treatise and handbook, "Police Misconduct: A Practitioner's Guide to Section 1983" ("Practitioner's Guide") (Juris Legal Information 2018), http://www.jurispub.com/Bookstore/Civil/Police-Misconduct.html. The "Practitioner's Guide" is 1540 pages long, with 18 chapters on the substantive law and 12 on practice, with issues checklists, practice tips, dozens of forms. Attendees of this webinar are eligible to receive a 20 percent discount from the purchase price of the "Practitioner's Guide," from $295 to $236 for the print version and from $250.75 to $200.60 as a PDF book, when they use code **WEB20** and place on-line order using credit card.

These materials will summarize Supreme Court decisions from 2020-21 important to the 42 U.S.C. § 1983 practitioner; clear up confusion regarding the state of mind requirement for violations from "objective reasonableness" to "deliberate indifference" for individual, municipal liability and punitive damages; and discuss the top ten ways police reforms after George Floyd and Breonna Taylor will affect your practice; all this with references to cases and links to resources from the U.S. Department of Justice (DOJ), International Association of Chiefs of Police (IACP), Police Executive Resource Forum (PERF), and other sources. Those resource materials are quoted at length because of their importance to the practitioner: for the plaintiff, they become checklists of steps that defendant officers or their departments could have taken; likewise, for the defense, they provide references for how the defendants complied with generally accepted practices and so avoided liability.

I. Supreme Court Review

Statistics for the 2020-21 Term

The Supreme Court rendered 67 merits opinions. The reports of a 6-to 3 split are exaggerated. 29 decisions were 9 to 0 or 8 to 0. That's 43 percent. 10 were 8 to 1 or 7 to 1. Another 15 percent. 7 to 2 or 6 to 2, 4 cases. 6 to 3 or 5 to 3, 16 cases. And 5 to 4, 8 cases. 65 percent of the time, or two-thirds, the Court was unanimous, or nearly so. Scotus blog, available at https://www.scotusblog.com/statistics/

Justice Kavanaugh was in the majority 97 percent of the time. Followed by Justices Roberts and Barrett at 91 percent, Gorsuch 90 percent, Alito 83 percent and Thomas 81 percent. Alito and Thomas are perceived to be the most conservative. Justice Breyer was with the majority 76 percent of the time, followed by Justice Kagan at 75 percent and Sotomayor at 69 percent of the time. Scotus Blog, available at https://www.scotusblog.com/statistics/

Residential Searches under *Caniglia v. Strom*, No. 20-157 (Decided May 17, 2021)

The "community caretaking" function articulated in ***Cady v. Dombrowski***, 413 U. S. 433 (1973), which applied to motor vehicles, would not be extended to justify a residential search.

Facts: Caniglia argued with his wife. He got a gun, put it on the dining room table, and asked his wife to "shoot [him] now and get it over with." She spent the night at a motel. The next morning, she asked the police to conduct a welfare check. At his residence, Caniglia denied that he was suicidal. But he agreed to go to the hospital for a psychiatric evaluation. After the ambulance left, the police went into the residence and seized two handguns.

The police relied on a "community caretaking exception" to the warrant requirement, which came from ***Cady***. The First Circuit did not base its decision on exceptions to the warrant requirement, such as consent, "exigent circumstances," or state law permitting mental health evaluations, but the ***Cady*** rule applicable to motor vehicles.

In a short, unanimous opinion, Justice Thomas noted that the Fourth Amendment does not prohibit all searches; only unreasonable ones. The "exigent circumstances" exception to the warrant requirement includes the need to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury," ***citing Kentucky v. King***, 563 U. S. 452, 460, 470 (2011). The First Circuit found that Caniglia had forfeited the "exigent circumstances" argument, so the decision was based on Cady's "community caretaking" exception.

Cady involved a warrantless search of an impounded vehicle for an unsecured firearm. The Supreme Court's decision noted that police officers who patrol the "public highways" are often called to discharge noncriminal "community caretaking functions," such as responding to disabled vehicles or investigating accidents. 413 U.S. at 441. But Justice Thomas distinguished the two situations: "What is reasonable for vehicles is different from what is reasonable for homes." Slip Op. at 4, ***citing Collins v. Virginia***, 584 U. S. ___, ___–___ (2018) (slip op., at 5–6) (ruling that automobile exception to warrant requirement did not permit entry of curtilage of home to search vehicle).

Chief Justice Roberts with Justice Breyer, Justice Alito and Justice Kavanaugh wrote separate concurrences. In essence, they noted that today's police officers are required to do more than investigate and enforce criminal laws. "Exigent circumstances" mean that there is no time to get a warrant. But there may be situations where police need to do a welfare check on someone's health or safety. ***Caniglia*** should not be read to limit those non-law enforcement purposes.

Residential Arrests under *Lange v. California*, 141 S.Ct. 2011 (2021)

Flight alone is not sufficient to justify pursuing a misdemeanant into his/her home.

FACTS: Lange was playing loud music and honking his horn when he drove past a California highway patrol officer. The officer followed him, then turned on his overhead lights to pull him over. Rather than stopping, Lange drove about a hundred feet to his home and entered his garage. The officer followed, questioned Lange and had him perform field sobriety tests. Later blood tests showed that Lange was three times the legal limit. Lange was charged with misdemeanor driving under the influence of alcohol and a noise infraction.

Lange moved to suppress evidence obtained through the warrantless entry. The state argued that Lange had committed the misdemeanor of refusing to pull over when the officer activated his overhead lights. The courts in California upheld the conviction; the officer's "hot pursuit" of the subject qualified under the "exigent circumstances" exception to the warrant requirement.

Justice Kagan wrote for the majority. She noted that police may make a warrantless entry when "the exigencies of the situation" create a compelling law enforcement need under ***Kentucky v. King***, 563 U.S. 452, 460 (2011). A great many pursuits of fleeing misdemeanor suspects involve exigent circumstances, but the Court refused to state a categorical rule that all flight justifies warrantless entries. The "exigent circumstances" exception applies when there isn't time to get a warrant, when, for example, to render emergency assistance to an injured occupant, to prevent the destruction of evidence, or to prevent the subject's escape. The majority wrote that the exception is applied on a case-by-case basis, rather than categorically, in every case.

The amicus (taking over when California abandoned its defense of a categorical rule) relied on ***United States v. Santana***, 427 U.S. 38 (1976). ***Santana*** held that the suspect could not avoid an arrest that had begun in a public place by retreating into her home. There, the "exigent circumstance" was the potential destruction of evidence (drugs) while police obtained a warrant. ***Santana*** involved a fleeing felon. ***Welsh v. Wisconsin***, 466 U.S. 740, 751 (1984) involved a warrantless entry of a residence to make an arrest for a "minor" offense. But it did not involve the suspect's flight. A later civil case, ***Stanton v. Sims***, 571 U.S. 3, 8 (2013) (per curiam) noted the split of authority in the circuits on whether the law regarding warrantless arrest of a fleeing misdemeanor suspect was clearly established. Saying it was not, the Supreme Court granted the officer qualified immunity.

So, rather than establishing a rigid rule that the flight of a misdemeanor subject always creates an exigent circumstance justifying a warrantless entry to make an arrest, the Court said much of the time it would, but reading its case precedents pointed to a case-by-case analysis where flight would be one factor. The Court also found support under the common law. Constables could enter homes to make felony arrests, but not necessarily for lesser offenses; there, a constable had to consider the "gravity of the underlying offense." 141 S.Ct. at 2024. Because the California Court of Appeal applied the categorial rule that a misdemeanant's flight established exigent circumstances, justifying a warrantless entry, rather than the case-by-case analysis required by the Court, the case was remanded for further proceedings.

Four Justices concurred in the judgment. But Chief Justice Roberts, with Justice Alito, wrote in favor of the categorical rule: hot pursuit of a misdemeanor suspect would be enough by itself to meet the "exigent circumstances" requirement. 141 S.Ct. at 2028-38.

Intent to Restrain as a Seizure under *Torres v. Madrid*, 141 S.Ct. 989 (2021)

The Supreme Court considered whether officers' shooting Torres with the intent to restrain her movement was a "seizure" under the Fourth Amendment.

FACTS: New Mexico State Police officers arrived at an apartment complex to execute an arrest warrant. According to Torres' version of events (which the court had to accept on summary judgment), she and another woman were standing outside, near a vehicle. Although she was not the target of the warrant, police attempted to speak with her. She was experiencing methamphetamine withdrawal, got into the driver's seat of the vehicle, and, mistaking the officers (who were wearing tactical vests marked

with police identification) for carjackers, took off. Although the officers were not in the path of the vehicle, they shot 13 times, with two of the bullets striking her in the back. A short distance away, she stole another vehicle and drove 75 miles to a hospital. The next day, she was arrested and later pled no contest to aggravated fleeing from a law enforcement officer, assault on a peace officer, and unlawfully taking a motor vehicle.

On Torres' subsequent § 1983 case, the district court granted summary judgment for the officers. The Tenth Circuit affirmed, concluding that no seizure occurred because the shots did not terminate Torres' freedom of movement or give rise to physical control over her.

Chief Justice Roberts wrote the majority opinion for himself and four justices. The majority relied on ***California v. Hodari D***., 499 U.S. 621 (1991), which in turn drew from the common law. In ***Hodari D***., a youth tossed away crack cocaine before he was tackled and handcuffed. Since he had not responded to the police show of authority and no physical force had been used, he had not yet been "seized," or "arrested" within the meaning of the common law. 400 U.S. at 624-26. Under ***Hodari*** and predecessor common law, a use of force, just a "laying hands," constituted an arrest, even if the person escaped. Although Torres plainly did not respond to the police show of authority, the use of force (i.e., shooting) manifested an intent to restrain her. It was therefore a "seizure," however momentary. 141 S.Ct. at 998-99. The Court left open on remand whether the shooting was reasonable and whether the officers would be entitled to qualified immunity. 141 S.Ct. at 1003.

Justice Barrett did not take part in the decision. Justice Gorsuch dissented, joined by Justices Thomas and Alito. Torres could have sued under state law for battery or under the Fourteenth Amendment for conduct that "shocks the conscience." 141 S.Ct. at 1004, 1016. The dissent read ***Hodari D***. differently from the majority. Hodari D. asserted that the Fourth Amendment applied because a reasonable person would not have felt free to leave. But the Court rejected that argument, saying a seizure meant "taking possession." ***Hodari D***., 499 U.S. at 624. At the time Hodari D. tossed away crack cocaine, he had not responded to the police show of authority and no physical force had been used. Saying that mere touching, a "laying hands," which the majority relied on, was an arrest was dicta in ***Hodari D***. 141 S.Ct. at 1005. Likewise, if a "seizure" was an "arrest" at common law, it meant apprehending or detaining a person to have them answer to a crime. In short, the police attempted to seize Torres, but did not.

PRACTICE TIP: The ***Torres*** case generated great interest. Eight amici included the American Civil Liberties Union, NAACP Legal Defense and Education Fund, and the United States, in support of Torres; and the National Association of Counties for the defendant officers. However, the decision has relatively limited application to the situation where an officer uses force to take someone into custody and the person takes off. The discussion relied heavily on ***Hodari D***. Two other cases are relevant. In ***Brower v. County of Inyo***, 489 U.S. 593, 597 (1989), the Court said a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied[,]" in that case a truck placed perpendicular to the path of a fleeing driver. In ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980), involving a strip search for drugs, the Court opined that a seizure occurs if "a reasonable person would have believed that he was not free to leave."

Torres makes clear that a shooting is a seizure to be evaluated under the reasonableness standard of the Fourth Amendment, even if the subject is able to flee. There is a seizure if the person submits to a show of authority or there is a use of force intended to apprehend the subject. But where does Fourth Amendment scrutiny, or to put it another way, Fourth Amendment protection, begin in a police shooting:

the moment of the shooting or the events leading up to it? It is still an open question, and the circuits are split, but I believe ***Mendenhall*** provides the answer to most situations: when the subject is not free to leave.

Supreme Court Cases to Watch in 2021-22

Petition for cert granted

Thompson v. Clark, No. 20-659

A case in which the Court will resolve a circuit split as to whether a plaintiff who seeks to bring a Section 1983 action alleging unreasonable seizure pursuant to legal process must first show that the criminal proceeding against him "formally ended in a manner not inconsistent with his innocence," or that the proceeding "ended in a manner that affirmatively indicates his innocence."

Petitions for cert pending

Knights v. U.S., No. 21-198

(1) Whether a court analyzing if a Fourth Amendment seizure has occurred is categorically barred from considering a person's race; and (2) whether a seizure occurred under all the circumstances of this case.

Mohamud v. Weyker, No. 21-187

Whether a constitutional remedy is available against federal officers for individual instances of law enforcement overreach in violation of the Fourth Amendment.

Frasier v. Evans, No. 21-57

(1) Whether training or law enforcement policies can be relevant to whether a police officer is entitled to qualified immunity; and (2) whether it has been "clearly established" since at least 2014 that the First Amendment protects the right of individuals to record police officers carrying out their duties in public.

***Shenandoah Valley Juvenile Center Commission v. John Doe*, No. 21-48**

(1) Whether professional judgment rather than deliberate indifference is the proper constitutional standard for a claim of inadequate medical care brought against a secure juvenile detention center by a minor immigrant detainee in federal custody; and (2) whether a minor's claim for injunctive relief seeking constitutionally adequate medical treatment from a secure juvenile detention center may be redressed by the court without a parent, guardian, or legal custodian joined as a party to the case.

Braun v. Burke, No. 21-10

(1) Whether a court should apply the intent-to-harm standard of liability to all police high-speed driving, as have the 8th and 9th Circuits, or instead employ an analysis which examines the facts of individual cases to decide whether there was an opportunity to deliberate and apply the standard of deliberate indifference or another standard other than intent-to-harm, as have the 3rd, 4th, 7th, and 10th Circuits; and (2) whether a court reviewing high-speed driving by a police officer should use an objective test to determine whether an emergency existed, as have the 3rd, 4th, and 7th Circuits, or rely merely on

the asserted claim of an officer that he subjectively believed there to be an emergency, as has the 8th Circuit.

City of New York v. Frost, No. 20-1788

Whether, where a Section 1983 plaintiff alleges that his pretrial detention was influenced by fabricated evidence, and the existence of probable cause independent of the challenged evidence defeats his Fourth Amendment claim, he may still pursue a due process-based claim based on alleged use of the same challenged evidence in securing the same pretrial detention.

City of Tahlequah, Oklahoma v. Bond**,** No. 20-1668

(1) Whether use of force that is reasonable at the moment it is employed can nonetheless violate the Fourth Amendment if the officers recklessly or deliberately created the need to use force; and (2) whether it was clearly established for qualified immunity purposes that advancing toward an intoxicated individual wielding a deadly weapon inside a garage was a "reckless" act that would render unconstitutional any subsequent use of lethal force in response to a threat to officer safety.

Rivas-Villegas v. Cortseluna, No. 20-1539

(1) Whether the U.S. Court of Appeals for the 9th Circuit departed from the Supreme Court's decisions in ***Graham v. Connor*** and ***Plumhoff v. Rickard*** in denying qualified immunity to Daniel Rivas-Villegas based upon the absence of a constitutional violation, by concluding that pushing a suspect down with a foot and briefly placing a knee against the back of a prone, armed suspect while handcuffing him, could constitute excessive force; and (2) whether the 9th Circuit departed from the Supreme Court's decision in ***Kisela v. Hughes*** and numerous other cases by denying qualified immunity even though two judges concluded the use of force was reasonable, and notwithstanding the absence of clearly established law imposing liability under circumstances closely analogous to those confronting Rivas-Villegas.

City of Hayward, California v. Stoddard-Nunez, No. 20-1006

(1) Whether an accelerating fleeing driver's sudden turn deprives a threatened shooting officer of qualified immunity; and (2) whether an unintended victim-passenger of a fleeing vehicle is "seized" for purposes of the Fourth Amendment.

Source: Scotus Blog, available at https://www.scotusblog.com/case-files/petitions-were-watching/

II. Top Ten Ways Policing after George Floyd and Breonna Taylor Will Affect Your Practice

The deaths of George Floyd, Breonna Taylor, and others have been catalysts for change in the law enforcement profession. Legislators and policymakers have pushed for "reform." The National Conference of State Legislatures (NCSL) reports that 36 states have introduced more than 700 bills since the death of George Floyd, and close to 100 have become law. Locally, city councils have debated their own measures, backed by community leaders. The NCSL provides information on law enforcement legislation that has been introduced in the 50 states and the District of Columbia. The database contains policing bills and executive orders. NCSL staff update bill status information for the current year daily and add new bills and executive orders to the database as they are introduced or identified. The NCSL site can be searched by state, topic, keyword, year, status or primary sponsor. Policing topics include oversight

and data, training, standards and certification, use of force, technology, policing alternatives and collaboration, executive orders and other timely issues. National Conference of State Legislatures (NCSL) "Legislative Responses for Policing-State Bill Tracking Database" https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx See also USA Today, "Cities and states across the US announce police reform following demands for change," June 19, 2020, found at https://www.usatoday.com/in-depth/news/2020/06/18/2020-protests-impact-city-and-state-changes-policing/5337751002/

This program identifies ten areas of reform that are of greatest interest to practitioners who bring or defend police cases arising under 42 U.S.C. § 1983.

#1 Qualified Immunity under Attack

Background

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (***Bivens*** (***Bivens v. Six Unknown Fed. Narcotics Agents***, 403 U.S. 388 (1971)) action), abandoned the good faith subjective test in favor of objective reasonableness. Since then, the qualified immunity defense has been applied to arrest warrants, ***Malley v. Briggs***, 475 U.S. 335 (1986); warrantless searches, ***Anderson v. Creighton***, 483 U.S. 635 (1987) (***Bivens*** action); use of force, ***Saucier v. Katz***, 533 U.S. 194 (2001); shooting at vehicles, ***Plumhoff v. Rickard***, 134 S.Ct. 2012 (2014); and shooting emotionally disturbed persons with knives, ***Kisela v. Hughes***, 138 S.Ct. 1148 (2018).

Although Supreme Court requires a "robust consensus of cases persuasive authority," the Court has "not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity[,]" ***District of Columbia v. Wesby***, 138 S.Ct. 577, 591 n. 8 (2018), ***citing Reichle v. Howards***, 566 U. S. 658, 665-666 (2012).

Qualified immunity is under attack in articles, symposia, and amicus briefs, and by liberal law professors, the ACLU, plaintiffs' public interest law groups, and even the libertarian Cato Institute. Opponents argue: (1) Qualified immunity is judge-made, without a statutory basis; (2) the threat of liability does not inhibit law enforcement because officers are indemnified; (3) because the defense shields law enforcement, it deprives plaintiffs of civil rights; and (4) since immunity allows misconduct to go unpunished, it erodes confidence in law enforcement. Defenders says officers should get benefit of doubt in close cases.

H.R. 7120 - George Floyd Justice in Policing Act of 2020

H.R. 7120, known as the "George Floyd Justice in Policing Act of 2020" was introduced in the 116th Congress (2019-2020). Among other things, the bill included provisions that would:

- Revise the *mens rea* requirement in 18 U.S.C. § 242, so that a defendant can be held criminally liable for acting knowingly or recklessly to deprive a person of his or her federal rights.
- Eliminate qualified immunity for federal, state, and local law enforcement officers in civil actions for violations of federal rights.

- Enhance the Department of Justice's authority to pursue investigations of law enforcement officers and agencies for engaging in a "pattern or practice" of violations of federal rights by granting it subpoena authority and further strengthen the statute by creating a cause of action for state attorneys general to pursue such "pattern or practice" actions.
- Incentivize independent investigations of police uses of deadly force.
- Create a national law enforcement misconduct registry.
- Establish use of force data reporting requirements.
- Prohibit racial and religious profiling by law enforcement officers and mandate training on racial, religious, and discriminatory profiling.
- Ban no-knock warrants in drug cases.
- Ban the use of chokeholds and carotid holds.
- Limit the transfer of military-grade equipment to state and local law enforcement.
- Require law enforcement officers to wear body cameras, prohibit the use of facial recognition technology by federal officers and the use of federal funds by states for such technology.
- Establish a use-of-force standard for federal law enforcement officers and condition grants for state and local law enforcement agencies on following the same standards.
- Create public safety innovation grants to foster non-policing innovations that enhance public safety.

H. Rept. 116-434 – George Floyd Justice in Policing Act of 2020, 116th Congress (2019-2020), available at https://www.congress.gov/congressional-report/116th-congress/house-report/434/1?overview=closed

> On June 17, 2020, after a nearly 12-hour debate, the House Judiciary Committee advanced the bill [H.R. 7120] to the House floor on a party-line vote (with all Democrats voting yes and all Republicans voting no). On the floor, the bill passed the Democratic-controlled House on a mostly party-line vote of 236–181. The legislation's key sponsors sought to garner support for the bill from moderate Republicans, but ultimately, only three House Republicans (all moderates) joined all House Democrats in voting to pass the bill.
>
> . . . .
>
> The bill was [re-]introduced in the 117th Congress in February 24, 2021, as H. R. 1280, the George Floyd Justice in Policing Act of 2021. The bill was sponsored by [Representative Karen] Bass and co-sponsored by 199 other Representatives (all Democrats). It passed the House on a nearly-party line vote of 220–212 on March 3, 2021. No Republicans supported the legislation.

Wikipedia, "George Floyd Justice in Policing Act," available at https://en.wikipedia.org/wiki/George_Floyd_Justice_in_Policing_Act

Senator Tim Scott (R-GA) introduced a counter-measure that had Republican support. Scott's 106-page Justice Act would:

- Increase federal reporting requirements for use of force, no-knock warrants.

- Increase penalties for false police reports.
- Withhold funding for police departments that allow chokeholds when deadly force is not authorized.
- Provide grants for expanding police body cameras with penalties for failing to use them.
- Create a database of police disciplinary records for use in hiring.
- Create a federal crime for lynching.
- Direct the Justice Department to provide training on de-escalation tactics and implement duty-to-intervene policies.

Wikipedia, "Tim Scott," available at https://en.wikipedia.org/wiki/Tim_Scott

Senator Scott's Justice Act did not call for the elimination of qualified immunity. Senators Scott and Cory Booker (D-NJ) had been attempting to pass a compromise in the Senate, but negotiations broke down on September 21, 2021.

A number of states already have immunities for public officials, including police officers, or caps on recoveries. Since the Floyd death, several states have passed laws abolishing or limiting qualified immunity. These include New Mexico, Massachusetts, and Connecticut. The New York City council passed an ordinance that limits the use of force and unreasonable searches and seizures. Equal Justice Initiative, "New Mexico Ends Qualified Immunity for Abusive Police," (April 9, 22021), available at https://eji.org/news/new-mexico-ends-qualified-immunity-for-abusive-police/

PRACTICE TIP: Qualified immunity is only limited immunity that works in gray areas where the law is not clearly established. The Supreme Court has not decided what constitutes "clearly established law," other than its own precedents. Although there may be time to deliberate, for instance, when officers are determining whether there is probable cause to arrest, it is unworkable to require officers in dynamic, use of force situations to survey the circuits to determine whether their conduct would be prohibited. Instead, they must rely on their training on generally accepted practices.

Saucier allows separate inquiries between the merits of the Fourth Amendment violation and qualified immunity on the use of force. ***Pearson v. Callahan***, 129 S. Ct. 808, 818 (2009) allows a court to bypass whether there was a merits violation and consider only the entitlement to immunity. But the analysis in reality often merges. Where there is only one version of events, as in a fatality, an outcome can favor law enforcement – either based on the merits or qualified immunity. But in most non-fatal uses of force, the facts are more often in dispute than the applicable law. If the plaintiff's version prevails, there will be liability under an "objective reasonableness" analysis, and immunity will fail. So far, attempts to eliminate qualified immunity under § 1983 have not succeeded, but the results would not be catastrophic for law enforcement officers if they did. Except in rare cases where they are not indemnified by their employing governments (for example, punitive damages), they will not be personally liable for a judgment.

Finally, many states already have limited immunity for municipal employees or caps on tort recoveries. In some cases, there is direct, vicarious liability against the employer for the torts or intentional acts of the employee. The practitioner involved in a § 1983 case with state law claims must be familiar with the current status of immunities, if any, for the defendant officers. Amendments to state immunity laws would not of course affect qualified immunity under § 1983.

#2 "Choke Holds," Neck Restraints, Positional Asphyxia, and Excited Delirium

Neck Restraints

Before George Floyd, Tennessee and Illinois had bans on police hold techniques that restrict the airway or blood flow to the brain when pressure is applied to the neck. Now 17 states have enacted legislation to ban or restrict the practice, according to the National Conference of State Legislatures. They include Minnesota, Colorado, California, Illinois, Nevada, Oregon and Virginia, among others. See "George Floyd killing prompts some states to limit or ban chokeholds," available at https://www.wkyc.com/article/news/nation-world/george-floyd-chokehold-bans/507-3cdf238f-8909-4594-b717-f07eae636e18

USA Today has prepared a chart showing cities that have police reforms, including the following categories: **neck restraints**, decrease in funding, required intervention, additional training or education, required de-escalation, increased reporting, change in protest protocol, and increased transparency. The chart shows that 48 cities have implemented changes in the use of **neck restraints**, including Los Angeles, Sacramento, San Diego, Denver, Washington, D.C., Miami, Boston, Minneapolis, New York, Austin, Dallas, Houston, Salt Lake City, and Seattle.

Many of the new laws include criminal penalties for officers if a chokehold or neck restraint leads to death or injury, unless they can show it was necessary to protect their life or someone else's. In Vermont, officers can face up to 20 years in prison and a fine of up to $50,000. USA Today, "Cities and states across the US announce police reform following demands for change," available at https://www.usatoday.com/in-depth/news/2020/06/18/2020-protests-impact-city-and-state-changes-policing/5337751002/;

Resource: "IMPROVING MPD'S POLICY ON THE USE OF CHOKEHOLDS AND OTHER NECK RESTRAINTS: REPORT AND RECOMMENDATIONS OF THE POLICE COMPLAINTS BOARD," District of Columbia (August 10, 2015), available at https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/8.10.15%20chokehold%20policy%20rec%20FINAL.pdf

U.S. Department of Justice (DOJ)

On September 14, 2021, the U.S. Department of Justice (DOJ) announced written department-wide policies explicitly prohibiting the use of "chokeholds" and "carotid restraints" unless deadly force is authorized, that is "when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person." The policy applies only to federal law enforcement officers, such as ATF, DEA, the FBI, the Marshals Service, and the Bureau of Prisons. It reads in part as follows:

> **Chokeholds and Carotid Restraints** The use of certain physical restraint techniques - namely chokeholds and carotid restraints - by some law enforcement agencies to incapacitate a resisting suspect has too often led to tragedy. **Chokeholds** apply pressure to the throat or windpipe and restrict an individual's ability to breathe. The **carotid restraint** technique restricts blood flow to the brain causing temporary unconsciousness. It is important that

> Department law enforcement components have an articulated policy in this area because these techniques are inherently dangerous. It is a long-standing Department policy that "[l]aw enforcement officers and correctional officers of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person." Policy Statement Use of Deadly Force, Approved by the Attorney General July 1, 2004.
>
> . . . .
>
> Given the inherent dangerousness of **chokeholds** and **carotid restraints**, and based on feedback from our law enforcement components on these techniques, Department law enforcement agents and correctional officers are hereby prohibited from using a chokehold or a carotid restraint unless that standard of necessity for use of deadly force is satisfied. Accordingly, Department law enforcement components will revise their policies to reflect this guidance **prohibiting the use of chokeholds or carotid restraints by Department law enforcement agents** and correctional officers, including federal task force officers, **unless deadly force is authorized**. Component heads will also ensure that personnel receive notice of this policy and that it is appropriately incorporated into training

Memorandum from the Deputy Attorney General, "Chokeholds & Carotid Restraints" (Sept. 14, 2021), available at https://www.justice.gov/dag/page/file/1432531/download

Positional Asphyxia

The U.S. Department of Justice (DOJ)

The U.S. Department of Justice (DOJ) has also provided guidance on positional asphyxia. It lists predisposing factors:

Predisposing Factors to Positional Asphyxia

Certain factors may render some individuals more susceptible to positional asphyxia following a violent struggle, particularly when prone in a face-down position:

- Obesity.
- Alcohol and high drug use.
- An enlarged heart (renders an individual more susceptible to a cardiac arrhythmia under conditions of low blood oxygen and stress). The risk of positional asphyxia is compounded when an individual with predisposing factors becomes involved in a violent struggle with an officer or officers, particularly when physical restraint includes use of behind-the-back handcuffing combined with placing the subject in a stomach-down position.

The DOJ recommends:

Advisory Guidelines for Care of Subdued Subjects

To help ensure subject safety and minimize the risk of sudden in-custody death, officers should learn to recognize factors contributing to positional asphyxia. Where possible, avoid the

use of maximally prone restraint techniques (e.g., hogtying). To help minimize the potential for in-custody injury or death, officers should:

- Follow existing training and policy guidelines for situations involving physical restraint of subjects.
- As soon as the suspect is handcuffed, get him off his stomach.

"Positional Asphyxia—Sudden Death," U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (June 1995), available at https://www.ncjrs.gov/pdffiles/posasph.pdf.

International Association of Chiefs of Police (IACP)

The Consensus Policy on the Use of Force of the International Association of Chiefs of Police (IACP) and eleven other agencies addresses and limits the use of choke holds and vascular neck restraints to circumstances allowing deadly force.

Definitions:

CHOKE HOLD: A physical maneuver that restricts an individual's ability to breathe for the purposes of incapacitation. **VASCULAR NECK RESTRAINT**: A technique that can be used to incapacitate individuals by restricting the flow of blood to their brain

Prohibition unless deadly force is authorized:

Choke Holds. For the purposes of this document, a choke hold is defined as "a physical maneuver that restricts an individual's ability to breathe for the purposes of incapacitation." In the most common choke hold, referred to as an arm-bar hold, an officer places his or her forearm across the front of the individual's neck and then applies pressure for the purpose of cutting off air flow. These are extremely dangerous maneuvers that can easily result in serious bodily injury or death. Therefore, the Consensus Policy allows their use only when deadly force is authorized. **Vascular Neck Restraint**. For the purposes of this document, a vascular neck restraint is defined as "a technique that can be used to incapacitate individuals by restricting the flow of blood to their brain." Given the inherently dangerous nature of vascular neck restraints, the Consensus Policy allows their use only when deadly force is authorized.

International Association of Chiefs of Police (IACP), "National Consensus Policy and Discussion Paper on Use of Force" (revised July 2020), available at https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf

IACP Position Paper on Excited Delirium

The IACP also offers guidance on "excited delirium," which is a species of positional asphyxia. Some of the highlights taken from a prior version of the guidance:

Law enforcement officers should be familiar with the characteristic signs and symptoms of excited delirium (ExDS) and approach situations involving individuals displaying these signs as medical emergencies that could result in sudden death.

> Excited delirium (ExDS) is a medical disorder that is not fully understood—there is no definitive evidence on what causes it or why some individuals who present with symptoms die.
>
> - Individuals experiencing ExDS often exhibit constant physical activity, extreme agitation, elevated body temperature often resulting in nudity, screaming or making unintelligible noises, and excessive strength.
> - In cases where death occurs, the following series of events almost always occurs: The individual shows signs of ExDS and is under the influence of drugs or has a history of mental illness. There is a struggle with law enforcement. Some sort of force is used (physical, chemical, or electronic). The individual is restrained. The individual stops struggling, his or her breathing becomes shallow, and within minutes he or she is dead.
> - Assuming the individual is not a danger to officers or others, the primary objective of law enforcement officers in these situations should be to rapidly control the individual and transfer him or her to the care of emergency medical providers.
> - Emergency medical services (EMS) personnel should be requested as soon as possible if ExDS is suspected.
>
> Due to the potential of rapid death in these instances, law enforcement personnel must act quickly to minimize the duration of resistance and struggle with the individual, which is thought to contribute to death. Since individuals with ExDS often do not feel pain, physical takedown using a swarming technique might be preferred when an adequate number of officers are present.
>
> Only those restraints necessary to control the situation should be used, and the subject should be positioned in way that assists breathing, such as on his or her side.
>
> As soon as the subject is controlled, EMS personnel should examine the subject and provide medical aid as necessary, to include sedation and cooling.

IACP Law Enforcement Policy Center, "Excited Delirium" (updated April 2017), available to members at https://www.theiacp.org/sites/default/files/2021-07/Excited%20Delirium%20FULL.pdf

PRACTICE TIP: **Chokeholds** were banned in most departments even before the Floyd death. **Vascular neck restraints** have also been identified as inherently dangerous. Generally accepted practice is that they should only be employed only when officers are allowed to use deadly force.

It is no defense to a positional asphyxia case that the subject was high on drugs or had prior medical conditions, even if an autopsy concludes that those factors contributed to the subject's death. The dangerous effects of restraining a subject face down for a long period are so well known that it presents an absolute liability scenario. That is not to say that an officer cannot take a resisting subject face down to the ground, and place a knee on his/her back while being handcuffed. But as soon as they are handcuffed, they should be turned to the side, stood up or seated, so that their breathing is not suppressed.

#3 No-Knock Warrants

Supreme Court

The common law knock and announce rule requires a police officer executing a search warrant to knock, identify himself or herself and his or her intent, and wait a reasonable amount of time for the occupants to let him/her into the residence. In ***Wilson v. Arkansas***, 514 U.S. 927, 931-37 (1995), the Supreme Court held that the common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry. But countervailing law enforcement interests included the threat of physical harm to police, the fact that an officer may be pursuing a recently escaped arrestee, and a reason to believe that evidence would likely be destroyed if advance notice were given-may establish the reasonableness of an unannounced entry. ***Richards v. Wisconsin***, 520 U.S. 385, 394 (1997) noted that a "no knock" entry can be justified when knocking and announcing the police presence would be dangerous or futile, or that it would inhibit the effective investigation of the crime. When the police must knock and wait, ***United States v. Banks***, 540 U. S. 31, 40-41 (2003), a reasonable wait time (e.g., 15-20 seconds) is a function of how long it would take to destroy evidence, rather than how long it would take the resident to reach the door.

Prevalence of No-Knock Warrants

Thirteen states have laws explicitly authorizing no-knock warrants, and in 20 additional states, no-knock warrants are routinely granted. Wikipedia, "No-knock warrant," available at https://en.wikipedia.org/wiki/No-knock_warrant. It is estimated that each year from 20,000 to 80,000 no-knock warrants are served across the nation. The New York Times examined open police and court records requests from 2010-2016 and found 81 civilian and nine officer deaths during the execution of no-knock warrants. Center for Justice Research, "Banning No-Knock Warrants," available at https://www.centerforjusticeresearch.org/reports/ban-no-knock-warrants

> There are no national statistics on the number and type of search warrants executed over time. Most of what is known about the prevalence of warrant executions and trends in their delivery comes from data on SWAT deployments. A public records review of 818 SWAT deployments conducted by 20 local law enforcement agencies across 11 states between 2010 and 2013 found that 62% were for drug searches; of those, forced entry was employed in 60% of the deployments."

CCJ, Task force on Policing, "No-Knock Warrants," available at https://councilоncj.foleon.com/policing/assessing-the-evidence/iii-no-knock-warrants-and-police-raids/

International Association of Chiefs of Police (IACP) Policy on Execution of Search Warrants

The Policy and accompanying Concepts and Issues paper provide best practices for organizing, planning, and structuring a tactical operation for execution of a search warrant. It contains an actual checklist for pre-raid planning. The balance of the content can be used as a checklist for proper execution.

> Extract from Policy on Warrant Service Planning:
>
> Secure a warrant and ensure that it is thoroughly reviewed for accuracy, legal integrity, and completeness. i. No-knock entries, where legally permitted and specified in the warrant, shall be conducted in accordance with state law. ii. The need for a no-knock warrant shall be clearly specified in the application and affidavit for a warrant. iii. Should nighttime service be anticipated or desired, justification shall be included in the affidavit and must be authorized in the search warrant. iv. The tactical team commander shall be consulted whenever a warrant calls for no-knock entry, nighttime entry, or service involving drugs or subjects deemed particularly dangerous.
>
> Entry Procedures:
>
> Notification a. An easily identifiable police officer shall knock and notify persons inside the search site, in a voice loud enough to be heard inside the premises, that he/she is a police officer and has a warrant to search the premises, and that he/she demands entry to the premises at once. b. Following the knock and announce, officers shall delay entry for an appropriate period of time based on the size and nature of the target site and time of day to provide a reasonable opportunity for an occupant to respond (normally between 15 and 20 seconds). If there is reasonable suspicion to believe that the delay would create unreasonable risks to the officers or others, inhibit the effectiveness of the investigation, or would permit the destruction of evidence, entry may be made as soon as practicable.
>
> Extract from the Concepts and Issues paper:
>
> Announcement. Normally, the executing officers should enter the premises only after they have announced their presence and requested admission. No-knock entries should be conducted only where clearly justified by the circumstances and, even then only in strict accordance with the law of the jurisdiction. Unless the search is based on a no-knock warrant, an easily identifiable police officer or team leader should knock and notify persons inside the search site (in a voice loud enough to be heard inside) that he or she is a police officer and has a search warrant for the premises and demands entry at once. Where possible, this announcement should be recorded or keyed in by a radio transmission to communications. Where a response is not obtained immediately, officers should delay forced entry for a period that is reasonable for an occupant to respond. Normally, this period need not exceed 15 to 20 seconds unless exigent circumstances dictate a shorter period.

IACP Policy Center, "Executing Search Warrants" (February 2006), available to members at https://www.theiacp.org/resources/policy-center-resource/executing-search-warrants

Attempts to Ban or Limit No-Knock Warrants

These attempts are largely in response to the shooting death of Breonna Taylor during the execution of a search warrant at her residence. Although the issuing court provided that it could be a "no-knock" warrant, entering police claimed they did knock and announce, following which the man with whom

Taylor was living initiated gunfire. Taylor was shot during the exchange. Measures that have been introduced or implemented to ban or limit no-knock warrants include:

- The **Justice for Breonna Taylor Act**, Senate Bill 3955. The act would require federal law enforcement officers to provide notice of their authority and purpose before executing warrant, i.e., knock and announce. State and local law enforcement agencies that receive funds from Department of Justice would require serving officers to provide notice of his/her authority and purpose before forcibly entering a premises. The bill is pending in the Senate Judiciary Committee.
- The **U.S. Department of Justice**. The Deputy Attorney General announced on September 21, 2021, that law enforcement agents of the Department of Justice, including federal task force officers, would be required to limit the use of "no knock" entries. "[A]n agent may seek judicial authorization to conduct a 'no knock' entry only if that agent has reasonable grounds to believe at the time the warrant is sought that knocking and announcing the agent's presence would create an imminent threat of physical violence to the agent and/or another person. . . . Because this policy limits 'no knock' entries to instances where there is an imminent threat of physical violence, it is narrower than what is permitted by law - for example, agents must 'knock and announce' even when they have reason to believe that doing so could result in the destruction of evidence." Memorandum from Deputy Attorney General Subject "Knock & Announce Requirement" (Sept. 13, 2021), available at https://www.justice.gov/dag/page/file/1432531/download
- No-knock warrants are prohibited or restricted in Oregon, Florida, Virginia, Utah, and Maine. Wikipedia, No-knock warrant, available at https://en.wikipedia.org/wiki/No-knock_warrant
- 15 cities, including Orlando, Louisville, Santa Fe, and Indianapolis have passed no-knock warrant bans or severe restrictions. Bans or restrictive measures are pending in 22 states and 20 cities. CCJ, Task force on Policing, "No-Knock Warrants," available at https://councilоncj.foleon.com/policing/assessing-the-evidence/iii-no-knock-warrants-and-police-raids/

PRACTICE TIP: Federal, state or local restrictions or elimination of "no-knock" warrants are aimed at increasing safety to officers and occupants in high-risk situations. They will primarily affect searches for drugs. Violations of the more restrictive procedures may result in suppression of seized evidence in criminal cases, or discipline of officers. But civil cases arising under § 1983 will continue to be analyzed under the reasonableness standard of the Fourth Amendment, informed by Supreme Court and lower federal court precedents. A violation of state or local law does not establish that the conduct at issue was unconstitutional, although those laws and procedures may be part of the reasonableness calculation.

#4 Shooting at Vehicles and Pursuits

Supreme Court on Shooting at Vehicles

The Supreme Court has ruled in favor of the law enforcement officers in the following cases. In ***Brosseau v. Haugen***, 543 U.S. 194 (2004), a suspect wanted on a felony warrant attempted to flee in a vehicle. An officer ran to the vehicle with her handgun drawn and ordered him to stop. As the suspect was attempting to start the vehicle, the officer smashed a window, and then, either before the suspect pulled

away or as he did so, the officer shot him once in the back. The Supreme Court granted qualified immunity because the law was not clearly established that shooting a fleeing felon who was creating risk to others violated Fourth Amendment. 543 U.S. at 199-201.

In ***Plumhoff v. Rickard***, 134 S.Ct. 2012 (2014), the driver sped away during a motor vehicle stop. A lieutenant, joined by five other police cruisers, engaged in a pursuit at speeds over 100 miles per hour. The driver exited the interstate, colliding with three cruisers. As the driver was rocking his car back and forth, spinning tires in effort to get away, one officer pounded on the driver's window and another fired three shots. The driver reversed direction, causing one of the officers to step aside, while two others fired an additional 12 shots. The driver lost control and died from the crash and the shots. There was no Fourth Amendment violation because the driver a posed public safety risk and the officers, in any case, would be entitled to qualified immunity. 134 S.Ct. at 2022.

In ***Mullenix v. Luna***, 136 S.Ct. 305 (2015), a state trooper took a position with his rifle 20 feet above an interstate with the intent of shooting at the fleeing subject's vehicle to disable it. As the subject's vehicle approached at 85 miles per hour, the trooper fired six shots. Four shots struck the subject's upper body. His car continued forward beneath the overpass 25 to 30 yards to a spike strip in less than a second, hit the median, and rolled. The subject died from gunshot wounds. The Supreme Court granted qualified immunity because the Court's precedents did not place trooper's actions beyond debate. 136 S.Ct. at 311.

Lower Federal Court Case Examples

Singletary v. Vargas, 804 F.3d 1174 (11th Cir. 2015): Video conclusively established that officer who was struck or fell when he lost balance was in path of accelerating vehicle. Shooting plaintiff did not violate Fourth Amendment.

Thompson v. Murray, 800 F.3d 979, 984 (8th Cir. 2015): Disputed whether officer was moving into or away from path of suspect's car. Allegedly perceiving that suspect was trying to run him over, officer fired shots through front windshield and driver's side window. Dismissing interlocutory appeal of denial of qualified immunity.

Rand v. Lavoie, Case No. 14-cv-570-PB (D.N.H. 9/5/2017): Following pursuit, trooper fired into windshield, killing female driver. Denying qualified immunity, because vehicle did not pose imminent danger to public and officer had opportunity to step aside.

International Association of Chiefs of Police (IACP)

The IACP "National Consensus Policy and Discussion Paper on Use of Force" prohibits firing at or from a moving vehicle:

> 3. Deadly Force Restrictions
>
> c. Firearms shall not be discharged at a moving vehicle unless (1) a person in the vehicle is threatening the officer or another person with deadly force by means other than the vehicle; or (2) the vehicle is operated in a manner deliberately intended to strike an officer or another person, and all other reasonable means of defense have been exhausted (or are not present or practical), which includes moving out of the path of the vehicle.

The IACP discussion paper elaborates:

> Shots Discharged at Moving Vehicles.
>
> The use of firearms under such conditions often presents an unacceptable risk to innocent bystanders. Even if successfully disabled, the vehicle might continue under its own power or momentum for some distance thus creating another hazard. Moreover, should the driver be wounded or killed by shots fired, the vehicle might proceed out of control and could become a serious threat to officers and others in the area. Notwithstanding, there are circumstances where shooting at a moving vehicle is the most appropriate and effective use of force. Officers should consider this use of deadly force only when "a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle," or when the vehicle is intentionally being used as a deadly weapon and "all other reasonable means of defense have been exhausted (or are not present or practical)." Examples of circumstances where officers are justified in shooting at a moving vehicle include when an occupant of the vehicle is shooting at the officer or others in the vicinity or, as has happened recently, the vehicle itself is being used as a deliberate means to kill others, such as a truck being driven through a crowd of innocent bystanders. Even under these circumstances, such actions should be taken only if the action does not present an unreasonable risk to officers or others, when reasonable alternatives are not practical, when failure to take such action would probably result in death or serious bodily injury, and then only when due consideration has been given to the safety of others in the vicinity. In cases where officers believe that the driver is intentionally attempting to run them down, primary consideration must be given to moving out of the path of the vehicle. The Consensus Policy recognizes that there are times when getting out of the way of the vehicle is not possible and the use of a firearm by the officer may be warranted.
>
> Shots Discharged from a Moving Vehicle.
>
> When discussing whether or not officers should be permitted to fire shots from a moving vehicle, many of the same arguments can be made as firing at a moving vehicle. Most notably, accuracy of shot placement is significantly and negatively affected in such situations, thereby substantially increasing the risk to innocent bystanders from errant shots. Therefore, the Consensus Policy prohibits officers from discharging their weapons from moving vehicles unless exigent circumstances exist. In these situations, as with all instances where exigent circumstances are present, the officer must have an articulable reason for this use of deadly force.

IACP "National Consensus Policy and Discussion Paper on Use of Force" (revised July 2020), available at https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf

Police Executive Research Forum (PERF)

Policy number 8 in the Police Executive Research Forum's 30 "Guiding Principles on Use of Force" is a prohibition on shooting at vehicles.

> POLICY 8 Shooting at vehicles must be prohibited. Agencies should adopt a prohibition against shooting at or from a moving vehicle unless someone in the vehicle is using or threatening deadly force by means other than the vehicle itself.

PERF notes that police agencies that have a policy against shooting at or from moving vehicles include: New York Police Department (enacted in 1972), Boston Police Department, Chicago Police Department, Cincinnati Police Department, Denver Police Department, Philadelphia Police Department, and the Washington, DC Metropolitan Police Department. See Police Executive Research Forum (PERF), Critical Issues in Policing Series, "Guiding Principles on Use of Force" (March 2016), Policy 8. available at https://www.policeforum.org/assets/30%20guiding%20principles.pdf.

PERF cited the Washington Post database of fatal officer-involved shootings. In approximately 5 percent of the 990 incidents in 2015, the subject was using a vehicle as a weapon. The number has remained fairly steady. As of 2020, 53 of the subjects fatally shot used a vehicle as a weapon to drag, crash into, or run over an officer. See Washington Post Fatal Force database, at https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ Following a Washington Post series that won Pulitzer Prize in 1999, D.C.'s rate of shooting at vehicles went from thirty two shootings with twelve deaths to three fatal shootings in 2001 and five in 2002. James T. Hamilton, *Democracy's Detectives*, Harvard University Press (2016), citing *Washington Post* series, pages found at https://www.google.com/search?tbo=p&tbm=bks&q=isbn:0674973593.

Restrictions on Pursuits

Supreme Court on Pursuits

The Supreme Court's decisions on high-speed pursuits have been favorable to law enforcement. The Fourth Amendment governs when a suspect's freedom of movement is stopped by intentional means. ***Brower v. County of Inyo***, 489 U.S. 593 (1989). In ***Scott v. Harris***, 127 S.Ct. 1769, 1779 (2007), the deputy's dashcam video established that the plaintiff's driving endangered human life; the deputy's execution of a "PIT" ("Precision Intervention Technique") maneuver to throw the car into a spin was not unreasonable or a Fourth Amendment violation in the use of force. In ***County of Sacramento v. Lewis***, 523 U.S. 833, 836 (1998), the Supreme Court held that the facts did not meet the Fourteenth Amendment's "intent to harm" standard that governed high-speed chases ending in personal injury with no seizure.

Data on Pursuits

Even with favorable outcomes in the Supreme Court, law enforcement has recognized the danger to officers, the pursued driver and to third parties. Increasing restrictions on pursuits is gaining law enforcement support. Limited, voluntary data collected by the IACP's pursuits database:

> from 2016-2018 show that most pursuits were short in duration (57 percent were three minutes or less) and length (55 percent were 2 miles or less), but reached relatively high speeds (30 percent exceeded 91 miles per hour). Most pursuits reported (66 percent) began with a traffic violation, while only 6 percent were for a violent felony. Pursuits were most frequently terminated by the officer and/or supervisor (33 percent), followed by the driver stopping (26 percent).

IACP Policy Center, "Vehicular Pursuits, Considerations Document and Concepts and Issues Paper," (updated December 2019), available to members at https://www.theiacp.org/sites/default/files/2019-12/Vehicular%20Pursuits%20-%202019.pdf (hereafter IACP Pursuit Considerations).

Statistics show that pursuits can be highly dangerous. FairWarning analyzed data from National Highway Traffic Safety Administration crash records, and here are some of the findings:

> At least 13,100 people were killed in police pursuits from 1979 through 2017, the most recent year for which NHTSA [National Highway Traffic Safety Administration] data are available, FairWarning found. That's an average of 336 deaths a year. More than 2,700 of those killed were innocent bystanders, which includes pedestrians and people in vehicles who were hit by a fleeing suspect or in rare cases by police.
>
> . . . .
>
> NHTSA records make clear that the death toll is growing. At least 1,594 deaths in police chases occurred from 2014 through 2017 — an average of 399 a year. That's the largest four-year total since 1979, when NHTSA began tracking fatal vehicle crashes. Nearly 300 of those killed from 2014 through 2017 were bystanders.

Further,

> At least 416 people were killed in police chases in 2017, according to an analysis of federal records by FairWarning. That's the fourth consecutive year when the number of people killed during police pursuits increased – and a 22-percent spike over 2013, when 341 people were killed, FairWarning found by analyzing National Highway Traffic Safety Administration crash records.

McClatchy, "Fatalities from Police Chases Climbing, could be Higher than Records Indicate," available at https://www.mcclatchydc.com/news/investigations/article226512455.html

IACP Considerations Document

The IACP has issued what it calls a "Considerations Document" rather than a Model Policy on Vehicular Pursuits, together with a "Concepts and Issues Paper." An agency should decide on whether pursuits are "Discretionary," "Permitted," "Restricted," or "Prohibited." The IACP's comprehensive guidance covers roles and responsibilities of communications and supervisory personnel, the primary and secondary units involved in the pursuit, and pursuit procedures.

Where pursuits are permitted, decisions should be based on a number of factors, such as "The seriousness of the known offense"; "Known information on the suspect"; "Road configuration, population density, and existence of vehicular and pedestrian traffic"; "Lighting, visibility, weather and other environmental factors"; "The relative performance capabilities of the pursuit vehicle(s)"; "The performance capabilities of the vehicle being pursued"; "Officer training and experience"; "Availability of support units"; "Speed and evasive tactics employed by the suspect"; "The presence of other persons in the law enforcement vehicle"; and "The presence of minors and/or other persons in the pursued vehicle."

Agencies should consider "prohibiting officers from conducting a pursuit in a direction against the lawful flow of traffic on a one-way street or lane of a divided highway." A pursuit policy should address

which intervention tactics are available and when they are allowed. These include: roadblocks; rolling roadblocks, ramming; pursuit intervention/immobilization technique (PIT maneuver) and tactical vehicle intervention (TVI); spike strips; tagging/tracking (tagging vehicle with GPS device); and shooting at/from a moving vehicle if permitted under the agency's use of force policy. The latter is prohibited under the IACP "Consensus Policy" with ten other police policy-making agencies.

PRACTICE TIP: Like many police-citizen contacts, a motor vehicle stop may produce a fight or flight response on the part of the subject. Police will then initiate and maintain a pursuit to catch the violator and to prevent injuries to third parties. But as the statistics show, the risks often outweigh the benefits, and the trend is to limit pursuits to fleeing felons. Written policies and procedures do not offer hard and fast rules, but generally recommend a situational assessment of the danger in chasing the vehicle versus letting it go. A practitioner with a plaintiff's case should look to the agency's written policies and the above-referenced best practices and whether they were followed. The defense has the benefit of qualified immunity, since bright lines on pursuit have not been clearly established. The author will say this, however: in his own practice and familiarity with the caselaw, he has never seen a case where liability was imposed against an officer who failed to pursue or broke off a pursuit because he/she deemed it too dangerous.

#5 Duty to Intervene

Bystander officers have a duty to intervene if they have an opportunity to prevent the misconduct of other officers and can be liable if they fail to act. Officers who fail to intervene can be subject to discipline, civil liability and criminal prosecution.

Police Executive Research Forum (PERF)

The Police Executive Research Forum (PERF) has a "Critical Issues in Policing Series." Its monograph titled "Guiding Principles on Use of Force" lists 30 guiding principles. Its guiding principle number 6 out of 30 is the duty to intervene:

> Duty to intervene: Officers need to prevent other officers from using excessive force. Officers should be obligated to intervene when they believe another officer is about to use excessive or unnecessary force, or when they witness colleagues using excessive or unnecessary force, or engaging in other misconduct. Agencies should also train officers to detect warning signs that another officer might be moving toward excessive or unnecessary force and to intervene before the situation escalates.

Police Executive Research Forum (PERF), Critical Issues in Policing Series, "Guiding Principles on Use of Force" (March 2016), Policy 6, available at https://www.policeforum.org/assets/30%20guiding%20principles.pdf.

U.S. Department of Justice (DOJ)

A U.S. Department of Justice Office of Community Oriented Police Services (COPS Office) comprehensive policy on use of force and use of force investigations provides in part:

> IV. DUTY TO INTERVENE Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when

> in a position to do so, safely intercede to prevent the use of such excessive force. Officers shall promptly report these observations to a supervisor.

Available at https://cops.usdoj.gov/pdf/Use-of-Force.pdf at 4.

The federal criminal statute that enforces Constitutional limits on conduct by law enforcement officers is 18 U.S.C. § 242. It is the criminal counterpart to 42 U.S.C. § 1983 and requires that the violation be "willful." Section 242 provides in relevant part:

> Whoever, under color of any law, . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime].

Section 242 is intended to "protect all persons in the United States in their civil rights, and furnish the means of their vindication." ***Screws v. United States***, 325 U.S. 91, 98 (1945) (quoting legislative history).

The Civil Rights Division of the DOJ is tasked with enforcement. Its guidance provides:

> To prove a violation of § 242, the government must prove each of the following elements beyond a reasonable doubt: (1) that the defendant deprived a victim of a right protected by the Constitution or laws of the United States, (2) that the defendant acted willfully, and (3) that the defendant was acting under color of law.
>
> Failure to Intervene
>
> An officer who purposefully allows a fellow officer to violate a victim's Constitutional rights may be prosecuted for failure to intervene to stop the Constitutional violation. To prosecute such an officer, the government must show that the defendant officer was aware of the Constitutional violation, had an opportunity to intervene, and chose not to do so. This charge is often appropriate for supervisory officers who observe uses of excessive force without stopping them, or who actively encourage uses of excessive force but do not directly participate in them.

U.S. Department of Justice, Civil Rights Division, "Law Enforcement Misconduct," available at https://www.justice.gov/crt/law-enforcement-misconduct

International Association of Chiefs of Police (IACP)

The International Association of Chiefs of Police (IACP), along with 11 other organizations, including the Fraternal Order of Police, have issued a Consensus Policy on Use of Force. It, too, emphasizes the duty to intervene:

> 4. An officer has a duty to intervene to prevent or stop the use of excessive force by another officer when it is safe and reasonable to do so.

IACP, "National Consensus Policy and Discussion Paper on Use of Force," (revised July 2020), available at https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf

Additionally, the IACP has issued guidance that it calls "Peer Bystander Intervention in Law Enforcement Agencies."

> There are many reasons officers do not intervene when they see or are aware of misconduct, some of these reasons include belief that loyalty means supporting a colleague's actions regardless of whether they are right or wrong, a fear of retaliation and backlash from peers, detriment to one's career, or the desire to not get involved.

The IACP provides specific recommendations where other policy statements do not. For instance, the IACP suggests training that includes "role-play scenarios that enable officers to practice how they would intervene in a wide range of situations." The IACP details "The Five Stages of Intervention." The following are extracts from it:

> Stage One – See the Problem
> Stage Two – Determine Whether Action Is Required
> Stage Three – Decide to Take Personal Responsibility to Act
> Stage Four – Determine How to Intervene
>
> - Distract – Redirect the individual's attention.
> - Direct – Address the misconduct directly and step in to intervene; depending on the relative rank of the officer engaging in misconduct, this may include giving them direct commands to cease the behavior[.]
> - Delegate – Appoint someone else to take an action.
>
> Stage Five – Take Action. Sometimes a situation clearly requires action and it is your obligation to do so.
>
> The IACP provides guidance on "How to intervene with a superior:"
>
> - Present solutions, not problems: Suggest an alternative way of succeeding.
> - Support the department's mission, vision and professionalism: Connect your concerns back to supporting the department's success. It shows a commitment to the profession and to the community.
> - Have their back: Let them know when something might reflect poorly on them and demonstrate that you are interested in supporting their career as well as your own.

IACP, "Peer Bystander Intervention in Law Enforcement Agencies" available to members at https://www.theiacp.org/sites/default/files/243806_IACP_CPE_Bystander_Intervention_p2.pdf

PRACTICE TIP: Since the Floyd case, there has been more attention to bystander liability, the officers who stand by and do not take action to prevent another officer's use of force. It is easier to state the rule than to implement it. As was evident in the Floyd situation, the problem of intervention is more difficult when subordinate officers observe the excessive force of their supervisor. If they physically intervene, will that encourage an unruly crowd to get involved? And will officials in the department back up the subordinate officers in a disciplinary proceeding? The IACP's "Peer Bystander" discussion paper makes specific recommendations. Because of attention being paid to the duty to intervene, bystander officers will increasingly be named defendants in § 1983 actions involving the use of force.

#6 De-escalation of Force

Supreme Court

Police are allowed to use "objectively reasonable" force in making an arrest, ***Graham v. Connor***, 490 U.S. 386 (1989), and deadly force when the subject presents an imminent threat of death or serious bodily harm. ***Tennessee v. Garner***, 471 U.S. 1 (1985). Yet the law does not require that officers choose the best or least intrusive alternative. See ***City and County of San Francisco v. Sheehan***, 135 S. Ct. 1765, 1777 (2015); ***Lal v. California***, 746 F.3d 1112, 1118 (9th Cir. 2014). In two cases involving Emotionally Disturbed Persons (EDPs) with knives, the Supreme Court granted qualified immunity without requiring that officers exhaust less intrusive alternatives to deadly force. ***Kisela v. Hughes***, 138 S.Ct. 1148 (2018); ***City and County of San Francisco v. Sheehan***, 135 S.Ct. 1765 (2015).

Although de-escalation is not a constitutional requirement, a jury should consider the totality of the circumstance in the reasonableness analysis, including whether de-escalation was a feasible alternative and whether it was attempted. Best practices from the IACP, Department of Justice and the Police Executive Research Forum all recommend the de-escalation of force when feasible:

The IACP

The Consensus Policy on the use of force defines de-escalation:

> DE-ESCALATION: Taking action or communicating verbally or non-verbally during a potential force encounter in an attempt to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the force necessary. De-escalation may include the use of such techniques as command presence, advisements, warnings, verbal persuasion, and tactical repositioning.

It provides:

> B. De-escalation 1. An officer shall use de-escalation techniques and other alternatives to higher levels of force consistent with his or her training whenever possible and appropriate before resorting to force and to reduce the need for force. 2. Whenever possible and when such delay will not compromise the safety of the officer or another and will not result in the destruction of evidence, escape of a suspect, or commission of a crime, an officer shall allow an individual time and opportunity to submit to verbal commands before force is used.

IACP "National Consensus Policy and Discussion Paper on Use of Force" (revised July 2020), available at https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf

U.S. Department of Justice

Similarly, the Department of Justice advocates de-escalation. Their decision-making model, as adopted by the Las Vegas Metropolitan Police Department (LVMPD) under a consent decree, implicity follows the recommendations of PERF, which is the leader in de-escalation and crisis intervention policy:

> VIII. DE-ESCALATION Policing requires that at times an officer must exercise control of a violent or resisting subject to make an arrest, or to protect the officer, other officers, or members of the community from risk of imminent harm. Clearly, not every potential violent confrontation can be de-escalated, but officers do have the ability to impact the direction and the outcome of many situations they handle, based on their decision-making and the tactics they choose to employ.
>
> When reasonable under the totality of circumstances, **officers should gather information about the incident, assess the risks, assemble resources, attempt to slow momentum, and communicate and coordinate a response. In their interaction with subjects, officers should use advisements, warnings, verbal persuasion, and other tactics and alternatives to higher levels of force. Officers should recognize that they may withdraw to a position that is tactically more secure or allows them greater distance in order to consider or deploy a greater variety of Force Options.** Officers shall perform their work in a manner that avoids unduly jeopardizing their own safety or the safety of others through poor tactical decisions.
>
> The prospect of a favorable outcome is often enhanced when supervisors become involved in the management of an overall response to potential violent encounters by coordinating resources and officers' tactical actions. Supervisors should possess a good knowledge of tactics and ensure that officers under their supervision perform to a standard. As a good practice, supervisors will acknowledge and respond to incidents in a timely manner where police use of force is probable.

Las Vegas Metropolitan Police Department (LVMPD), available at https://www.lvmpd.com/en-us/InternalOversightConstitutionalPolicing/Documents/Use-of-Force-Policy-2017.pdf (emphasis added). See also U.S. Department of Justice's Office of Community Oriented Policing Services (COPS Office), "Law Enforcement Best Practices: Lessons Learned from the Field," available at https://cops.usdoj.gov/RIC/ric.php?page=detail&id=COPS-W0875.

Police Executive Research Forum

The Police Executive Research Forum (PERF) has been in the forefront of de-escalation policy and its implementation. PERF's "Critical Issues in Policing Series" emphasizes de-escalation and crisis intervention for (1) subjects in crisis; or (2) armed with weapon other than firearm. According to the Washington Post's interactive database on fatal police shootings, of the 1,021 people fatally shot by police in 2020, 217 were known to have mental illness; 175 had knives. Washington Post statistics on police involved fatal shootings, available to subscribers at https://www.washingtonpost.com/graphics/investigations/police-shootings-database/

According to PERF,

"De-escalation can be used in a range of situations, especially when confronting subjects who are combative and/or suffering a crisis because of mental illness, substance abuse, developmental disabilities, or other conditions that can cause them to behave erratically and dangerously. De-escalation strategies should be based on the following key principles":

- Effective communication is enough to resolve many situations; communications should be the first option, and officers should maintain communication throughout any encounter.

- In difficult situations, communications often are more effective when they begin at a "low level," e.g., officers speaking calmly and in a normal tone of voice, and asking questions rather than issuing orders.
- Whenever possible, officers should be trained to use distance and cover to "slow the situation down" and create more time for them to continue communicating and developing options.
- If an encounter requires a use of force, officers should start at only the level of force that is necessary to mitigate the threat. Officers should not unnecessarily escalate a situation themselves.
- As the situation and threats change, officers should re-evaluate them and respond proportionally; in some cases, this will mean deploying a higher force option, in others a lower option, depending on the circumstances.

PERF's "Guiding Principles on Use of Force," available at http://www.policeforum.org/assets/guidingprinciples1.pdf ("Guiding Principles"), Policies 4 and 14.

PRACTICE TIP: The practitioner should prepare for examination and cross-examination on officers' opportunity to de-escalate and the effort made.

#7 Training Models that Integrate Communications, Assessments and Training

Departments know they will encounter subjects in crisis and threatening with edged weapons. Consensus policies require training on de-escalation techniques and crisis intervention for EDPs. There is a risk of injury if departments do not train in those areas. If departments know of that risk and are "deliberately indifferent," they can be liable. This policy of "deliberate indifference" establishes municipal liability if it is causally related to underlying violation. **See *City of Canton v. Harris***, 489 U.S. 378 (1989).

PERF surveyed its members and learned that agencies spent a median of 58 hours of recruit training on firearms and another 49 hours on defensive tactics, but they spent only about 8 hours of recruit training each on topics of de-escalation, crisis intervention, and Electronic Control Weapons (Tasers). PERF advises

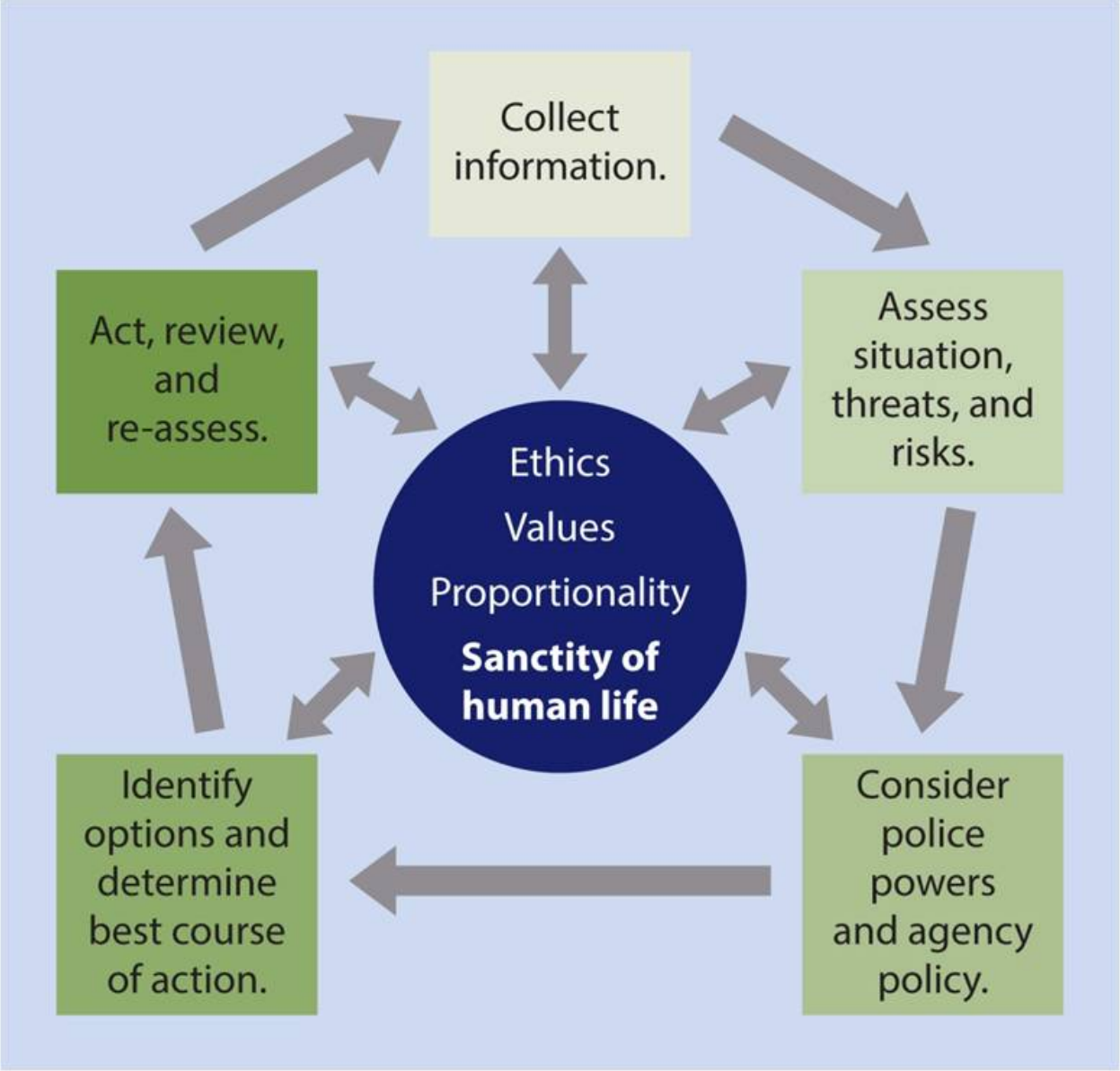
> Agencies should adopt General Orders and/or policy statements making it clear that de-escalation is the preferred, tactically sound approach in many critical incidents. General Orders should require officers to receive training on key de-escalation principles. Many agencies already provide crisis intervention training as a key element of de-escalation, but crisis intervention policies and training must be merged with a new focus on tactics that officers can use to de-escalate situations. De-escalation policy should also include discussion of proportionality, using distance and cover, tactical repositioning, "slowing down" situations that do not pose an immediate threat, calling for supervisory and other resources, etc. Officers must be trained in these principles, and their supervisors should hold them accountable for adhering to them.

Guiding Principles, Policy 4.

PERF's Integrating Communications, Assessment and Training (ICAT) decision-making model is becoming the gold standard for law enforcement. It has five steps, abbreviated as follows:

Step 1: Collect information
Step 2: Assess situation, threats, and risks
Step 3: Consider police powers and agency policy
Step 4: Identify options and determine best course of action
Step 5: Act, review, and re-assess

Those steps are illustrated in the following diagram:



Police Executive Research Forum, Critical Issues in Policing Series, ICAT, Integrating Communications, Assessment and Training, Training Guide, for Defusing Critical Incidents, available at https://www.policeforum.org/assets/icattrainingguide.pdf

PERF says:

> Old ways of thinking continue to permeate police training, tactics, and culture. In our research, PERF repeatedly encountered examples of outdated concepts that are pervasive in police training and police culture. In some instances, we heard officials say that the concepts described below were no longer taught or practiced, only to find that they continue to be publicly cited in the defense of controversial uses of force.

Guiding Principles, Policy 17

PERF specifically cites the "Use of Force Continuum" as outmoded:

> Some agencies still rely on rigid, mechanical, escalating continuums of force, in which levels of resistance from a subject are matched with specific police tactics and weapons. While the models themselves have become more complicated over time, continuums suggest that an officer, when considering a situation that may require use of force, should think, "If presented with weapon A, respond with weapon B. And if a particular response is ineffective, move up to the next higher response on the continuum." This pattern is often seen in news stories about officer-involved shootings.

Guiding Principles, Policy 17

PERF also cites the "21-foot rule" as misunderstood and misapplied:

> [M]any police agencies and officers have embraced the "21-foot rule[.]" . . . [O]ver time, police chiefs have said that this "safety zone" concept was corrupted, and in some cases has come to be thought of as a "kill zone"—leading some officers to believe they are automatically justified in shooting anyone with a knife who gets within 21 feet of the officer. Although some have claimed that few officers today are formally trained in the "21-foot rule," many police chiefs have said that the 21-foot-rule continues to be disseminated informally. PERF's research into recent incidents revealed examples of the "rule" being cited by officers or their attorneys to justify shootings of suspects with edged weapons.
>
> Instead,
>
> Agencies should train their officers on the principles of using distance, cover, and time when approaching and managing certain critical incidents. In many situations, a better outcome can result if officers can buy more time to assess the situation and their options, bring additional resources to the scene, and develop a plan for resolving the incident without the use of force or only with force that is necessary to mitigate the threat[.]

Guiding Principles, Policies 16, 17.

See also Police Executive Research Forum (PERF) monographs in "Critical Issues in Policing Series": "Re-Engineering Training on Police Use of Force," available at http://www.policeforum.org/assets/reengineeringtraining1.pdf;

"Integrating Communications, Assessment, and Tactics (ICAT)" available at http://www.policeforum.org/assets/icattrainingguide.pdf;

ICAT training guide available at www.policeforum.org/TrainingGuide;

Police Executive Research Forum (PERF 2020), "Refining the Role of Less-Lethal Technology: Critical Thinking, Communications, and Tactics Are Essential in Defusing Critical Incidents," available at https://www.policeforum.org/assets/LessLethal.pdf

Law enforcement has also adopted the term "verbal judo" and communication strategies from the work of George J. Thompson, Ph.D. See, e.g., George J. Thompson, Ph.D. and Jerry B. Jenkins, *Verbal Judo: The Gentle Art of Persuasion*, Updated Edition (2013), available at https://www.amazon.com/Verbal-Judo-Gentle-Persuasion-Updated/dp/0062107704

PRACTICE TIP: In bringing or defending a critical incident, the practitioner should evaluate whether the defendant officer employed de-escalation and crisis intervention techniques. Did the officer escalate, engage, rush in, close the space, shout commands, and, if threatened, use excessive, even deadly force? Or did the officer de-escalate, disengage, call for experienced back up, give the person room, but isolate them, speak calmly, develop rapport, wait for person to calm down, and use less than lethal force? Then the analysis turns to the officer's training. Counsel will want to know how many hours of academy training the officer had in de-escalation and crisis intervention techniques, and whether the department has in-service training that includes roll playing and simulated situations. Remember, to hold the employer liable, there must be a policy of "deliberate indifference" to the relevant training and a causal relationship with the incident. ***City of Canton v. Harris, supra.*** A department that provides ICAT or similar training will probably be able to defeat a municipal liability claim, even if a single officer was poorly trained or failed to follow his/her training.

#8 Disciplinary Systems that Involve Early Warning Tracking, Citizen Review Boards, Public Hearings and Public Access to Disciplinary Records

Former Officer Derek Chauvin, the principal defendant in the death of George Floyd, had numerous citizen complaints filed against him – so many that it raised the issue of why he had been retained by the Minneapolis Police Department. So, national police reform efforts have scrutinized law enforcement policies and procedures for hiring and retaining law enforcement officers, with particular attention to transparency, disclosure of disciplinary records, and public participation.

As with "deliberate indifference" to training, discussed above, there must be deficiency in the disciplinary system that is directly linked to the violation at issue. ***City of Canton v. Harris***, 489 U.S. 378 (1989); **see also *Beck v. City of Pittsburgh***, 89 F.3d 966 (3d Cir. 1996) (failure to discipline based on citizen complaint process that favored police officers). The fact that a department hires or retains an officer who violates rights enforceable under § 1983 does not impute liability to the employer. **See, e.g**., ***Pharaoh v. Dewees***, Civil Action 14-3116 (E.D. Pa. 05/04/2016) (Officer's history of misusing sick days and failing to sign in unrelated to whether he had history of using excessive force in making arrests).

The following discussion focuses on specific disciplinary issues relevant to litigating a failure to supervise or discipline case: early warning tracking, citizen complaint process, progressive discipline, due process hearings, public disclosure of disciplinary records, and state decertification.

Early Warning Tracking

Departments should have systems to red flag and correct problem officers. The following are indicators:

> • Officer-involved shootings • Other uses of force • Citizen-initiated complaints against the officer • Internal investigations involving the officer • Missed scheduled firearms qualification or missed court appearances • Vehicle collisions in which the officer was driving • Elevated use of time off • Overtime usage • Work-related injuries • Unsatisfactory performance evaluation • Civil litigation against the officer • Tardiness • An EIS [Early Intervention System] may also track positive indicators, including satisfactory performance evaluations, awards, commendations, and community member thank/you appreciation letters. U.S. Department of Justice, "Police-Community Relations Toolkit: Guide to Critical Issues in Policing,"

The U.S. Justice Department's Civil Rights Division has required a number of police departments to establish EISs as part of consent decrees, including the police departments in Los Angeles, Cincinnati, Pittsburgh, Washington, DC, New Orleans, and the New Jersey State Police. U.S. Department of Justice, "Police-Community Relations Toolkit: Guide to Critical Issues in Policing," available at https://www.justice.gov/file/1376346/download

Citizen Complaint Process

Typically, citizen complaints are referred to a board comprised of sworn officers or civilians, or of some combination of the two. The board does an investigation, including obtaining witness statements. Generally, the findings are catalogued as "unfounded," "exonerated," "not sustained," "sustained," or "closed by memo." A complaint will be classified as "unfounded" when the facts indicated that the complainant was untruthful or inaccurate; "exonerated" when everything the complainant stated was true, but the board found that the officer followed proper police procedure; "closed by memo" when a complainant dropped the claim, or was uncooperative in the investigatory process. A board will apply a preponderance of the evidence standard in determining whether to sustain a complaint. Thus, a complainant has the burden of showing that 51 percent of the evidence supported his/her version of the incident**. See, e.g., *Beck v. City of Pittsburgh***, 89 F.3d 966 (3d Cir. 1996) As a practical matter, the preponderance standard mandates a finding of "not sustained" whenever the complainant does not have a corroborating witness or other evidence.

The U.S. Departments of Justice has made recommendations on how a citizen's complaint process should be structured to make it easy to file a complaint, in any of several different ways and in the native language of the complainant. U.S. Department of Justice, Community Oriented Policing Services (COPS) "Civilian Oversight of Law Enforcement: Report on the State of the Field and Effective Oversight Practices," (2021), Complaint process, pages 76-86, available at https://cops.usdoj.gov/RIC/Publications/cops-w0952-pub.pdf

Civilian Oversight

According to the U.S. Department of Justice,

> The Final Report of the President's Task Force on 21st Century Policing, published in May 2015, offered several recommendations, including many relating to public trust, procedural

> justice, and legitimacy; accountability and transparency; community policing efforts; and the **inclusion of community members in policy development, training programs, and review of force incidents**. In addition, the task force's report recommended that civilian oversight of law enforcement be established in accordance with the needs of the community and input from local law enforcement stakeholders. Civilian oversight of law enforcement can contribute significantly to the implementation and institutionalization of many of the task force's recommendations and further the development of public trust, legitimacy, cooperation, and collaboration necessary to improve police-community relations and enhance public safety
>
> . . . .
>
> Civilian oversight may entail, but is not limited to, the **independent investigation of complaints alleging officer misconduct**, auditing or monitoring various aspects of the overseen law enforcement agency, analyzing patterns or trends in activity, issuing public reports, and issuing recommendations on discipline, training, policies, and procedures.

U.S. Department of Justice, Community Oriented Policing Services (COPS) "Civilian Oversight of Law Enforcement: Report on the State of the Field and Effective Oversight Practices," (2021) available at https://cops.usdoj.gov/RIC/Publications/cops-w0952-pub.pdf

Progressive Discipline and Penalty Guides

Law enforcement officers are protected under Due Process Clause of U.S. Constitution, collective bargaining agreements, civil service rules, state laws, and/or internal department orders and procedures. They have a right to written policies and procedures: a list of prohibited conduct; and notice of their duties, obligations, and rights in a written general order. They have a right to be disciplined for cause; under a vague standard like "unbecoming," the department should show harm. They have right to progressive discipline: corrective action, informal procedures for resolving disciplinary actions, and adverse actions. Adverse actions, ones that will include suspensions, demotions, and termination, require written notice of the charges and an evidentiary, due process hearing on the record, and a decision by a neutral fact-finder. The "trial board's" decision is typically referred to the chief or sheriff, who makes the final agency decision, subject to the right of appeal or arbitration. Departments should have a penalty guide and matrix that increases the penalty due to the severity and the number of violations from corrective action to removal from office. The hearing and the results may be made public. The trend is to make them public, although until recently there has been little public interest in the discipline of individual officers.

Resources: IACP Standards of Conduct, available to members at https://www.theiacp.org/sites/default/files/2019-07/Standards%20of%20Conduct%20Policy%20-%202019.pdf;

L.A. Sheriff's Department Guidelines for Discipline, found at http://www.la-sheriff.org/s2/static_content/info/documents/Guidelines_For_Discipline%20_01-01-2017_EDITION.pdf; D.C. MPD Disciplinary Procedures, found at https://go.mpdconline.com/GO/120_21re.pdf;

City of Madison, WI, Disciplinary Matrix, found at https://www.cityofmadison.com/police/documents/sop/PSIAdiscMatrix.pdf

Public Access to Disciplinary Records

Officer personnel records are discoverable in litigation under § 1983. They are often shielded from public disclosure through a protective order. The personnel records of public employees are unavailable in most states through Right to Know requests. The Associated Press has done a state-by-state analysis of the public records laws in all 50 states, based on statutes and court opinions as well as interviews with experts. With significant back-up detail, it lists public access to law enforcement employment records in the following states as:

- "mostly closed": Alaska, Arkansas, Washington, D.C., Delaware, Hawaii, Idaho, Iowa, Kansas, Mississippi, Montana, Nebraska, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Virginia, Wyoming.
- "restricted": Alabama, California, Colorado, Connecticut, Indiana, Kentucky, Maine, Michigan, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, South Carolina, Texas (depending on city), Utah, West Virginia.
- "mostly public": Arizona, Florida, Georgia, Illinois, Louisiana, Maryland, Minnesota, New York, North Dakota, Ohio, Tennessee, Vermont, Washington, Wisconsin.

AP, "Analysis of police misconduct record laws in all 50 states," available at https://apnews.com/article/business-laws-police-reform-police-government-and-politics-d1301b789461adc582ac659c3f36c03c

Similarly, a New York Radio Station, WNYC, reports that police records are confidential in 23 states, limited availability in 15 states, and public in 12 states. Project WNYC, Disciplinary Records, available at https://project.wnyc.org/disciplinary-records/

The **George Floyd Justice Policing Act of 2021**, introduced originally in 2020, would create a federal registry of police misconduct complaints and disciplinary actions. Section 201 would establish a national police misconduct registry. The registry would contain complaints, discipline, terminations, and lawsuits and the results against officers for use of force or racial profiling. States that receive federal law enforcement grants would have to report this information for themselves and local law enforcement agencies within the state. They would also have to submit records demonstrating that all law enforcement officers of the state or unit of local government have completed all state certification requirements. The registry would be available on a public website. H. Rept. 116-434 – George Floyd Justice in Policing Act of 2020, 116th Congress (2019-2020), https://www.congress.gov/congressional-report/116th-congress/house-report/434/1?overview=closed As noted in the discussion under #1 Qualified Immunity, the bill passed the House but is stalled in the Senate.

Certification and De-certification

All but four states, California, Hawaii, Massachusetts and New Jersey, license or certify their officers. States that certify officers do so through a Peace Officer Standards and Training (POST) board or commission, which sets standards for who may become and remain an officer. **The International Association of Directors of Law Enforcement Standards and Training** (IADLEST) provides guidance for certification standards, including background checks to see whether a candidate has previously been decertified, terminated, or disciplined.

The National Conference of State Legislatures lists the statutory bases for decertification in the following 11 states: Alabama, Arizona, Arkansas, Georgia, Iowa, Kansas, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, Utah. National Conference of State Legislatures, "Law Enforcement Officer Decertification," available at https://www.ncsl.org/research/civil-and-criminal-justice/decertification.aspx

According to the United States Conference of Mayors, the statutory grounds for decertification vary considerably, with some allowing decertification only in narrow, defined cases, with others giving POSTs greater latitude. "In the most restrictive examples, POSTs may only decertify an officer if the officer has been convicted of a crime bearing on his or her fitness. Others have the authority to decertify an officer for conduct that, for example, shows a 'reckless disregard' for public safety." The Conference of Mayors recommends that:

- The four states (California, Hawaii, Massachusetts, and New Jersey) that do not already require that law enforcement officers be certified should establish such systems.
- States have in place a system for suspending or revoking an officer's certification upon the recommendation of his or her department's chief after an investigation by the department showing that the officer has breached those standards and engaged in serious misconduct.
- POSTs have authority to decertify officers if that officer's department has terminated him/her for conduct that violates the professional standards of policing by showing a reckless disregard for public safety or involving acts of dishonesty—for example, an illegal use of force or falsifying evidence.
- Systems for the retention and sharing of decertification data, particularly across state lines, be improved. Currently, states may report de-certifications to the National Decertification Index maintained by IADLEST, but such reporting is not uniform and, thus, the database is not comprehensive. For this reason, even diligent POSTs (and police departments) may be unable to determine whether a prospective officer has been previously decertified.

United States Conference of Mayors Report on Police Reform and Racial Justice, "Transparency and Accountability to Reinforce Constitutional Policing," available at https://www.usmayors.org/issues/police-reform/transparency-and-accountability-to-reinforce-constitutional-policing/

PRACTICE TIP: The practitioner should start with the defendant officers and then move upstream to the government employer. You need to obtain the employment records for the officer, and whether the officer has a record of similar incidents: for instance, in a use of force case, citizen complaints on use of excessive force, discipline, even injury reports. That an officer is frequently injured in making arrests may mean he/she is injuring others.

If an officer has a bad record, the second step is to determine whether it is attributable to the policies or customs of the employer. You look at whether it has early warning tracking; progressive discipline with a disciplinary matrix and penalty guide; a citizen complaint process that is not stacked in favor of officers; and reporting to state agencies of officers who have been fired for misconduct or dishonesty.

#9 Legalization of Marijuana Possession and What That Means to Motor Vehicle Stops, Searches and Arrests

Searches of Vehicles and Occupants

Historically, the smell of marijuana gave officers grounds to search a vehicle without a warrant under the motor vehicle exception, **see *Carroll v. United States***, 267 U.S. 132, 149 (1925), and to search an occupant incident to arrest, **see *Weeks v. United States***, 232 U.S. 383, 392 (1914). See "Searches of Vehicles and Occupants Based on Odor of Marijuana," available at https://nccriminallaw.sog.unc.edu/searches-vehicles-occupants-based-odor-marijuana/ A routine stop could lead to a search or arrest for drugs, a fugitive, or an illegal firearm.

But now, 33 states permit the medical use of marijuana, and 11 states and the District of Columbia allow the recreational use of marijuana for adults. This has created a complicated litigation picture. Several cases show why.

In ***State v. Seckinger***, 920 N.W.2d 842 (Neb. 2018), a state trooper stopped a woman in Nebraska for motor vehicle violations. The trooper smelled marijuana. The woman denied smoking and refused a search of the vehicle. But based on the motor vehicle exception, the trooper found methamphetamine and arrested the woman. Her defense was that the marijuana odor, illegal in Nebraska, could have come from its lawful consumption in Colorado, about 60 miles away. The Nebraska Supreme Court rejected the argument, ruling:

> Assuming the vehicle is readily mobile, the odor of marijuana alone provides probable cause to search the vehicle under the automobile exception to the warrant requirement. And while there may be innocent explanations for the odor of marijuana inside a vehicle, the concept of probable cause is based on probabilities and does not require officers to rule out all innocent explanations for suspicious facts."

See "Despite Legal Marijuana Law, Odor in Car Still Creates Probable Cause to Search," available at https://www.lexipol.com/resources/blog/despite-legal-marijuana-law-odor-in-car-still-creates-probable-cause-to-search/, citing cases. California is the largest state to allow marijuana possession. The article cites ***People v. Strasburg***, 56 Cal.Rptr.3d 306, 310 (Cal. App. 1st Dist.), ***cert. denied***, 552 U.S. 1049 (2007) (valid medical marijuana prescription did not overcome right to search vehicle; statute provided only limited immunity, not shield from investigation).

In a Maryland case, the defendant was sitting alone in his car when officers detected the smell of burning marijuana. They found a joint and rolling papers in his car and cocaine in a search of his person. State law in Maryland makes possession of less than 10 grams of marijuana a civil offense. The Maryland Court of Appeals, the State's highest court, ruled that the search of the vehicle was permissible under court precedent. Amounts higher than 10 grams, distribution and driving under the influence are still crimes, but the search of the defendant was not justified. Under court precedent, the smell of marijuana did not justify a search incident to arrest. The amount involved made it a civil violation, not a felony or misdemeanor. Plus, there is a heightened expectation of privacy involving one's person versus a diminished expectation involving a motor vehicle. See ABA Journal, "After Decriminalization, Pot Smell and Joint Didn't Justify Search, Court Says; Hemp Laws also Raise Issues," available at http://www.abajournal.com/news/article/after-decriminalization-pot-smell-and-joint-didnt-justify-search-court-says-hemp-laws-also-raise-issues, citing to ***Michael Pacheco v. State of Maryland***, No. 17, September Term.

Lower state court decisions have limited motor vehicle searches based on the odor of marijuana. A PBS article reports:

> [A] Pennsylvania judge declared that state police didn't have a valid legal reason for searching a car just because it smelled like cannabis, since the front-seat passenger had a medical marijuana card. The search yielded a loaded handgun and a small amount of marijuana in an unmarked plastic baggie — evidence the judge suppressed.
>
> "The 'plain smell' of marijuana alone no longer provides authorities with probable cause to conduct a search of a subject vehicle," Lehigh County Judge Maria Dantos wrote, because it's "no longer indicative of an illegal or criminal act." She said that once the passenger presented his medical marijuana card, it was "illogical, impractical and unreasonable" for troopers to conclude a crime had been committed.
>
> Prosecutors have appealed the ruling, arguing the search was legal under recent state Supreme Court precedent. But they acknowledge that marijuana odor is an evolving issue in the courts.
>
> "We want to get it right," said Heather Gallagher, chief of appeals in the district attorney's office. "We need guidance, so law enforcement knows what to do."

PBS, "In Ara of Legal Pot, Can Police Still Search Cars Based on Odor?" available at https://www.pbs.org/newshour/nation/in-era-of-legal-pot-can-police-still-search-cars-based-on-odor.

The same article mentions that other states' courts have restricted odor-based searches:

> Massachusetts' highest court has said repeatedly that the smell of marijuana alone cannot justify a warrantless vehicle search. In Vermont, the state Supreme Court ruled in January [2019] that the "faint odor of burnt marijuana" didn't give state police the right to impound and search a man's car. Colorado's Supreme Court ruled in May [2019] that because a drug-detection dog was trained to sniff for marijuana — which is legal in the state — along with several illegal drugs, police could not use the dog's alert to justify a vehicle search.

Driving while High; Finding a Test

Nine states and the District of Columbia have legalized recreational marijuana and 30 states and D.C. have legalized medical pot. NPR, "The Pot Breathalyzer Is Here. Maybe" available at https://www.npr.org/2018/08/04/634992695/the-pot-breathalyzer-is-here-maybe. And while it is still illegal to drive while under the influence in even those states that have decriminalized recreational and medical use, 70 percent of Americans think it is unlikely that they will be busted while high on marijuana. In fact, a study from the largest federation of auto clubs, the AAA, found that in the prior 30 days "almost 15 million drivers have gotten behind the wheel of a car within an hour of smoking, injecting or covering themselves with a marijuana product." AAA says in states where marijuana is legal fatal accidents have doubled when drivers tested positive for THC, the active ingredient in marijuana. "Driving while high: Offenders don't think they'll be arrested," available at https://www.cbsnews.com/news/driving-while-high-offenders-dont-think-theyll-be-arrested/. Marijuana "can cause slower reaction in braking, problems with staying in the center of the lane, and impaired attention, decision-making and risk-taking." According to another study, "In 2016, 38% of fatally injured drivers tested positive for marijuana, 16% for opioids and 4% for both." "Cops want to know who's driving while stoned. Tests are being developed, but level of impairment after smoking weed is still hard to measure," available at

https://www.chicagotribune.com/marijuana/illinois/ct-marijuana-roadside-drug-test-20191025-zr2ouoci6jfxdnjnjcifhtv3s4-story.html.

Most states still rely on standard practices to determine whether someone is driving while high: a motor vehicle violation to provide reasonable suspicion for a stop; the smell of marijuana or visible evidence such as a joint; and essentially the same field sobriety tests that are given to subjects suspected of driving under the influence of alcohol: the "horizontal gaze nystagmus test," the "walk and turn test," and the "one-leg stand." The National Highway Traffic and Safety Administration (NHTSA) estimates that these tests are between 60 and 80 percent reliable. "How Police Test for Marijuana DUI in California" available at https://www.duiease.com/test-for-marijuana-california/

For alcohol, there is a national standard. "If your blood alcohol content (BAC) is 0.08 percent or higher, you're considered cognitively impaired at a level that is unsafe to drive. Extensive research supports this determination, and the clarity makes enforcement of drunken driving laws easier." NBC News, "Smoking weed: When is someone too high to drive?" available at https://www.nbcnews.com/health/health-news/smoking-weed-when-someone-too-high-drive-n954211. Measuring marijuana consumption is more difficult; it stays in the blood longer and the science hasn't determined what is a "safe" level. But "[S]ix states have adopted 'per se' (inherently illegal) limits on THC found during a blood test, from 1 nanogram per milliliter in Oregon to 5 nanograms per milliliter in Montana and Washington. Other states have a zero tolerance for THC, including Illinois (which just legalized recreational consumption), Arizona, Indiana, Oklahoma and Rhode Island." "The Holy Grail for Law Enforcement: Accurate Roadside Testing for Driving While Stoned" available at https://www.cannabissciencetech.com/news/holy-grail-law-enforcement-accurate-roadside-testing-driving-while-stoned.

Refusal to agree to a blood test can lead to license suspension or revocation under states' implied consent laws. But blood cannot be drawn without a warrant, or in limited situations, exigent circumstances. ***Mitchell v. Wisconsin***, 139 S.Ct. 2525 (2019) (alcohol). Companies are now working on roadside tests that use saliva collected as oral swabs to detect THC and/or crystal meth, methadone, cocaine, and several other prescription medications. These include a German-made device, Drager DrugTest 5000; and domestic products made by mLife Diagnostics and SoToxa, already in use in Europe. These devices record the presence THC, but not the amount or recency of use. Chicago Tribune, "Cops want to know who's driving while stoned. Tests are being developed, but level of impairment after smoking weed is still hard to measure," available at https://www.chicagotribune.com/marijuana/illinois/ct-marijuana-roadside-drug-test-20191025-zr2ouoci6jfxdnjnjcifhtv3s4-story.html. Hound Lab in California has developed a breathalyzer that can measure THC in molecules in parts per trillion, whereas alcohol impairment is measured in parts per thousand. The company says, "When you find THC in breath, you can be pretty darn sure that somebody smoked pot in the last couple of hours[.]" NPR, "The Pot Breathalyzer Is Here. Maybe" available at https://www.npr.org/2018/08/04/634992695/the-pot-breathalyzer-is-here-maybe.

PRACTICE TIP: Decriminalization of marijuana use has complicated the law enforcement landscape. The cases so far have arisen in motions to suppress evidence in criminal cases. When to stop, search a vehicle and arrest and search an occupant is unclear and evolving to keep up with changes in the law. Based on the foregoing, it is much harder to arrest and convict someone for driving under the influence of marijuana. De-criminalization of drug use means fewer stops, fewer searches for drugs, guns and contraband, and more traffic accidents and fatalities. The practitioner's interest here is in civil cases involving § 1983. Based on the lack of clarity in established law on stops, searches, and arrests, law enforcement officers can certainly employ the qualified immunity defense to their benefit.

#10 First Amendment, Right to Protest and Best Practices in Crowd Control

George Floyd died on May 25, 2020. By June 18, 2020, there had been 1,700 demonstrations in all 50 states. USA Today, "Tracking protests across the USA in the wake of George Floyd's death," available at https://www.usatoday.com/in-depth/graphics/2020/06/03/map-protests-wake-george-floyds-death/5310149002/

According to the IACP,

> [L]aw enforcement practices and protocols have undergone transformations. Studies of crowd behavior and law enforcement after-action reports have led to the development of new strategies and tactics for protest policing. Agencies now utilize tactical teams that work within the crowd to identify agitators and provocateurs, protocols that call for arrests only when absolutely necessary, systematic event pre-planning, established command and control, and the use of a variety of non-deadly force options.

IACP Law Enforcement Policy Center, "Crowd Management," April 2019, available to members at https://www.theiacp.org/sites/default/files/2020-08/Crowd%20Management%20FULL%20-%2008062020.pdf (IACP Policy and Concepts and Issues paper on Crowd Management).

Legal Precedents

The First Amendment to the United States Constitution provides that "Congress shall make no law …. abridging the freedom of speech … or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." **U. S. Const., amend. I.** Like the other constitutional amendments, reasonableness standards govern the application of the First Amendment to particular situations; often a balancing of private and governmental interests. Even in traditional public forums, like public streets, sidewalks and parks, the government may impose reasonable restrictions on the time, place, and manner of protected speech. The Supreme Court has held that

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for the communication of the information.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

Governmental regulation of expressive activity is permissible if it is "content neutral." In ***Hill v. Colorado***, 530 U.S. 703 (2000), the Supreme Court upheld a statute that made it unlawful in regulated areas of a health care facility to knowingly approach within eight feet of another person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." 530 U.S. at 708**. See also *Thomas v. Chicago Park Dist.***, 534 U.S. 316, 322 (2002) (noting permit requirement in did not involve prior restraint on speech and had adequate safeguards to guide official's granting or denying a permit).

Police can make arrests when protests turn violent. Although the Fourth Amendment requires that law enforcement have "particularized" probable cause, that requirement can be met by an order that the crowd disperse; an adequate opportunity for them to do so; and the arrest of those who remain. But in ***Vodak v. City of Chicago***, 639 F. 3d 738 (7th Cir. 2011), individual police officers could not have reasonably believed they had probable cause to arrest when there was no parade permit specifying where the marchers could or could not go; many of the protesters could not have heard the order to disperse and return to their starting point; and others who were trapped in the police line were not a part of the demonstration. 639 F. 3d at 746. In ***Barham v. Ramsey***, 434 F.3d 565 (D.C. Cir. 2006), the assistant chief decided to cordon off the park and place whoever was there under arrest. However, he "did not order any persons to clear the park before directing his officers to conduct the mass arrest, and he did not warn the persons in the park that arrest was imminent." 434 F.3d at 569. Further, "[t]he mass arrest at Pershing Park violated the clearly established Fourth Amendment rights of plaintiffs by detaining them without particularized probable cause. Everyone arrested in the park was charged with Failure to Obey an Officer." 434 F.3d at 573. The D.C. Circuit panel went on to note that "police officers may quell an unruly demonstration by 'deal[ing] with the crowd as a unit' only after invoking a valid legal mechanism for clearing the area and then providing an opportunity for affected persons to follow an order to disperse." 434 F.3d at 576-77, ***citing Washington Mobilization Committee v. Cullinane***, 566 F.2d 107, 120 (D.C. Cir. 1977). That did not occur, and the arrests were unlawful.

Guidance from the International Association of Chiefs of Police (IACP)

The IACP Law Enforcement Policy Center has issued a model policy and concepts and issues document on "Crowd Management" for demonstrations and civil disturbances. Following a definition section, the policy covers "Preparation and Planning" for an event; "Management and Organization" to set up an Incident Command System (ICS); "General Crowd Response" to deploy officers to manage the crowd; "Response to Spontaneous Civil Disturbances" such as a riot or unlawful assembly; "Use of Force" that is permitted, limited or prohibited; "Crowd Dispersal" procedures; "Mass Arrest" when dispersal efforts fail; "Deactivation" when the disturbance has been brought under control. (IACP Policy and Concepts and Issues Paper on Crowd Management).

<u>Best Practices on Use of Force</u>

On the use of force, the IACP details limitations and restrictions on the following uses of force:

- Canine teams (not deployed for crowd control)
- Horses (used to contain, control, or direct)
- Motor vehicles (to contain, control, or direct, but not brought into contact)
- Bicycles (to control and move persons)
- Impact projectiles, both non-direct (skip fired) and direct (not fired into crowds)
- Electronic control weapons (ECWs) (Tasers against actively resisting individuals)
- Aerosol restraint spray, known as oleoresin capsicum (OC), also called pepper spray against groups engaged in unlawful activity
- CS (2-chlorobenzalmalononitrile) chemical agent, known as tear gas (when lesser options are not available)
- Baton (held horizontally for crowd control)

IACP Policy and Concepts and Issues Paper on Crowd Management

Best Practices on Mass Arrests

The IACP recommends:

- Uniformed personnel shall wear their badges and nameplates or other identification in a visible location on their person at all times.
- Full civil disturbance gear and related equipment should be staged at key locations—but should not be issued initially in crowd management situations, as it may escalate tensions and anxiety.
- The fact that some individuals in a crowd have engaged in unlawful conduct does not normally provide blanket grounds for use-of-force countermeasures, crowd dispersal, or declaration of an unlawful assembly. Mass arrests shall be avoided, unless necessary.
- Before ordering forced dispersal of a civil disturbance, the Incident Commander (IC) should determine whether lesser alternatives may be effective. These include establishing contact with event organizers or crowd leaders to assess their intentions and motivations and develop a mutually acceptable plan for de-escalation and dispersal; communicating to the participants that their assembly is in violation of the law and that the agency wishes to resolve the incident peacefully, but that acts of violence will be dealt with swiftly and decisively.
- Target specific violent or disruptive individuals for arrest.
- The warning shall consist of an announcement citing the offenses or violations being committed, an order to disperse, and designated dispersal routes; a second and third warning should be issued at reasonable time intervals before designated actions are taken to disperse the crowd.
- Specific crowd dispersal tactics should be ordered as necessary where the crowd does not heed warnings. These include display of forceful presence to include police lines combined with motorcycles, law enforcement vehicles, mounted units, bicycle units, and mobile field forces; multiple simultaneous arrests; use of aerosol crowd control chemical agents; and law enforcement formations and the use of batons for forcing crowd movement.
- Mass arrests should be conducted by designated squads.
- An adequate secure area should be designated for holding arrestees after processing and while awaiting transportation to a detention center.
- Arrest teams should be advised of the basic offenses to be charged in all arrests, and all arrestees shall be advised of these charges.
- Arrestees who are sitting or lying down but agree to walk shall be escorted to the transportation vehicle for processing. Two or more officers should carry those who refuse to walk.
- Arrestees shall be searched incident to arrest for weapons, evidence of the crime of arrest, and contraband.

IACP Policy and Concepts and Issues Paper on Crowd Management

A liberal advocacy group, The Center for Policing Equity, generally endorses the IACP's guidance on crowd management during demonstrations and civil disturbances. But they add the use of the term

"kittling" and would "prohibit any practice in which demonstrators are boxed in or guided to an area from which all avenues of egress are blocked (sometimes referred to as 'kettling')":

> The practice of encircling demonstrators with no avenue of egress makes it difficult or impossible for officers to differentiate members of the crowd who may be engaged in violence or property damage from those who are not. It prevents all demonstrators from complying with an order to disperse and exposes all of them to arrest or use of force, regardless of individual culpability.

Center for Policing Equity, "Guiding Principles for Crowd Management," available at https://policingequity.org/images/pdfs-doc/crowdmgt.pdf

PRACTICE TIP: It may be that you have a client who was arrested and subject to a use of force during a demonstration, and he/she wants to sue the arresting officer and reach the lead municipality on a training and planning theory. Or you represent the officer and agency on the defense side. The IACP guidance is a checklist of best practices for practitioners on both the plaintiff's and the defense side. IACP Policy and Concepts and Issues paper on Crowd Management. Other suggested resources include: Police Executive Research Forum (PERF) CHIEF CONCERNS, "Police Management of Mass Demonstrations: Identifying Issues and Successful Approaches" (2006), available at https://www.policeforum.org/assets/docs/Critical_Issues_Series/police%20management%20of%20mass%20demonstrations%20-%20identifying%20issues%20and%20successful%20approaches%202006.pdf The Washington, D.C. Metropolitan Police Department has a good general order, Standard Operating Procedures: Handling First Amendment Assemblies and Mass Demonstrations, available at https://go.mpdconline.com/GO/SOP_16_01.pdf

POLICE MISCONDUCT:
A Practitioner's Guide to Section 1983

CUMULATIVE SUPPLEMENT

Important Developments in 2019 and 2018

Wayne C. Beyer, Esq.

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Important Developments in 2019

Wayne C. Beyer, Esq.

Introduction

Juris Publishing and the author of "Police Misconduct: A Practitioner's Guide to Section 1983" ("Practitioner's Guide"), Wayne C. Beyer, Esq., want to ensure that those who have purchased or received the book remain up to date. So we bring you this 2019 Year in Review as a courtesy to keep you current. We will continue to provide updates at least annually. These supplements will summarize Supreme Court decisions important to the 42 U.S.C. § 1983 practitioner; emerging trends in the Circuits and district courts; and the development of best practices by national police organizations, think tanks, and the U.S. Department of Justice. Here are 2019's most important developments.

Supreme Court

Fabrication of Evidence Claims

This section supplements the fabrication of evidence discussion in the "Practitioner's Guide" with the latest Supreme Court case. See Chapter 6: Malicious Prosecution and Wrongful Conviction, II. Malicious Prosecution as Fourth Amendment, Unreasonable Seizure under § 1983; III, Wrongful Conviction as Fourteenth Amendment, Due Process Violation under § 1983. On the issue of accrual, see also Chapter16: Non-Merits, Procedural Defenses, II. Accrual, I. Malicious Prosecution and Wrongful Conviction.

The question in *McDonough v. Smith*, 139 S.Ct. 2149 (2019), was when the statute of limitations begins to run for federal civil rights claims alleging that prosecutors fabricated evidence in a criminal proceeding: at the time the criminal defendant is cleared of wrongdoing, or when he/she should have known that the evidence was fabricated?

McDonough processed ballots as a commissioner for the board of elections. In a primary election, some were forged. McDonough claimed that Smith, who was appointed to investigate and prosecute the matter, scapegoated him based on a political grudge. He also claimed that Smith used fabricated evidence to try to convict him, specifically that he falsified affidavits, coached witnesses to lie, and orchestrated a suspect DNA analysis to link McDonough to relevant ballot envelopes. McDonough was arrested, arraigned and released with restrictions on his liberty (e.g., travel) pending trial. This allegedly fabricated evidence was used at trial. The first trial resulted in a mistrial. The second resulted in an acquittal.

Within three years of the acquittal, McDonough filed suit under § 1983 in district court, alleging fabrication of evidence and malicious prosecution. The district court dismissed the malicious prosecution claim as barred by prosecutorial immunity, and the fabricated evidence claim as untimely. The Second Circuit affirmed dismissal of the malicious prosecution claim. It

held that the fabricated evidence claim accrued when he learned that the evidence was false and was used against him at trial, and when he suffered a loss of liberty as a result of that evidence. Under the applicable three-year statute of limitations, his suit was untimely. Other Circuits, though, had held that the statute of limitations for a fabricated evidence claim does not begin to run until favorable termination of the challenged criminal proceedings. The Supreme Court granted certiorari to resolve the conflict in the Circuits.

Justice Sotomayor's opinion, joined by Justices Roberts, Ginsburg, Breyer, Alito, and Kavanaugh, assumed without ruling that the constitutional provision at issue was the Due Process Clause, specifically procedural due process based on limitations on McDonough's liberty while awaiting trial. 139 S.Ct. at 2155. The federal fabrication of evidence claim most closely resembled a common law malicious prosecution tort, which accrued upon a favorable termination of the prosecution. 139 S.Ct. at 2155-58. A rule that required a plaintiff to bring a civil case while criminal charges were pending "would run counter to core principles of federalism, comity, consistency, and judicial economy." 139 S.Ct. at 2158.

Justice Thomas filed a dissenting opinion, in which Justices Kagan and Gorsuch joined. Because McDonough did not identify the specific constitutional right at issue, the Court should have dismissed certiorari as improvidently granted. 139 S.Ct. at 2161-62.

PRACTICE TIP: The dissent would have left dismissal of McDonough's § 1983 claim and the conflicts in the Circuits intact. The majority's resolution of the fabrication of evidence claim is consistent with its other jurisprudence. Section 1983 analogues of the malicious prosecution claims accrue upon favorable termination. Wrongful conviction claims accrue upon reversal of the conviction. They are considered violations of procedural due process. See "Practitioner's Guide," cited above.

Retaliatory Arrests

Retaliatory arrests are covered in the "Practitioner's Guide" in Chapter 12: First, Fifth, Sixth, Eighth Amendments, and Laws, II. First Amendment, C. Police-Citizen Encounters, 1. Verbal Protests.

Nieves v Bartlett, 139 S.Ct. 1715 (2019), most recently addressed whether probable cause to arrest defeats a First Amendment retaliation claim. Bartlett was arrested during an annual event in a remote part of Alaska that involved large crowds and heavy drinking. Sergeant Nieves was asking some partygoers to move their beer keg inside their RV because minors had been making off with alcohol. Bartlett belligerently yelled to the RV owners not to speak to police, and when Sergeant Nieves approached to explain the situation to Bartlett, the highly intoxicated Bartlett told him to leave. Several minutes later, Bartlett observed a second officer asking a minor whether he and his underage friends had been drinking. Bartlett approached aggressively, interfered by standing between the second officer and the teenager, and with slurred speech yelled that the officer should not speak with the minor. When Bartlett stepped close to the officer in a combative way, the officer pushed him back. Seeing this confrontation, Sergeant Nieves initiated an arrest, and as Bartlett was slow to comply, took him to the ground. Bartlett claimed that Nieves, referring to the earlier encounter, said, "Bet you wish you would have talked to me now." Charges of disorderly conduct and resisting arrest were dropped.

In his § 1983 case, Bartlett claimed he was arrested for refusing to speak to Nieves in the earlier encounter and his intervention in the second officer's discussion with the underage partygoer. The district court granted summary judgment for the officers based on the existence of probable cause for the arrest. The Ninth Circuit reversed, saying the arrest would chill a person from future First Amendment activity, and here it was the but-for cause of the arrest.

Chief Justice Roberts wrote an opinion in which justices Breyer, Alito, Kagan, and Kavanaugh Joined. It discussed *Hartman v. Moore*, 547 U.S. 250 (2006) (a *Bivens* action), and *Lozman v. City of Riviera Beach*, 138 S.Ct. 1945 (2018), as raising but-for causation issues; despite the plaintiff's protected First Amendment activity, would the plaintiff in those cases have been prosecuted or arrested? But as under malicious prosecution and false imprisonment under the common law, a First Amendment retaliatory arrest case under 42 U.S.C. § 1983 is generally defeated on a showing of probable cause. Regardless of the subjective motive of the arresting officer, the majority concluded that the presence of probable cause will generally defeat a claim of retaliation. But if the plaintiff can establish the absence of probable cause, then the *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), test would govern; the plaintiff could show that he/she would not have been arrested but-for the speech. 139 S.Ct. at 1725.

The majority did not join in a separate section of Chief Justice Roberts' opinion. Justice Roberts wrote that, in limited situations where officers have probable cause to make an arrest but exercise their discretion not to do so, the plaintiff should be allowed to present evidence that he/she was arrested when individuals who were not engaged in speech were not. After making that showing, the plaintiff would proceed as under *Mt. Healthy*. But here the plaintiff's case failed because there was probable cause for his arrest. 139 S.Ct. at 1727-28.

Justice Thomas concurred that probable cause for the arrest would defeat a First Amendment retaliation claim. But he disagreed with creating an exception to the probable cause requirement that would allow plaintiffs to show that those who were not engaged in protected speech were not arrested for similar offenses. 139 S.Ct. at 1728-30. Justice Gorsuch concurred in part and dissented in part. He agreed with the majority opinion insofar as probable cause is not an absolute defense to a First Amendment retaliation claim. But he said selective arrest claims under the First Amendment should be treated similarly to selective prosecution claims under the Fourteenth. 139 S.Ct. at 1730-34. Justice Ginsburg concurred in the judgment in part, but dissented to the extent that she favored a *Mt. Healthy* analysis. 139 S.Ct. at 1734-35. In a lengthy dissent, Justice Sotomayor rejected Chief Justice Roberts' rule that probable cause could be overcome upon a showing that individuals who were not engaged in speech were not arrested. 139 S.Ct. at 1735-42.

PRACTICE TIP: Although the door is closed on Fourth Amendment wrongful arrest claims where there is probable cause, it is at least ajar under *Nieves* if the plaintiff can show he/she would not have been arrested but-for his/her protected activity. But the case is a curious choice to make that point because Bartlett was not engaging in protected activity. By approaching aggressively and standing between the second officer and the teenager, he was physically interfering. That is unprotected conduct, not speech. Additionally, Chief Justice Roberts' exception for low-level offenses in which a subject who was not engaging in protected speech was not arrested is impractical in practice. That would require pre-trial discovery of reliable comparators. But as Justice Sotomayor suggests, finding arrest (or even incident) reports for subjects who were

not arrested and comparing them to subjects who were engaged in protected First Amendment activity and also arrested is unworkable. 139 S.Ct. at 1740.

Qualified Immunity

The Supreme Court issued another qualified immunity decision favorable to law enforcement officers in the last term, but again failed to clarify what precedents, other than its own, qualify as "clearly established law." See "Practitioner's Guide," Chapter 14: Absolute and Qualified Immunity, III. Qualified Immunity; Substance, C. Determination of Clearly Established Law.

City of Escondido v. Emmons, 139 S.Ct. 500 (2019) (per curiam) was a further case in which the Supreme Court chastised the Ninth Circuit for deciding the issue of qualified immunity at "too high a level of generality." *See, e.g., Kisela v. Hughes*, 138 S.Ct. 1148 (2018) (per curiam) (granting summary judgment for officer who shot emotionally disturbed woman approaching another woman with knife). The facts in *Emmons* were quite simple. Police were responding to a domestic complaint. A man opened the apartment door and came outside. The officer, standing outside the door, told the man not to close the door. But the man closed the door and tried to "brush past" the officer. The officer then stopped the man, took him quickly to the ground, and handcuffed him. The officer did not hit the man or display any weapon. The officer's body worn camera video showed that the man was not in any visible or audible pain as a result of the takedown or while on the ground. Officers helped the man up and arrested him for a misdemeanor offense of resisting and delaying a police officer.

Although the district court granted qualified immunity for the officer, the Ninth Circuit reversed, saying only that the "right to be free of excessive force" was clearly established. The Ninth Circuit cited a case in which the subject offered only passive resistance. But the Supreme Court wrote that "the Court of Appeals' formulation of the clearly established right was far too general."

> "[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. . . . While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate. . . . Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. . . . But a body of relevant case law is usually necessary to clearly establish the answer. . . ." [*District of Columbia v.*] *Wesby,* 583 U. S., at ___, 138 S.Ct. [577], at 581 [2018] (internal quotation marks omitted).

139 S.Ct. at 504.

As it did in *Kisela v. Hughes*, the Supreme Court granted Court granted cert., and, without briefing or argument, issued a per curiam decision remanding the case to the Ninth Circuit.

On remand from the Supreme Court, the Ninth Circuit panel ordered supplemental briefing on whether "clearly established law prohibit[ed] the officers from stopping and taking down a man in these [factual] circumstances?" *Emmons v. City of Escondido*, 921 F.3d 1172, 1173 (2019) (per curiam). The Supreme Court did not mention it, but the Circuit panel noted that the police body

camera recorded the officer telling the plaintiff not to close the door, to place his hands behind his back, and to get down, before being taken to the ground. Although the plaintiff's additional briefing cited excessive force cases, those cases did not "present sufficiently similar factual circumstances to have 'placed the ... constitutional question beyond debate'" under the Supreme Court's exacting standard. Nor did the Ninth Circuit "find a case so precisely on point with this one as to satisfy the Court's demand for specificity." Accordingly, the Circuit ruled that the officer was entitled to qualified immunity. 921 F.3d at 1175.

PRACTICE TIP: In *Emmons*, the right to arrest the plaintiff for resisting and delaying a police officer conducting a welfare check was not at issue. 139 S.Ct. at 502. The issue was whether it is unreasonable force to take someone to the ground and handcuff them when they have not followed a direction and pushed passed an officer. In this case, the plaintiff was not necessarily a suspect for a known offense, he was not actively resisting arrest, and there was no indication that he could not have been detained if he was not tackled at that moment. It is a very commonplace scenario. The law enforcement community could well say the amount of force used was unnecessary; and, consequently, the facts would be so "obvious" that there would not be a large body of circuit court law to have developed around them. Even so, the Supreme Court continues to issue decisions favorable to law enforcement on qualified immunity, and fails to shed additional light on what courts' precedents are sufficient to put the issue "beyond debate." The thrust of the Court's jurisprudence is that officers are entitled to qualified immunity unless the plaintiff can cite to specific cases or a body of controlling authority that put officers on notice that what they are doing violated the law. Arguably, in requiring a near identity of material facts, the Court's decisions are considering the qualified immunity issue at too high a level of specificity.

Bivens *Actions*

As most practitioners know, 42 U.S.C. § 1983 does not apply to federal officials; only state and municipal officials. But the Supreme Court fashioned an analogous remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S.388 (1971) (creating a remedy for civil damages against federal agents who searched a home in violation of the Fourth Amendment). *Bivens* actions are discussed in the "Practitioner's Guide," Chapter 15: Claims against State and Federal Officials, III. Suits against Federal Government and Federal Officials, A. *Bivens* Actions.

The facts in *Hernandez v. Mesa*, No. 17-1678 (decided 2/25/2020) involve a U.S. border patrol agent on American soil fatally shooting a 15-year-old Mexican who was on Mexican territory at the time. The Department of Justice declined to bring charges against the border patrol agent, and the United States denied Mexico's request that he be extradited to Mexico. *Hernandez* was on appeal from the Fifth Circuit, which refused to extend a *Bivens* remedy, saying in part:

> Relevant statutes confirm that Congress's failure to provide a federal remedy was intentional. For instance, in section 1983, Congress expressly limited damage remedies to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." 42 U.S.C. § 1983. Given that *Bivens* is a judicially implied version of section 1983, it would violate separation-of-powers principles if the implied remedy reached further than the express one.

Hernandez v. Mesa, 885 F.3d 811, 820 (2018).

The question presented was whether *Bivens* would be extended to provide a civil remedy where no other remedy exists. Justice Alito wrote the lengthy majority opinion in which Justices Roberts, Thomas, Gorsuch, and Kavanaugh concurred. In deciding whether *Bivens* should be extended, the Court uses a two-step inquiry. First, it asks whether the request involves a claim that arises in a "new context" or involves a "new category of defendants." If so, the Court then asks whether there are any "special factors [that] counse[l] hesitation" about creating the extension. Here, the petitioners' claims arose in a new context, a cross-border shooting. Slip op. at 8-9. Then, multiple factors counsel hesitation before extending *Bivens* to this new context: It impinges on foreign relations, here between the United States and Mexico. It can undermine the national security interest of protecting the illegal entry of persons and goods into the United States. And finally, Congress has previously declined to award damages against federal officials for injuries inflicted outside U.S. borders. Where Congress has not created a remedy, the Court should not step in to do so. Slip op at 9-19.

Justice Ginsburg filed a dissenting opinion in which Justices Breyer, Sotomayor, and Kagan joined. Extending *Bivens* to cover a "rogue" officer would not be a new setting, but, even if it was, neither foreign policy nor national security would be endangered.

PRACTICE TIP: The application of *Bivens* to constitutional violations has been very limited. *Hernandez* would create protections under the U.S. Constitution to a Mexican resident on Mexican territory. And if the Court had reached the issue, the border patrol agent would have been entitled to qualified immunity because the applicable law was not clearly established.

Warrantless Searches under the Fourth Amendment

One criminal case from the 2018-19 term is most relevant to § 1983 practice: *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019), which involved drawing blood from a drunk driving suspect. This adds to the discussion of blood alcohol testing in the "Practitioner's Guide," Chapter 3: Fourth Amendment Searches of Persons, II. Searches of Detainees, B. Searches Incident to Arrest, 1. Supreme Court.

To prove a drunk driving offense, it is useful for the government to have a breathalyzer or blood sample test result. Both breath and blood tests are a search, but the Fourth Amendment issue is whether and when the tests can be conducted without a warrant. Does an exception to the warrant requirement apply? The exigent circumstances exception, because alcohol in the blood dissipates? The search incident to arrest exception? Implied consent, because as a condition of having a driver's license, the person has consented to the test?

In *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019), the obviously intoxicated driver was found wandering near his car. A preliminary breath test showed that he was about three times the legal limit. When Mitchell was too drunk for the officer to administer a breath test at the station, the officer took him to the hospital to have his blood drawn. There, the officer told the passed-out driver that he was presumed to have consented to having his blood drawn.

Justice Alito wrote a plurality opinion, in which Justices Roberts, Breyer and Kavanaugh joined, which held that that an officer can direct hospital personnel to conduct a blood test on an unconscious driver when the officer has probable cause to arrest the driver for drunk driving and

no reliable breath test has been given. The decision relies on the exigent circumstances exception: the blood alcohol evidence is dissipating, and there are medical reasons to take an unconscious suspected drunk driver to the hospital; which in turn limits the time available for an officer to obtain a warrant. 139 S.Ct. at 2536-39. If a driver could show that his/her blood would not have been drawn if the police were not seeking blood-alcohol information and the police did not have any reason to believe they could not have obtained a warrant, the rule might not apply. Mitchell could address those issues on remand. 139 S.Ct. at 2539.

Justice Thomas' concurrence would apply the exigent circumstance exception based on the dissipation of alcohol from the blood. 139 S.Ct. at 2540-41. Justice Sotomayor, joined by Justices Ginsburg and Kagan, contended that the plurality opinion rested on a false premise, a choice between getting a warrant for a blood test and getting a drunk driver to the hospital. Moreover, Wisconsin had already conceded that the exigent circumstances exception did not justify the blood test in Mitchell's case. 139 S.Ct. at 2546-51. Similarly, Justice Gorsuch dissented because the Court granted review on the issue of whether Wisconsin's implied consent law applied. Instead, the Court resolved the case on a different ground. 139 S.Ct. at 2551.

Cases to Watch in 2020

Here are three cases to watch in the current Supreme Court term that may affect the § 1983 litigator's practice.

Kansas v. Glover

In *Kansas v. Glover*, No. 18-556 (argued 11/4/2019), the Court will decide whether it is reasonable for an officer to assume that the registered owner of a vehicle is the subject driving for the purpose of making an investigative stop. In *Glover*, a deputy sheriff on patrol ran a registration check on a pickup that was registered to a subject whose license had been revoked. Assuming the registered owner was the operator, the officer stopped the truck, confirmed that the driver was the registered owner and issued him a citation. The case is on appeal from the Kansas Supreme Court which affirmed a trial court's suppression of evidence coming from the traffic stop; the stop violated the Fourth Amendment's prohibition against unreasonable seizures because the deputy sheriff did not have reasonable suspicion that a violation had been committed.

PRACTICE TIP: *Glover* will address what constitutes reasonable suspicion to conduct a motor vehicle stop. The Court's discussion of reasonable suspicion will apply to § 1983 cases involving motor vehicle stops.

Lomax v. Ortiz-Marquez

Lomax v. Ortiz-Marquez, No. 18-8369 (argued 2/26/2020) will be of interest to practitioners who handle corrections cases under § 1983. The Prison Litigation Reform Act, 28 U.S.C. § 1915(g), bars inmates from filing or appealing a federal civil action without paying court fees if they have filed three or more cases or appeals that were dismissed on the basis that they were frivolous or malicious or did properly state a legal claim for relief (a three "strike" rule). *Lomax* will address whether a dismissal without prejudice to amend and refile counts as a "strike."

Torres v. Madrid

In *Torres v. Madrid*, No. 19-292 (argued 3/30/2020), the issue is whether an unsuccessful attempt to detain a suspect by use of physical force is a "seizure" within the meaning of the Fourth Amendment, as the U.S. Courts of Appeals for the 8th, 9th and 11th Circuits and the New Mexico Supreme Court hold, or whether physical force must be successful in detaining a suspect to constitute a "seizure," as the U.S. Court of Appeals for the 10th Circuit and the District of Columbia Court of Appeals hold.

The facts in this Tenth Circuit case were that officers in tactical vests with police markings had gone to an apartment complex to arrest a woman who was allegedly involved in an organized crime ring. The plaintiff was parked in front, but drove off as officers approached. Fearing for their safety, they shot. Although struck by two bullets, the plaintiff was able to drive to a shopping center, steal another car, and eventually drive to a hospital approximately 75 miles away. The Circuit held she had not been seized because of her continued flight. Since it found no Fourth Amendment violation, the Circuit did not reach the officers' entitlement to qualified immunity. *Torres v. Madrid*, No. 18-2134 (5/2/2019).

PRACTICE TIP: The case has generated a great deal of interest, with a dozen or so organizations filing amicus briefs. While some cases rule that a person is not seized until they are shot or accede to police authority, *California v. Hodari D.,* 499 U.S. 621, 626 (1991); *Brower v. County of Inyo,* 489 U.S. 593 (1989); *Terry v. Ohio,* 392 U.S. 1, 19 n. 16 (1968), the *United States v. Mendenhall,* 446 U.S. 544, 553 (1980), concludes that subjects are not seized for Fourth Amendment purposes until they are no longer free to leave. The better view of these cases is to say that Fourth Amendment protections adhere when the subject is no longer free to go, even if they flee. Otherwise, they are at least protected under the more stringent "reckless or callous indifference" or "intent to harm" standard of the Fourteenth Amendment. See Chapter 8, Fourth Amendment: Deadly Force, III. Not Seizures under Fourth Amendment; Chapter 10: Fourteenth Amendment Culpability, State of Mind Requirements; Clearing up the Confusion, B. Fourteenth Amendment "Deliberate Indifference" and "Intent to Harm."

Arrest

Facial Recognition Technology

Law enforcement has compared file photos with video footage through facial recognition technology to make arrests, but some say the use of the technology is going too far. This topic supplements the discussion of mistaken identity arrests in the "Practitioner's Guide," Chapter 5: Fourth Amendment: Arrests with Warrants, IV. Recurring Issues, A. Mistaken Identity Arrests.

Here is how facial recognition technology works:

> Generally, facial recognition technology (FRT) creates a "template" of the target's facial image and compares the template to photographs of preexisting images of a face(s) (known). The known photographs are found in a variety of places, including driver's license databases, government identification records, mugshots, or social media accounts, such as Facebook.
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> . . . .

> A template for FRT is created by use of measurements. The face is measured through specific characteristics, such as the distance between the eyes, the width of the nose, and the length of the jaw line. The facial landmarks, known as nodal points, are measured and translated into a template with a unique code. New technologies are emerging that are improving recognition rates, such as 3-D facial recognition and biometric facial recognition that uses the uniqueness of skin texture for more accurate results. Once the face in question is analyzed, the software will compare the template of the target face with known images in a database in order to find a possible match.

ABA, "Facial Recognition Technology: Where Will it Take Us?" available at https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2019/spring/facial-recognition-technology/ (internal citations omitted; hereafter "ABA Article").

Targeted photo comparisons between a surveillance photograph of a person of interest with a database of, say, drivers' licenses to try to identify the person are not so much the target of objections as is indiscriminate surveillance: picking out faces in a crowd or inputting scans from officers' body cameras to see if they have outstanding warrants. Critics of facial recognition technology raise First and Fourth Amendment privacy issues concerning persons who are not criminal suspects. ABA Article. There are also racial and ethnic objections. A study by the National Institute of Standards and Technology (NIST) "found that, when conducting a particular type of database search known as 'one-to-one' matching, many facial recognition algorithms falsely identified African-American and Asian faces 10 to 100 times more than Caucasian faces." Reuters, "U.S. government study finds racial bias in facial recognition tools," available at https://www.reuters.com/article/us-usa-crime-face/u-s-government-study-finds-racial-bias-in-facial-recognition-tools-idUSKBN1YN2V1.

"The Hill" newspaper reports that

> The Privacy and Civil Liberties Oversight Board (PCLOB), an independent agency, is coming under increasing pressure to recommend the federal government stop using facial recognition. Forty groups, led by the Electronic Privacy Information Center, sent a letter [in January] to the agency calling for the suspension of facial recognition systems "pending further review."
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> The letter cited a recent New York Times report about Clearview AI, a company which claims to have a database of more than 3 billion photos and is reportedly collaborating with hundreds of police departments.
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> It also mentioned a study by the National Institute of Standards and Technology, part of the Commerce Department, which found that the majority of facial recognition systems have "demographic differentials" that can worsen their accuracy based on a person's age, gender or race.

The Hill, "Government Privacy Watchdog under Pressure to Recommend Facial Recognition Ban," available at https://thehill.com/policy/technology/480152-government-privacy-watchdog-under-pressure-to-recommend-facial-recognition.

Federal agencies defend their use of technology. The FBI has access to about 640 million photographs, including drivers' licenses, passports and mugshots, that can be searched using facial recognition technology. AP, "Watchdog Says FBI Has Access to More than 640M Photographs," available at https://apnews.com/6f45d569c3084c5ca823ced145de8f82. Customs and Border Protection (CBP) and the Transportation Security Administration (TSA) use facial recognition tech programs in airports and border areas. The Hill, "Trump Officials Defend use of Facial Recognition Technology Amid Backlash," https://thehill.com/policy/technology/452529-trump-officials-defend-use-of-facial-recognition-amid-backlash

But lawmakers and others have expressed concern and opposition. The U. S. House Committee on Oversight has held hearings on facial recognition technology. NextGov, "Lawmakers Working on Legislation to 'Pause' Use of Facial Recognition Technology," available at https://www.nextgov.com/emerging-tech/2020/01/lawmakers-working-legislation-pause-use-facial-recognition-technology/162470/ The ACLU has sued the Federal Bureau of Investigation (FBI), Department of Justice (DOJ), and Drug Enforcement Administration (DEA) for "records on the government's use of face recognition programs and other biometric identification and tracking technology." AP, "ACLU Sues FBI, DEA for Facial Recognition Records," https://www.usnews.com/news/best-states/massachusetts/articles/2019-10-31/aclu-sues-fbi-dea-for-facial-recognition-records. Sens. Chris Coons (D-DE) and Mike Lee (R-UT) have introduced the Facial Recognition Technology Warrant Act to require federal agents to obtain "a judge's approval before using facial recognition to conduct surveillance of a criminal suspect." The bill "would require federal law enforcement to explain to a judge why they want to use facial recognition to track someone in real time for longer than three days, and would limit that surveillance to 30 days." NBC News, "Federal Bill Would Restrict Police Use of Facial Recognition Technology," available at https://www.nbcnews.com/news/us-news/new-federal-bill-would-restrict-police-use-facial-recognition-n1082406.

Over law enforcement objection, state and local governments have sought to ban or limit use of facial recognition technology. California passed legislation prohibiting police departments from outfitting body cameras with technology to identify subjects through their facial features and other biometric traits. The law took effect January 1, and is subject to renewal when it expires in 2023. San Francisco Chronicle, "California Blocks Police from Using Facial Recognition in Body Cameras," https://www.sfchronicle.com/politics/article/California-blocks-police-from-using-facial-14502547.php. Cambridge, Massachusetts has joined Brookline, Northampton, and Somerville in banning the municipal use of the technology, and "[a] bill before the State House would also establish a statewide moratorium on the use of facial recognition technology and other forms of biometric surveillance, including the analysis of a person's gait or voice, until the legislature regulates the software." MassLive.com, "Cambridge Bans Facial Recognition Technology, Becoming Fourth Community in Massachusetts to do So," https://www.masslive.com/news/2020/01/cambridge-bans-facial-recognition-technology-becoming-fourth-community-in-massachusetts-to-do-so.html

PRACTICE TIP: The civil rights practitioner is likely in the future to be involved in an arrest assisted in part by the use of facial recognition technology. The issue will be whether there

was evidence in addition to the result of the "match" of the suspect to the database to support probable cause.

Effects of Legalizing Marijuana

Searches of Vehicles and Occupants

Historically, the smell of marijuana gave officers grounds to search a vehicle without a warrant under the motor vehicle exception, see *Carroll v. United States*, 267 U.S. 132, 149 (1925), and to search an occupant incident to arrest, see *Weeks v. United States*, 232 U.S. 383, 392 (1914). See "Searches of Vehicles and Occupants Based on Odor of Marijuana," available at https://nccriminallaw.sog.unc.edu/searches-vehicles-occupants-based-odor-marijuana/ A routine stop could lead to a search or arrest for drugs, a fugitive, or an illegal firearm. See "Practitioner's Guide," Chapter 2, Fourth Amendment: Searches of Premises, VII. Special Situations, B. Searches of Vehicles.

But now, 33 states permit the medical use of marijuana, and 11 states and the District of Columbia allow the recreational use of marijuana for adults. This has created a complicated litigation picture. Several cases show why.

In *State v. Seckinger*, 920 N.W.2d 842 (Neb. 2018), a state trooper stopped a woman in Nebraska for motor vehicle violations. The trooper smelled marijuana. The woman denied smoking and refused a search of the vehicle. But based on the motor vehicle exception, the trooper found methamphetamine and arrested the woman. Her defense was that the marijuana odor, illegal in Nebraska, could have come from its lawful consumption in Colorado, about 60 miles away. The Nebraska Supreme Court rejected the argument, ruling:

> Assuming the vehicle is readily mobile, the odor of marijuana alone provides probable cause to search the vehicle under the automobile exception to the warrant requirement. And while there may be innocent explanations for the odor of marijuana inside a vehicle, the concept of probable cause is based on probabilities and does not require officers to rule out all innocent explanations for suspicious facts."

See "Despite Legal Marijuana Law, Odor in Car Still Creates Probable Cause to Search," available at https://www.lexipol.com/resources/blog/despite-legal-marijuana-law-odor-in-car-still-creates-probable-cause-to-search/, citing cases. California is the largest state to allow marijuana possession. The article cites *People v. Strasburg*, 56 Cal.Rptr.3d 306, 310 (Cal. App. 1st Dist.), cert. denied, 552 U.S. 1049 (2007) (valid medical marijuana prescription did not overcome right to search vehicle; statute provided only limited immunity, not shield from investigation).

In a Maryland case, the defendant was sitting alone in his car when officers detected the smell of burning marijuana. They found a joint and rolling papers in his car and cocaine in a search of his person. State law in Maryland makes possession of less than 10 grams of marijuana a civil offense. The Maryland Court of Appeals, the State's highest court, ruled that the search of the vehicle was permissible under court precedent. Amounts higher than 10 grams, distribution and driving under the influence are still crimes, but the search of the defendant was not justified. Under court precedent, the smell of marijuana did not justify a search incident to arrest. The amount involved made it a civil violation, not a felony or misdemeanor. Plus, there is a heightened expectation of privacy involving one's person versus a diminished expectation involving a motor

vehicle. See ABA Journal, "After Decriminalization, Pot Smell and Joint Didn't Justify Search, Court Says; Hemp Laws also Raise Issues," available at http://www.abajournal.com/news/article/after-decriminalization-pot-smell-and-joint-didnt-justify-search-court-says-hemp-laws-also-raise-issues, citing to *Michael Pacheco v. State of Maryland*, No. 17, September Term.

Lower state court decisions have limited motor vehicle searches based on the odor of marijuana. A PBS article reports:

> [A] Pennsylvania judge declared that state police didn't have a valid legal reason for searching a car just because it smelled like cannabis, since the front-seat passenger had a medical marijuana card. The search yielded a loaded handgun and a small amount of marijuana in an unmarked plastic baggie — evidence the judge suppressed.
>
> "The 'plain smell' of marijuana alone no longer provides authorities with probable cause to conduct a search of a subject vehicle," Lehigh County Judge Maria Dantos wrote, because it's "no longer indicative of an illegal or criminal act." She said that once the passenger presented his medical marijuana card, it was "illogical, impractical and unreasonable" for troopers to conclude a crime had been committed.
>
> Prosecutors have appealed the ruling, arguing the search was legal under recent state Supreme Court precedent. But they acknowledge that marijuana odor is an evolving issue in the courts.
>
> "We want to get it right," said Heather Gallagher, chief of appeals in the district attorney's office. "We need guidance, so law enforcement knows what to do."

PBS, "In Era of Legal Pot, Can Police Still Search Cars Based on Odor?" available at https://www.pbs.org/newshour/nation/in-era-of-legal-pot-can-police-still-search-cars-based-on-odor.

The same article mentions that other states' courts have restricted odor-based searches:

> Massachusetts' highest court has said repeatedly that the smell of marijuana alone cannot justify a warrantless vehicle search. In Vermont, the state Supreme Court ruled in January [2019] that the "faint odor of burnt marijuana" didn't give state police the right to impound and search a man's car. Colorado's Supreme Court ruled in May [2019] that because a drug-detection dog was trained to sniff for marijuana — which is legal in the state — along with several illegal drugs, police could not use the dog's alert to justify a vehicle search.

Driving while High; Finding a Test

Nine states and the District of Columbia have legalized recreational marijuana and 30 states and D.C. have legalized medical pot. NPR, "The Pot Breathalyzer Is Here. Maybe" available at https://www.npr.org/2018/08/04/634992695/the-pot-breathalyzer-is-here-maybe. And while it is still illegal to drive while under the influence in even those states that have decriminalized recreational and medical use, 70 percent of Americans think it is unlikely that they will be busted while high on marijuana. In fact, a study from the largest federation of auto clubs, the AAA, found that in the prior 30 days "almost 15 million drivers have gotten behind the wheel of a car within an hour of smoking, injecting or covering themselves with a marijuana product." AAA says in

states where marijuana is legal fatal accidents have doubled when drivers tested positive for THC, the active ingredient in marijuana. "Driving while high: Offenders don't think they'll be arrested," available at https://www.cbsnews.com/news/driving-while-high-offenders-dont-think-theyll-be-arrested/. Marijuana "can cause slower reaction in braking, problems with staying in the center of the lane, and impaired attention, decision-making and risk-taking." According to another study, "In 2016, 38% of fatally injured drivers tested positive for marijuana, 16% for opioids and 4% for both." "Cops want to know who's driving while stoned. Tests are being developed, but level of impairment after smoking weed is still hard to measure," available at https://www.chicagotribune.com/marijuana/illinois/ct-marijuana-roadside-drug-test-20191025-zr2ouoci6jfxdnjnjcifhtv3s4-story.html. See Chapter 4: Fourth Amendment: Stops, Arrests without Warrants, VI. Recurring Warrantless Arrest Situations, D. Motor Vehicle Stops.

Most states still rely on standard practices to determine whether someone is driving while high: a motor vehicle violation to provide reasonable suspicion for a stop; the smell of marijuana or visible evidence such as a joint; and essentially the same field sobriety tests that are given to subjects suspected of driving under the influence of alcohol: the "horizontal gaze nystagmus test," the "walk and turn test," and the "one-leg stand." The National Highway Traffic and Safety Administration (NHTSA) estimates that these tests are between 60 and 80 percent reliable. "How Police Test for Marijuana DUI in California" available at https://www.duiease.com/test-for-marijuana-california/

For alcohol, there is a national standard. "If your blood alcohol content (BAC) is 0.08 percent or higher, you're considered cognitively impaired at a level that is unsafe to drive. Extensive research supports this determination, and the clarity makes enforcement of drunken driving laws easier." NBC News, "Smoking weed: When is someone too high to drive?" available at https://www.nbcnews.com/health/health-news/smoking-weed-when-someone-too-high-drive-n954211. Measuring marijuana consumption is more difficult; it stays in the blood longer and the science hasn't determined what is a "safe" level. But "[S]ix states have adopted 'per se' (inherently illegal) limits on THC found during a blood test, from 1 nanogram per milliliter in Oregon to 5 nanograms per milliliter in Montana and Washington. Other states have a zero tolerance for THC, including Illinois (which just legalized recreational consumption), Arizona, Indiana, Oklahoma and Rhode Island." "The Holy Grail for Law Enforcement: Accurate Roadside Testing for Driving While Stoned" available at https://www.cannabissciencetech.com/news/holy-grail-law-enforcement-accurate-roadside-testing-driving-while-stoned.

Refusal to agree to a blood test can lead to license suspension or revocation under states' implied consent laws. But blood cannot be drawn without a warrant, or in limited situations, exigent circumstances. *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019) (alcohol). Companies are now working on roadside tests that use saliva collected as oral swabs to detect THC and/or crystal meth, methadone, cocaine, and several other prescription medications. These include a German-made device, Drager DrugTest 5000; and domestic products made by mLife Diagnostics and SoToxa, already in use in Europe. These devices record the presence THC, but not the amount or recency of use. Chicago Tribune, "Cops want to know who's driving while stoned. Tests are being developed, but level of impairment after smoking weed is still hard to measure," available at https://www.chicagotribune.com/marijuana/illinois/ct-marijuana-roadside-drug-test-20191025-zr2ouoci6jfxdnjnjcifhtv3s4-story.html. Hound Lab in California has developed a breathalyzer that can measure THC in molecules in parts per trillion, whereas alcohol impairment is measured in parts per thousand. The company says, "When you find THC in breath, you can be pretty darn sure

that somebody smoked pot in the last couple of hours[.]" NPR, "The Pot Breathalyzer Is Here. Maybe" available at https://www.npr.org/2018/08/04/634992695/the-pot-breathalyzer-is-here-maybe.

PRACTICE TIP: Decriminalization of marijuana use has complicated the law enforcement landscape. The cases so far have arisen in motions to suppress evidence in criminal cases. When to stop, search a vehicle and arrest and search an occupant is unclear and evolving to keep up with changes in the law. Based on the foregoing, it is much harder to arrest and convict someone for driving under the influence of marijuana. The practitioner's interest here is in civil cases involving § 1983. Based on the lack of clarity in established law, law enforcement officers can certainly employ the qualified immunity defense to their benefit.

Non-Deadly Force

Wrap Technologies

This section supplements the treatment of non-deadly force in the "Practitioner's Guide," Chapter 7: Fourth Amendment: Non-Deadly Force, III. Specific Uses of Non-Deadly Force. BolaWrap is the latest less-lethal force tool. The device shoots out a cord that wraps around a subject's lower body, immobilizing them without pain, so that they can effectively be taken into custody. Here is what the company, Wrap Technologies, says about it:

> The BolaWrap™ 100 is a hand-held remote restraint tool that discharges an eight-foot bola style Kevlar® tether to effectively entangle an individual at a range of 5-25 feet. Designed in cooperation with law enforcement, the small but powerful BolaWrap 100 safely offers an additional tool for law enforcement encounters allowing for a better chance of encounter control, reducing the incidence of and need for injurious uses of force. Other non-lethal devices rely on "pain compliance" often escalating encounters (creating "fight or flight" scenarios) with significant potential for injury. BolaWrap 100 provides law enforcement an effective new tool to safely engage individuals at a distance.
>
> The small, light but rugged BolaWrap 100 is designed for weak hand operation to provide effective remote restraint while all other use of force continuum options remain open. The design provides a wide latitude of accuracy to engage and restrain individuals without pain or uncontrolled falls. Quick eject and rapid reload of bola cartridges allows one device to be reused in a single encounter or in multiple encounters. The bola cartridge contains two sockets that discharge two small harmless pellets at a thirty degree angle. The pellets are linked by the eight-foot Kevlar tether such that the tether first engages an individual's legs then the force of the pellets causes the tether to wrap. Small barbs on each pellet engage clothing to retard the unwinding of the bola tether wrap. The bola cartridge contains a 9 mm fractional charge blank cartridge (as used in prop guns) to discharge the tether.

Once deployed, the BolaWrap impedes the subject's ability to flee or fight, so that they can be approached and safely be taken into custody. The company says: "The BolaWrap 100 is intended as a tool to impede flight by engaging the legs of a subject. This subject engagement can also protect the surrounding public and the officer from injury. Primary use cases fall into the two broad categories often encountered:"

- Remotely retain and limit the mobility of an individual attempting to evade arrest or questioning. Individuals increasingly ignore law enforcement verbal commands.

- Assist in subduing individuals actively resisting arrest by limiting mobility making other engagement options less risky to officers and less injurious to individuals and the public.

REMOTE ENTANGLEMENT RESTRAINT AS A POLICE USE OF FORCE TOOL A Review Study of One Year of Field Statistics - - Police Shooting Deaths, at 6-8 https://www.fostercity.org/sites/default/files/fileattachments/police/page/15971/whitepaper_02022018.pdf

Because it can be deployed up to 25 feet, the BolaWrap would seem to be a good alternative to Tasers of pepper spray on an emotionally disturbed individual armed with a knife, bottle, bat or similar weapon, but obviously not a firearm. Because the eight-foot cord stretches out before it wraps around the subject, it is not effective indoors: "Due to the requirement for the Bola tether to expand outward to effectively engage, use in close enclosed quarters (e.g. homes, narrow hallways, etc.) is not generally effective."

Demonstrations of its use can be seen on the Wrap Technologies website, https://wraptechnologies.com/ and YouTube https://www.youtube.com/channel/UCUAp9jPdZXjpAwcREtsHO8w. The BolaWrap has been featured across more than 60 networks, including CBS, FOX, NBC and others. According to the website, about 45 police or sheriff's departments have bought or tested the BolaWrap, including: Fort Worth; Los Angeles Police Department; Orlando; 10 Illinois agencies, including northern Chicago suburbs of Buffalo Grove and Des Plaines and western suburbs Westchester, Elgin and Aurora; Daytona Beach; Orlando; Columbia, Missouri.; New York City; Yonkers; Miami; Birmingham, Alabama; Ferguson, Missouri; and Atlanta.

PRACTICE TIP: Additional Resources on use of force: Police Executive Research Forum (PERF 2020), "Refining the Role of Less-Lethal Technology: Critical Thinking, Communications, and Tactics Are Essential in Defusing Critical Incidents," available at https://www.policeforum.org/assets/LessLethal.pdf. U.S. Department of Justice's Office of Community Oriented Policing Services (COPS Office), "Law Enforcement Best Practices: Lessons Learned from the Field," available at https://cops.usdoj.gov/RIC/ric.php?page=detail&id=COPS-W0875

Deadly Force after *Mendez*

Introduction

An important unresolved Fourth Amendment issue is where should Fourth Amendment scrutiny begin when law enforcement officers caused or contributed to cause their use of deadly force? Many of the cases involve suicidal, mentally disturbed individuals who are not complying with police commands and who have not committed an offense until they raise or point a weapon at an officer. Should the Fourth Amendment review concentrate only on the moment of shooting to the exclusion of events leading up to it? Similarly, where does the reasonableness analysis begin when a search warrant execution goes wrong, or a pursuit that begins with a minor offense ends with a car crash, drawn guns, and an officer standing in the way to avoid the motorist getting away?

Is it an unreasonable seizure if an officer's unreasonable conduct creates the circumstances that otherwise authorize the use of deadly force?

As the author has previously noted, the Circuits have had varying and not altogether reconcilable approaches: from considering only the events "immediately preceding and moment of the shooting" to a broader review of the "totality of the circumstances" to a more complicated causation analysis of whether one Fourth Amendment violation "provoked" another. "Practitioner's Guide," Chapter 8: Fourth Amendment: Deadly Force, V. Recurring Fourth Amendment Issues, H. Conduct Preceding Shooting. The First, Third, Seventh (applying qualified immunity), and Eleventh Circuits consider "all the surrounding circumstances" and "actions leading up to" the use of force. The Second, Fourth, Fifth, and Eighth Circuits consider "circumstances immediately prior to and at the moment" the officer made the decision to use deadly force. The Sixth Circuit applies a "segmented" approach, considering each possible violation separately and not as causally related. The Ninth Circuit until the ruling in *County of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017), discussed below, applied a "provocation" theory. Antecedent events could be considered if an earlier, independent Fourth Amendment violation intentionally or recklessly caused a second Fourth Amendment violation, i.e., the self-defense shooting. Similarly, the Tenth Circuit would consider whether the officer's own reckless or deliberate (but not negligent) conduct immediately before the seizure unreasonably created the need to use deadly force.

This section discusses the Supreme Court's recent rejection of the Ninth Circuit's "provocation" rule in *County of Los Angeles v. Mendez*, surveys the other Circuits' handling of deadly force cases after *Mendez*, and ends with some recommendations for resolution.

Ninth Circuit

Under the Ninth Circuit's "provocation" rule, if

> an officer intentionally or recklessly provokes a violent response, and the provocation is an independent constitutional violation, that provocation may render the officer's otherwise reasonable defensive use of force unreasonable as a matter of law. In such a case, the officer's initial unconstitutional provocation, which arises from intentional or reckless conduct rather than mere negligence, would proximately cause the subsequent application of deadly force.

Billington v. Smith, 292 F.3d 1177, 1190-91 (9th Cir. 2002).

In *City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015), the Supreme Court addressed but did not reject the "provocation theory." In a footnote, it said, "[o]ur 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. . . . Whatever their merits, all that matters for our qualified immunity analysis is that they do not clearly establish any right that the officers violated." 135 S.Ct. at 1776 (citations omitted). As discussed in the previous, 2018 supplement, that rejection occurred in *County of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017).

In *Mendez*, the Supreme Court said that if a shooting was reasonable, it could not be rendered unreasonable by some other unreasonable act; there it was a warrantless entry. The Court reverted to guidelines under *Graham v. Connor*, 490 U.S. 386 (1989), and traditional proximate

cause analysis; although the plaintiffs could not recover on their unreasonable seizure claim, the Court said that did not "foreclose recovery for injuries proximately caused *by the warrantless entry*." 137 S.Ct. at 1548 (emphasis in original). Presumably that meant that the plaintiffs could recover for the shooting, not because it was an unreasonable seizure under the Fourth Amendment, but because it was an injury proximately caused by the warrantless entry, an unreasonable search under the Fourth Amendment. In a footnote, the Court addressed an issue the plaintiff briefed, which was whether Fourth Amendment scrutiny should consider "*unreasonable police conduct prior to the use of force that foreseeably created the need to use it.*" The Court responded: "We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here. . . . All we hold today is that *once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation." 137 S.Ct. at 1549 n. * (citations omitted; first emphasis added; second in original). On remand, the Ninth Circuit found that the unlawful entry was the proximate cause of the shooting. *Mendez v. County of Los Angeles*, 897 F.3d 1067, 1076 (9th Cir. 2018) ("[W]e hold that the officer's unlawful entry proximately caused the [plaintiff's] injuries.").

Following rejection of its "provocation theory," the Ninth Circuit has not clearly sided with the circuits that follow the longer view, "totality of the circumstances" test, or the shorter "moment of the shooting" test. For example, in *Estate of Serrano v. Trieu*, No. 16-15744 (9th Cir. 2/23/2018), the decedent wielded an 11-inch steak knife with a six-inch blade in an aggressive manner, pursued as a deputy sheriff retreated approximately 160 feet, and ignored commands to stop until he was within 15 to 20 feet, when the deputy fired a single shot. Noting that that deputy was not required to retreat,

> [t]he deputy is not liable based on events antecedent to the shooting. The Supreme Court rejected this court's provocation doctrine in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1544 (2017). Although a proximate cause theory survives *Mendez*, the plaintiffs have not identified a constitutional violation preceding the shooting. The plaintiffs 'cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.' *Sheehan*, 135 S. Ct. at 1777 (quoting *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002))."

See also Isayeva v. Sacramento Sheriff's Department, 872 F.3d 938 (9th Cir. 2017) (officers attempted to take large, mentally ill man possibly on methamphetamines into custody for mental health evaluation, first using taser, chokehold and then deadly force when man pummeled deputy to point he began to pass out; bypassing whether there were Fourth Amendment violations for taser use and shooting, Circuit panel held that deputy was entitled to summary judgment based on qualified immunity);

Johnson v. City of Philadelphia, 837 F.3d 343, 351, 353 (3d Cir. 2016) (holding that Fourth Amendment "does not oblige an officer to passively endure a life-threatening physical assault, regardless of the assailant's mental state." The Supreme Court in *Mendez* left open the possibility that, under the *Graham* test, a court should consider "unreasonable police conduct prior to the use of force that foreseeably created the need to use it[;]" also declining to decide whether *Graham's* "totality of the circumstances" test "should account for whether the officer's own reckless or deliberate conduct unreasonably created the need to use deadly force") (citation omitted).

PRACTICE TIP: But note that the Supreme Court's notion that an unreasonable search can lead to damages for excessive force is inconsistent with almost all other jurisprudence that treats search and seizure claims separately. If that were so, no force would be justified in a false arrest case.

First Circuit

The First Circuit does not cite *Mendez*. But cases since then affirm that the court will consider events leading up to the seizure in evaluating its constitutionality. In *McKenney v. Mangino*, 873 F.3d 75 (1st Cir. 2017), officers encountered a 66-year-old suicidal man. On review, the Circuit panel had to accept the plaintiff's facts that:

> [D]defendant [officer] had "ample opportunity to observe [decedent's] actions and movements" before pulling the trigger and that the defendant's decision to shoot [decedent] was "unreasonably precipitous." . . . These facts include [decedent's] suicidality, the slowness of his gait, the clear visibility, the fact that six minutes had elapsed since any officer had last ordered [decedent] to drop his weapon, the fact that nobody had warned [decedent] that deadly force would be used if he failed to follow police commands, and the six-minute gap between when [decedent] raised his gun skywards and when the defendant pulled the trigger. . . . To sum up, the precedents make pellucid that the most relevant factors in a lethal force case like this one are the immediacy of the danger posed by the decedent and the feasibility of remedial action.

873 F.3d at 83-84 (citation omitted).

Noting again that "the district court concluded that a rational jury could reasonably infer both that [decedent] did not pose an imminent threat and that viable remedial measures had not been exhausted[,]" the Circuit affirmed denial of qualified immunity and remanded the case to the district court. 873 F.3d at 84.

See also Conlogue v. Hamilton, 17-2210 (1st Cir. 10/11/2018) (fatal shooting of armed civilian by state trooper following prolonged standoff; ruling "an objectively reasonable officer standing in [the officer's] shoes would have thought it appropriate to deploy deadly force against an armed man who, after a nearly three-and-one-half-hour standoff in which he was repeatedly warned to drop his weapon, persisted in pointing a loaded semi-automatic firearm narrowly above the heads of three officers and within easy firing range. . . . Under the *totality of the circumstances*, we conclude that the district court's entry of summary judgment in [the trooper's] favor on the basis of qualified immunity must be [a]ffirmed.") (emphasis added).

Second Circuit

The Second Circuit continues to focus on the moment of the shooting. In *Rose v. City of Utica*, No. 18-1491-cv (2d Cir. 9/25/2019) (summary order), the district court held in relevant part that it was not clearly established at the time of the shooting that a police officer could not lawfully use deadly force against an armed individual who (1) had reportedly been firing a shotgun inside a public park, (2) did not react to an approaching officer's command to drop his weapon, and (3) turned toward the officer while still holding the shotgun in his hands. Under existing caselaw, an officer is entitled to use deadly force when an armed individual fails to comply with an order to put down a weapon and moves in what the officer reasonably perceives to be a threatening manner.

The plaintiffs also argued that the officer did not follow the police department's de-escalation policies. "But whether [the officer] followed the policies or not is irrelevant to whether, at the time he fired the shots, [the officer] was acting reasonably under the Constitution." See *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (defendant's "various violations of police procedure . . . leading up to the shooting are irrelevant to the objective reasonableness of his *conduct at the moment he decided to employ deadly force*") (emphasis added)).

See also Marreno v Cote, No. 17-4009-cv (3/1/2019) (summary order) (officer shot as vehicle sped away; dismissing appeal from district court denying qualified immunity based on disputed facts, whether officer "reasonably believed at the *moment* he fired at [decedent] that [decedent] posed a significant threat of death or serious physical harm" to [shooting officer] or the other officers.) (emphasis added);

Callahan v. Wilson, 863 F.3d 144, 146, 149 (2d Cir. 2017) ("We conclude that the use of force instructions here were inconsistent with our prior decision in *Rasanen v. Doe*, 723 F.3d 325 (2d Cir. 2013), and we cannot say that the error was harmless. In *Rasanen v. Doe*, decided approximately two years before the trial here, we explained that the jury charge in a Section 1983 police shooting case alleging excessive use of force by a police officer in circumstances similar to those here must include a specific instruction regarding the legal justification for the use of deadly force. 723 F.3d at 333, 337. Nor does the Supreme Court's recent decision in *County of Los Angeles v. Mendez*, ___ U.S. ___, 137 S.Ct. 1539, 198 L.Ed.2d 52 (2017), undermine *Rasanen's* holding as to the requirements for a jury charge in the type of excessive force case presented here.");

Estate of Jaquez v. City of New York, No. 16-1366-cv (9/8/2017) (summary order) (having determined that use of less-lethal force was reasonable before fatal shot was fired, district court did not commit error in asking jury to decide whether subject was pushing himself off floor and holding knife at time of fatal shot).

Third Circuit

The Third Circuit reviews the "totality of the circumstances." *Martin v. City of Newark*, No. 18-1228 (3d Cir. 7/13/2018), involved a fatal shooting after a traffic stop. Viewing disputed facts in the plaintiff's favor, the driver cursed at the officer and initially walked away but then quickly reentered a car that the officer referred to as stolen. The two engaged in a struggle at the open driver's side door, with the driver in the driver's seat and the officer's hands inside of the car. The driver ignored the officer's warning that he would fire his weapon if the driver started the car. Under the defense version, the driver accelerated with some portion of the officer's body inside the car. But accepting the plaintiff's version for purposes of summary judgment, the officer shot the driver as he turned the key in the ignition.

Under the "totality of the circumstances," the shooting was reasonable. The officer "was faced with an erratic and noncompliant driver who disregarded his explicit warning not to start the car, despite [the officer's] proximity to, and presence (of at least his hands) within, the vehicle. [The driver] posed a threat to [the officer's] life: being injured by a moving vehicle." The plaintiff contended that the traffic stop was unlawful. But the Circuit panel, citing *Mendez*, found that an objectively reasonable use of force "may not be found unreasonable by reference to some separate constitutional violation." Alternatively, the officer was entitled to qualified immunity "because it was not clearly established [at the time of the shooting] that an officer uses excessive force when

he shoots at a driver who starts a car despite having been warned not to and does so while the officer is positioned between the car and its open driver's side door."

See also Davenport v. Borough of Homestead, 870 F. 3d 273 (3d. Cir. 2017) (officers fired to end flight of vehicle as it entered high pedestrian traffic area, striking passenger who was driver's mother; joining other circuits that held passenger stated Fourth rather than Fourteenth Amendment claim, Circuit panel held under "*totality of circumstances*" review that three of four officers did not violated Fourth Amendment and were entitled to qualified immunity; as to officer who may have fired after final collision, fact dispute prevented resolution on interlocutory appeal) (emphasis added);

Summers v. Ramsey, No. 16-4401 (3d Cir. 11/29/2017) (police were trying to contain naked man thought to be on PCP, when the man turned suddenly and shattered patrol officer's windshield with two strikes of his bare hand; agreeing with district court's assessment that naked man's previous actions coupled with blows to patrol car would lead reasonable officer to fear death or serious bodily injury, justifying fatal shooting);

Thompson v. Howard, No. 15-3338 (3d Cir. 2/17/2017) ("[B]y the time [officer] began shooting, [plaintiff] had already demonstrated a reckless disregard for the safety of others by crashing into [another officer's] police car as [that officer] was getting out of it. [Plaintiff] then compounded that recklessness by blindly fleeing with the gas pedal 'all the way to the floor,' driving over sidewalks and lawns in a residential neighborhood. Thus, regardless of whether [plaintiff] was at that moment driving towards or away from the officers, it was not objectively unreasonable for [shooting officer], when confronted with [plaintiff's] dangerous, chaotic, high-speed flight, to believe that [plaintiff] posed a serious risk to persons who might be in the area and to resort to deadly force to prevent such persons from being injured[;]" granting qualified immunity because it was not clearly established that officer's decision was unlawful).

Fourth Circuit

The Fourth Circuit puts weight on the circumstances immediately preceding the use of force. In *Betton v. Belue*, No. 18-1974 (11/5/2019), a team of plain-clothes law enforcement officers armed with assault style rifles used a battering ram to enter the plaintiff's residence to execute a warrant authorizing a search for marijuana and other illegal substances. The officers did not identify themselves as police or otherwise announce their presence. From the rear of his residence, the plaintiff heard a commotion but did not hear any verbal commands. Responding to the noise, the plaintiff pulled a gun from his waistband and held it down at his hip. Three officers fired a total of 29 shots, striking the plaintiff him nine times and causing him to be permanently paralyzed. "We are required to consider the relevant *circumstances immediately preceding the moment that force was used*." (citing *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005) (emphasis added)). The relevant circumstances included that the officers failed to identify themselves or issue verbal commands to a man who was holding a firearm at this side. The court affirmed the district court's order denying one of the officer's motion for summary judgment based on qualified immunity.

See also Harris v. Pittman, No. 17-7308 (4th Cir. 6/18/2019) (officer fired several shots at plaintiff during violent struggle; Fourth Amendment issue was whether threat continued justifying firing additional shots; stating that, "[b]ecause the inquiry into excessiveness turns on the information possessed by the officer at the *moment that force is employed*, force justified at the

beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated[;]" panel majority denied summary judgment for officer) (additional quotation marks omitted; emphasis added);

Hensley on behalf of North Carolina v. Price, 876 F.3d 573, 582-83 (2017) (deputies responding to domestic disturbance did not order man to stop, drop gun, or issue warning as he held gun with its muzzle pointed at ground, descended porch stairs and walked toward officers; "We assess the reasonableness of their conduct based on the totality of the circumstances, *Yates v. Terry*, 817 F.3d 877, 883 (4th Cir. 2016), and based on the information available to the [d]eputies '*immediately prior to and at the very moment they fired the fatal shots*.'" *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (internal quotation marks omitted); holding that shooting man simply because he had possession of firearm violates Fourth Amendment.) (emphasis added).

Fifth Circuit

The Fifth Circuit considers the moment of the threat. Citing *Mendez*, the Fifth Circuit panel in *Hale v. City of Biloxi*, No. 17-60565 (5th Cir. 4/19/2018), rejected the plaintiff's theory that the officers had manufactured the need to use deadly force. Two officers respectively shot and tased the subject during the execution of an arrest warrant for suspected credit card fraud. The plaintiff took his hand out of the line of sight of the officers and placed it in his pocket, despite warnings from armed police officers that his conduct might cause him to be tased and shot. The plaintiff argued, however,

> that we must look to the totality of circumstances and not just at his decision to put his hands in his pocket. In particular, [the plaintiff] argues the officers recklessly created the circumstances leading up to that moment, including by violating the "knock and announce rule" and not telling him he was under arrest. [The plaintiff] argues that he was consequently surprised and confused by the officers' presence and orders and could not be expected to recognize their authority.
>
> It is clear [the plaintiff] cannot "manufacture an excessive force claim where one would not otherwise exist" by pointing to other purported constitutional violations. *See County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017). His argument sounds much like the rejected "provocation doctrine" of *Mendez*. Additionally, [the plaintiff's] "totality of the circumstances" argument fails on the facts of this case.
>
> The Supreme Court in *Mendez* expressly declined to address the argument that, in assessing the totality of the circumstances, courts must take into account "unreasonable police conduct prior to the use of force that foreseeably created the need to use it." See 137 S. Ct. at 1547 n.* (declining to address the argument, stating that "[a]ll we hold today is that once a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation").

When the plaintiff ignored orders to keep his hands visible, including placing his hand in his pocket where officers could not see what he was reaching for, they could reasonably believe he "had only been pretending to comply and was *at that moment* reaching into his pocket for a weapon." (emphasis added.)

See also Shepherd v. City of Shreveport, 920 F.3d 278, 283 (5th 2019) (man armed with knife disregarded series of instructions, and was moving quickly toward police corporal who continued to move backwards; corporal fatally shot man with shotgun; affirming summary judgment for defendants, Fifth Circuit panel reiterated, "[i]n this circuit, the excessive force inquiry is confined to whether the officer was in danger at the *moment* of the threat that resulted in the officer's shooting. Therefore, *any of the officers' actions leading up to the shooting are not relevant*[.]" (internal quotation marks and citation omitted; emphasis added);

Garza v. Briones, No. 18-40982 (5th Cir. 11/25/2019) ("The reasonableness of deadly force is measured '*at the time of the incident*.' *Bazan ex rel. Bazan v. Hidalgo Cty*., 246 F.3d 481, 490 (5th Cir. 2001) (emphasis added). Even though [decedent] was holding only a BB gun, that wasn't evident to defendants in the moment: The gun's appearance was almost indistinguishable from a handgun. Just before the shooting, [decedent] was behaving erratically, refusing to comply with direct police orders, and waving around what the officers presumed to be a deadly weapon. The video evidence from the dashcams of two patrol vehicles confirms that, just before defendants fired, [decedent] raised the gun above the tabletop, pointed the barrel in [shooting officer's] direction, and lowered his eyeline seemingly to aim the firearm. It was then that [shooting officer] fired his weapon, and the others fired only after they heard a gunshot[;]" granting summary judgment for defendants.).

Sixth Circuit

The Sixth Circuit "segments" different violations. In *Lemmon v. City of Akron*, No. 18-3566 (6th Cir. 4/4/2019), an officer stopped a subject on a bicycle who fit description of possibly armed robber at convenience store. During a tense standoff, the subject refused to show his hands, placing his right hand in his waistband. When he dropped his bike, the subject made a quick movement toward a sergeant, who fatally shot him. Rejecting the plaintiff's theory that the court should consider whether the police had reasonable suspicion for the stop under *Terry v. Ohio*, 392 U.S. 1 (1968), the Sixth Circuit applied its "temporally segmented approach."

> The proper approach under Sixth Circuit precedent is to view excessive force claims in segments. That is, the court should first identify the "seizure" at issue here and then examine "whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances." (citing *Livermore v. Lubelan*, 476 F.3d 397, 40607 (6th Cir. 2007)).

Accordingly, "the events leading up to [the subject] being stopped in the parking lot are immaterial to the issue of whether [the sergeant] reasonably utilized deadly force during the standoff." So there was no constitutional violation.

In *Thornton v. City of Columbus*, No. 17-3743 (3/14/2018), officers responded to a call involving a man threatening people with a firearm. At least one person informed the officers that the man had run inside the residence at issue while still having his firearm. Because exigent circumstances justified the entry, there was no violation of a constitutionally protected right, and the officers were entitled to qualified immunity. The Sixth Circuit continues to follow a "segmented" approach under which they do not consider whether an unreasonable search can render an otherwise reasonable use of force unreasonable. Citing *Mendez*, the Circuit panel wrote:

> In this circuit, the court "consider[s] the officer's reasonableness under the circumstances he faced at the time he decided to use force." *Thomas v. City of Columbus*, 854 F.3d 361, 365 (6th Cir. 2017) (citing *Livermore v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007) (discussing the "segmented analysis" this circuit employs to analyze use-of-force claims). Accordingly, "[w]e do not scrutinize whether it was reasonable for the officer to create the circumstances." *Thomas*, 854 F.3d at 365 (internal quotation marks and citation omitted). "[A] different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure." *Los Angeles v. Mendez*, 137 S. Ct. 1539, 1544 (2017).

The non-fatal shooting of the plaintiff did not violate the Fourth Amendment. Because the use of deadly force was reasonable, the officers had qualified immunity.

Seventh Circuit

The Seventh Circuit uses a "totality of the circumstances" approach. *Strand v. Minchuk*, 910 F.3d 909 (7th Cir. 2018), began when an officer issued parking tickets and the trucker tried to take pictures to show the absence of no-parking signs. The officer

> allowed the situation to escalate and boil over by slapping [the trucker's] cell phone to the ground and then tearing [the trucker's] shirt from his body. The fist fight then ensued, with [the trucker] choosing to stop throwing punches and stand up and offer his express surrender, including by raising his hands above his head. It was then—with no direction to [the trucker] to keep his hands in the air, to fall to his knees, or to lay on the ground—that [the officer] drew his gun and fired the shot.

910 F.3d at 916.

The Circuit panel reviewed the controlling law: "The law requires an assessment of the *totality of the facts and circumstances* and a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." But "[e]ven though an officer may in one moment confront circumstances in which he could constitutionally use deadly force, that does not necessarily mean he may still constitutionally use deadly force the next moment." 910 F.3d at 915 (internal quotation marks and citation omitted; emphasis added). Because there was evidence that the trucker had surrendered, the officer was not entitled to summary judgment. "The district court correctly observed that additional fact finding was necessary to determine whether 'the rapidly-evolving nature of the altercation' justified [the officer's] use of deadly force or whether "he had time to recalibrate the degree of force necessary, in light of [the trucker's] statement of surrender.'" 910 F.3d at 916.

Doornbos v. City of Chicago, 868 F.3d 572 (7th Cir. 2017), was not a deadly force case, but it is instructive on the Seventh Circuit's consideration of "the totality of the circumstances," here whether an unreasonable stop caused an unreasonable use of force. Considering the plaintiff's appeal from a defense verdict, the Circuit panel noted that the plaintiff "was leaving a Chicago train station when a plainclothes police officer confronted him, grabbed him, and with the help of two other plainclothes officers, forced him to the ground." The panel said the defendant officer's "own testimony suggests that he initiated an unlawful frisk while policing in plain clothes, and that conduct proximately caused the violent confrontation." That testimony "was relevant for the jury in assessing whether [the officer's] use of force was reasonable under the '*totality of the circumstances*[,]'" 868 F.3d at 583 (citing *Mendez*, 137 S.Ct. at 1546; emphasis added). Noting

that "*once* a use of force is deemed reasonable under *Graham* [*v. Connor*, 490 U.S. 386 (1989)], it may not be found unreasonable by reference to some separate constitutional violation." 868 F.3d at 583 (citing *Mendez*, 137 S.Ct. at 1547 .n*) (emphasis in original). But here the Circuit panel addressed the issue *Mendez* left open:

> However, when assessing the "totality of the circumstances" under *Graham*, the *Mendez* Court expressly left open the possibility of "taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." And that is our approach here. *When an officer's unreasonable (and unconstitutional) conduct proximately causes the disputed use of force, that conduct is part of the "totality of the circumstances"* that should be considered to determine if the use of force was reasonable, especially since the officers here were not in uniform.

868 F.3d at 583 (citation omitted; emphasis added).

See also Horton v. Pobjecky, 883 F.3d 941, 950 (7th Cir. 2018) (when sixteen-year-old and three other young men attempted to rob pizzeria at gunpoint, off-duty police officer who was waiting for pizza, shot and killed him; "noting that the availability of less severe alternatives does not necessarily render the use of deadly force unconstitutional[,]" and that court "must refuse to view the events through hindsight's distorting lens," reasonableness test requires court to "consider the *totality of the circumstances*, including the pressures of time and duress, and the need to make split-second decisions under intense, dangerous, uncertain, and rapidly changing circumstances[;]" affirming summary judgment for defendants) (emphasis added).

Eighth Circuit

The Eighth Circuit is one of the circuits that gives most weight to the moment of the shooting. In *Frederick v. Motsinger*, 873 F.3d 641 (8th Cir. 2017), a woman entered a convenience store with a four-inch folding knife and told the store clerk to call 911. A sergeant arrived first and held her at gunpoint as she made quick, impatient movements. An officer with a taser arrived, while she continued to question their authority and refused to drop the knife. She told them she was a "paranoid schizophrenic." The officer with the taser deployed it, but it did not take effect. At that point, she charged the officer with the taser, and a third officer fired three shots. She succumbed to the wounds. Her estate focused on the events preceding the shooting, arguing in line with the Ninth Circuit's previous "provocation rule" that the tasing provoked her violent reaction. Following the Supreme Court's decision in *Mendez*, the estate did not argue that the shooting was objectively unreasonable, but contended that the tasing was a separately compensable Fourth Amendment violation that would entitle it to damages that proximately flowed from it. But the circuit panel applied its precedent ("Numerous cases have upheld use of tasers to control potentially violent, defiant detainees who pose a safety risk to the officers or others, particularly when the officer warns that a taser will be used, as [the officer] did here[]"), and held the officers were entitled to qualified immunity. 873 F.3d at 647.

In affirming the grant of qualified immunity, in *Dooley v. Tharp*, 856 F.3d 1177 (8th Cir. 2017), the Circuit panel did not consider events leading up to the shooting of a man in an army uniform walking along the side or a highway, carrying a rifle, and "flipping off" passing cars; or events subsequent to the shooting, e.g., the "rifle" was a pellet gun, and a frame-by-frame review of the deputy's dashboard camera showed that the man was apparently attempting to comply with

the shooting deputy's order to drop the gun. "[T]he officers had several minutes to decide how best to approach [the man]. They also had the opportunity to modify their plan after [the man] came into view and a more complete set of circumstances became known to them[,]" but "[t]he circumstances did not become tense, uncertain, or rapidly evolving until [the shooting deputy], in his words, 'began screaming at [the man] to '[d]rop the gun[,]"' so their entitlement to qualified immunity boiled down to the moment of the shooting based on the officer's perception, albeit incorrect, of the danger. "Instantaneously, the subject began to turn toward us and I saw him spin around, raising his rifle and pointing it at me." 856 F.3d at 1182-83.

Tenth Circuit

The Tenth Circuit relies on its pre-*Mendez* rule, that it will consider whether officers' reckless or deliberate conduct created the need to use force. On remand from the Supreme Court, *White v. Pauly*, 137 S.Ct. 548 (2017) (per curiam), the Tenth Circuit reconsidered whether a state police officer was entitled to qualified immunity. *Pauly v. White*, No. 14-2035 (10th Cir. 10/31/2017). Three officers had responded to a residence at night to investigate an earlier road rage incident. When one of the three brothers who were occupants pointed a firearm in the direction of an officer who had taken cover behind a wall 50 feet away, the officer fired without first giving a warning, fatally shooting the brother.

The Circuit recited its existing precedent: "The reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own 'reckless or deliberate conduct during the seizure unreasonably created the need to use such force[,]'" citing *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2007) (quoting *Sevier v. City of Lawrence, Kan*., 60 F.3d 695, 699 (10th Cir. 1995)). See also *Allen v. City of Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) ("consider[ing] an officer's conduct prior to the suspect's threat of force if the conduct is 'immediately connected' to the suspect's threat of force[,]" (quoting *Romero v. Bd. of Cty. Comm'rs*, 60 F.3d 702, 705 n.5 (10th Cir. 1995))).

Under that standard, "the alleged reckless actions of all three officers were so immediately connected to the . . . brothers arming themselves that such conduct should be included in the reasonableness inquiry. . . . [T]he threat made by the brothers, which would normally justify an officer's use of force, was precipitated by the officers' own actions and [the shooting officer's] use of force was therefore unreasonable." Although the panel majority found sufficient evidence to raise a fact issue regarding the Fourth Amendment excessive force violation under its methodology, it noted in a footnote that "the concept that pre-seizure conduct should be used in evaluating the reasonableness of an officer's actions is not universally held among other circuits." Citing to the Supreme Court's decision in *Mendez*, where the Court declined to address "taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it," the Circuit majority observed "at least for now, *Sevier* and *Allen* remain good law in this circuit." However, the entire panel agreed that the shooting officer was entitled to qualified immunity.

See also Estate of Ceballos v. Husk, 919 F.3d 1204 (10th Cir. 2019) (man "acting crazy" or on alcohol, fatally shot as he emerged from garage armed with baseball bat and walking toward officers; denying qualified immunity because prior Tenth Circuit precedent put officer on notice that he could be liable for reckless and deliberate conduct immediately preceding shooting that created need to use deadly force).

Eleventh Circuit

In *Shaw v. City of Selma*, 884 F.3d 1093 (11th Cir. 2018), the Eleventh Circuit panel emphasized the "totality of the circumstances." In deciding whether a man armed with a hatchet presented an imminent threat, the officer did not have to wait for the man to raise a hatchet over his head:

> [The subject] was mentally ill and dangerous. [The officer] had been warned moments before that [the subject] "would fight [him] in a minute." [The subject] was an armed and noncompliant suspect who had ignored more than two dozen orders to drop the hatchet. At the time he was shot, [the subject] was advancing on [the officer] with hatchet in hand. He was close to him — within a few feet — and was getting closer still, yelling at [the officer] to "Shoot it!" [The subject] could have raised the hatchet in another second or two and struck [the officer] with it. Whether the hatchet was at [the subject's] side, behind his back, or above his head doesn't change that fact. Given those circumstances, a reasonable officer could have believed that [the subject] posed a threat of serious physical injury or death at that moment. A reasonable officer could have also concluded, as [the officer] apparently did, that the law did not require him to wait until the hatchet was being swung toward him before firing in self-defense.

884 F.3d 1099-1100.

Additionally, the officer was entitled to qualified immunity: "Even with the benefit of hindsight and without making any special allowance, we would not find that [the officer] violated clearly established Fourth Amendment law." 884 F.3d 1100-1101.

See also Hammett v. Paulding County, 875 F.3d 1036. 1048 (11th Cir. 2017) (police officers executed search warrant intending to seize methamphetamines; confrontation ensued during which each officer fired one shot, killing subject's husband; "[w]hen an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim[,]"citing *Mendez*, 137 S.Ct.at 1547; "The operative question in excessive force cases is 'whether the *totality of the circumstances* justifie[s] a particular sort of search or seizure.'" quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9, (1985)) (emphasis added).

Knight through Kerr v. Miami-Dade County, 856 F.3d 795, 814 (11th Cir. 2017) (officers discharged their firearms at SUV driven in reverse toward them, killing non-party driver, killing one passenger and wounding another; plaintiffs did not argue that officers' alleged violation of department pursuit policy was itself Fourth Amendment violation, but rather that officers' decision to pursue SUV created situation that required use of deadly force; but "trial court carefully considered the temporal separation between any claimed pursuit-policy violation and the moment that shots were fired, and it concluded that the relevant violations were only those that occurred after the cars stopped.").

D.C. Circuit

In *Lane v. District of Columbia*, 887 F.3d 480 (D.C. Cir. 2018), the shooting officer and three others were on patrol as part of the Gun Recovery Unit of the Metropolitan Police Department ("MPD"). The officers encountered the subject in an apartment parking lot. When one of the officers asked the subject if he was carrying a gun, the subject fled. Two of the officers pursued

the subject on foot, while the shooting officer and another officer pursued in a police vehicle. A portion of the chase was captured on an MPD video camera. The shooting officer testified that he saw the subject's right hand moving toward his waistband, causing the shooting officer to fear that he was reaching for a gun. The subject repeatedly looked over his left shoulder, toward the pursuing officers, and turned toward the police vehicle, pointing what appeared to the shooting officer to be a gun. The officer fired two shots. One struck the subject in the back and one in the buttocks. The subject was transported to the hospital where he died as a result of the wounds. The shooter and another officer testified that they saw the subject holding a gun, and a BB gun was recovered from the scene. The jury was shown the video and was able to make their own determination regarding the credibility of the officers' testimony and whether the subject appeared to have in his hand a cell phone, a shadow, or a gun. The district court did not abuse its discretion in denying the estate's motion for a new trial after a defense verdict and the D.C. Circuit affirmed. 887 F.3d at 487.

PRACTICE TIP: Under *Mendez*, a shooting must itself be unreasonable, but under the Supreme Court's invocation of a traditional proximate cause analysis, unreasonable police conduct beforehand can likely be considered, rendering a fatality an unreasonable seizure in violation of the Fourth Amendment. But still considering causation, the practitioner should recall the distinction between cause in fact and proximate cause. A subject is not protected under the Fourth Amendment until he/she is not "free to leave." *See United States v. Mendenhall,* 446 U.S. 544, 553 (1980). So the response to a 911 call; the decision to make a warrantless entry; or the decision to engage in a high-speed pursuit is more properly viewed as a cause in fact, and not a legal cause. Fourth Amendment scrutiny logically does not begin there, but rather when an officer is encountering a subject. The Supreme Court has also told the practitioner that the failure to follow best practices do not necessarily render the conduct unreasonable. *Sheehan*, 135 S.Ct. at 1772-74 (plaintiff could not defeat summary judgment by offering expert testimony that "officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless."). And finally, because of the ongoing lack of clarity in this area of the law, officers will continue to enjoy qualified immunity.

State and Municipal Restrictions on Use of Force

Thanks to the efforts of the International Association of Chiefs of Police (IACP) and the Police Executive Research Forum (PERF), police departments in New Jersey are among those putting more emphasis on crisis-intervention for those with mental health problems, de-escalation and exhausting other alternatives to the use of force, and prohibiting firing at vehicles when officers can safely move out of their path. See National Consensus Policy on Use of Force, at https://www.theiacp.org/sites/default/files/all/n-o/National_Consensus_Policy_On_Use_Of_Force.pdf Police Executive Research Forum (PERF) monographs in "Critical Issues in Policing Series": "Re-Engineering Training on Police Use of Force," available at http://www.policeforum.org/assets/reengineeringtraining1.pdf; "Guiding Principles on Use of Force," available at http://www.policeforum.org/assets/guidingprinciples1.pdf; "Integrating Communications, Assessment, and Tactics (ICAT)" available at https://www.policeforum.org/assets/icattrainingguide.pdf and its guide to ICAT training is available at www.policeforum.org/TrainingGuide.

The biggest change in state law this year was in California. Assembly Bill 392 was signed into law by Governor Gavin Newsom on August 19, 2019, and took effect on January 1, 2020.

The new law is clearly aimed at codifying best practices, such as those listed in the resources above, but the extent to which it places additional burdens on police or alters existing law has been exaggerated. It's key provisions:

- Respect for the "dignity and sanctity of every human life."
- "As set forth below, it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer." Arguably, requiring force to be "necessary" rather than the constitutional standard "reasonable" sets a higher bar.
- Use of force "consistent with law and agency policies" is consistent with existing practice if "agency policies" are not used to determine whether the conduct was constitutional but rather was subject to disciplinary action.
- Use of force evaluated from "perspective of a reasonable officer in the same situation based on the totality of the circumstances," rather than with "hindsight."
- "[P]physical, mental health, developmental, or intellectual disabilities . . . may affect their ability to understand or comply with commands from peace officers."
- "A peace officer shall not use deadly force against a person based on the danger that person poses to themselves," i.e., to prevent their suicide.
- "A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested." But "retreat does not mean tactical repositioning or other de-escalation tactics."

PRACTICE TIP: Department regulations may set a higher standard than the Constitution requires, e.g., "minimal" rather than "reasonable force," or "exhaust all other alternatives" before using deadly force. Deviations from those standards can be used in disciplinary actions against officers, but not in civil rights trials. The same can be said of state laws or regulations. They cannot alter the federal constitutional standard, but they can be used in litigation of state law claims, e.g., whether the force used was "reasonable" instead of "necessary."

Restrictions on Pursuits

This section supplements the discussion in the "Practitioner's Guide," Chapter 9: Fourteenth Amendment Due Process and Fourth Amendment: Pursuits. The Supreme Court's decisions on high speed pursuits have been favorable to law enforcement. In *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998), the Supreme Court held that the facts did not meet the Fourteenth Amendment's "intent to harm" standard that governed high-speed chases ending in personal injury with no seizure. But the Fourth Amendment governs when a suspect's freedom of movement is stopped by intentional means. *Brower v. County of Inyo*, 489 U.S. 593 (1989). In *Scott v. Harris*, 127 S.Ct. 1769, 1779 (2007), the deputy's dashcam video established that the plaintiff's driving endangered human life; the deputy's execution of a "PIT" ("Precision Intervention Technique") maneuver to throw the car into a spin was not unreasonable or a Fourth Amendment violation in the use of force. Even with favorable outcomes in the Supreme Court, law enforcement has recognized the danger to officers, the pursued driver and to third parties. Increasing restrictions on pursuits is gaining law enforcement support.

Limited, voluntary data collected by the IACP's (International Association of Chiefs of Police's) pursuits database

> from 2016-2018 show that most pursuits were short in duration (57 percent were three minutes or less) and length (55 percent were 2 miles or less), but reached relatively high speeds (30 percent exceeded 91 miles per hour). Most pursuits reported (66 percent) began with a traffic violation, while only 6 percent were for a violent felony. Pursuits were most frequently terminated by the officer and/or supervisor (33 percent), followed by the driver stopping (26 percent).

IACP Policy Center, Vehicular Pursuits, updated December 2019, Considerations Document and Concepts and Issues Paper, available to members at https://www.theiacp.org/sites/default/files/2019-12/Vehicular%20Pursuits%20-%202019.pdf (hereafter IACP Pursuit Considerations).

Statistics show that pursuits can be highly dangerous. FairWarning analyzed data from National Highway Traffic Safety Administration crash records, and here are some of the findings:

> At least 13,100 people were killed in police pursuits from 1979 through 2017, the most recent year for which NHTSA data are available, FairWarning found. That's an average of 336 deaths a year. More than 2,700 of those killed were innocent bystanders, which includes pedestrians and people in vehicles who were hit by a fleeing suspect or in rare cases by police.
>
> The precise number of bystander deaths is unknown because some NHTSA records are vague about whether a victim was a bystander or a fleeing suspect. FairWarning identified 2,737 pursuit-related deaths of bystanders using NHTSA records.
>
> NHTSA records make clear that the death toll is growing. At least 1,594 deaths in police chases occurred from 2014 through 2017 — an average of 399 a year. That's the largest four-year total since 1979, when NHTSA began tracking fatal vehicle crashes. Nearly 300 of those killed from 2014 through 2017 were bystanders.

Further,

> At least 416 people were killed in police chases in 2017, according to an analysis of federal records by FairWarning. That's the fourth consecutive year when the number of people killed during police pursuits increased – and a 22-percent spike over 2013, when 341 people were killed, FairWarning found by analyzing National Highway Traffic Safety Administration crash records.

"Fatalities from Police Chases Climbing, could be Higher than Records Indicate," McClatchy, available at https://www.mcclatchydc.com/news/investigations/article226512455.html#storylink=cpy.

The IACP has issued what it calls a "Considerations Document" rather than a Model Policy on Vehicular Pursuits, together with a "Concepts and Issues Paper." An agency should decide on whether pursuits are "Discretionary," "Permitted," "Restricted," or "Prohibited." Where pursuits

are permitted, decisions should be based on a number of factors, such as "The seriousness of the known offense"; "Known information on the suspect"; "Road configuration, population density, and existence of vehicular and pedestrian traffic"; "Lighting, visibility, weather and other environmental factors"; "The relative performance capabilities of the pursuit vehicle(s)"; "The performance capabilities of the vehicle being pursued"; "Officer training and experience"; "Availability of support units"; "Speed and evasive tactics employed by the suspect"; "The presence of other persons in the law enforcement vehicle"; and "The presence of minors and/or other persons in the pursued vehicle."

The IACP's comprehensive guidance covers roles and responsibilities of communications and supervisory personnel, the primary and secondary units involved in the pursuit, and pursuit procedures. Agencies should consider prohibiting officers from conducting a pursuit in a direction against the lawful flow of traffic on a one-way street or lane of a divided highway." A pursuit policy should address which intervention tactics are available and when they are allowed. These include: roadblocks; rolling roadblocks, ramming; pursuit intervention/immobilization technique (PIT maneuver) and tactical vehicle intervention (TVI); spike strips; tagging/tracking (tagging vehicle with GPS device); and shooting at/from a moving vehicle if permitted under the agency's use of force policy. The latter is prohibited under the IACP "Consensus Policy" with ten other police policy-making agencies. See National Consensus Policy on Use of Force, available at https://www.theiacp.org/sites/default/files/all/n-o/National_Consensus_Policy_On_Use_Of_Force.pdf

The IACP guidance also covers pursuit termination, interjurisdictional pursuits, post-pursuit procedures, and training. IACP Pursuit Considerations. See also "Civil Liability for Law Enforcement Pursuit Driving" 2007 (2) AELE Mo. L. J. 101 (I), available at http://www.aele.org/law/2007LRFEB/2007-02MLJ101.pdf; "Civil Liability for Law Enforcement Pursuit Driving (II): Scott v. Harris," 2007 (6) AELE Mo. L.J. 101, available at http://www.aele.org/law/2007LRJUN/2007-06MLJ101.pdf

The dangers of police pursuits have caused them to come under "intense scrutiny." "Many law enforcement agencies have started doing them only in cases of violent crimes or have banned them entirely." "Armed man's fatal shooting by Texas troopers after chase shows difference in police pursuit policies," https://www.dallasnews.com/news/crime/2020/01/20/armed-mans-fatal-shooting-by-texas-troopers-after-chase-shows-difference-in-police-pursuit-policies/ In Dallas, city police officers have the discretion to initiate pursuits for felonies. But some cities, like Atlanta, have banned pursuits entirely, at least while they review their procedures. "Atlanta police chief halts all vehicle chases," https://www.ajc.com/news/crime--law/breaking-atlanta-police-chief-halts-all-vehicle-chases/Oa9YietoId748P8VdQrh7I/

PRACTICE TIP: Like many police-citizen contacts, a motor vehicle stop may produce a fight or flight response on the part of the subject. Police will then initiate and maintain a pursuit to catch the violator and to prevent injuries to third parties. But as the statistics show, the risks often do not outweigh the rewards, and the trend is to limit pursuits to fleeing felons. Written policies and procedures do not offer hard and fast rules, but generally recommend a situational assessment of the danger in chasing the vehicle versus letting it go. A practitioner with a plaintiff's case should look to the agency's written policies and whether they were followed. The defense has the benefit of qualified immunity, since bright lines on pursuit have not been clearly established. The author will say this, however: in his own practice and familiarity with the caselaw, he has never seen a

case where liability was imposed against an officer who failed to pursue or broke off a pursuit because he/she deemed it too dangerous.

Attempts to End Qualified Immunity

The qualified immunity defense is discussed throughout the "Practitioner's Guide," but particularly in Chapter 14: Absolute and Qualified Immunity, III. Qualified Immunity; Substance, IV. Qualified Immunity; Procedure. The qualified immunity defense is under attack from the left and the right. In articles, symposia, and amicus briefs, liberal law professors, the ACLU, plaintiffs' public interest law groups, and even the libertarian Cato Institute, have identified perceived deficiencies in the defense and called for its elimination.

The amicus briefing in favor of certiorari in *Allah v. Milling*, 876 F.3d 48 (2d Cir. 2017) is representative of the arguments. In *Milling*, following a two-day bench trial, the district court ruled that Allah's due process rights were violated when prison officials assigned him to administrative segregation. Allah was a pre-trial detainee at the time. The district court rejected the defendants' assertion of qualified immunity. The Second Circuit panel agreed that Allah's substantive due process rights were violated, but, in a split decision, concluded that the defendants were entitled to qualified immunity. Accordingly, the Circuit panel reversed and remanded. 876 F.3d at 59-60.

A group of law school professors calling themselves "Scholars of the Law" made three central arguments in their amicus brief:

(1) The doctrine of qualified immunity lacks a sound legal basis. The original justification was that qualified immunity borrowed a "good faith" defense from the common law. But the Supreme Court has made subjective good faith irrelevant to the defense, replacing it with an objective "reasonable officer" standard. BRIEF FOR SCHOLARS OF THE LAW OF QUALIFIED IMMUNITY AS AMICUS CURIAE SUPPORTING PETITIONER BRIEF, *Allah v Milling*, No. 17-8654 (2018) (Scholars' Brief), at 5-10.

(2) The doctrine fails to achieve its own goals. The goal of qualified immunity has been to ensure that "the threat of liability" did not inhibit officials in the performance of their duties. The fact that officials are almost always indemnified for damages awards by insurance or their employing municipality reduces that concern. In practice, litigating the qualified immunity defense does not reduce the costs or burdens. Scholars' Brief at 10-13.

(3) There are many plausible improvements to the doctrine. The courts can adopt the rationale of *Hope v. Pelzer*, 536 U.S. 730, 735-736, 741 (2002), which, rather than require that the plaintiff identify cases that are "materially similar" to defeat qualified immunity, focuses on whether pre preexisting law provided a "fair and clear warning" that the conduct was unlawful, even if arising under "novel factual circumstances." Another suggestion is for lower courts to decide whether there has been a constitutional violation on the merits, instead of bypassing that issue to address whether the right was clearly established. That would help to create a body of clearly established law. Other alternatives that are put forth are to return to considering an official's good faith intent; to follow the rule of lenity in criminal cases, which examines whether violation of an ambiguous law was willful; and to eliminate the availability of interlocutory appeals. Scholars' Brief at 10-13.

Another group encompassing the ACLU, public interest lawyers, and the plaintiffs' bar also filed an amicus brief. The brief argues that qualified immunity denies justice to those deprived

of federally guaranteed rights; imposes additional litigation costs on civil rights litigants; and harms law enforcement by eroding public trust. BRIEF OF CROSS-IDEOLOGICAL GROUPS DEDICATED TO ENSURING OFFICIAL ACCOUNTABILITY, RESTORING THE PUBLIC'S TRUST IN LAW ENFORCEMENT, AND PROMOTING THE RULE OF LAW AS AMICI CURIAE IN SUPPORT OF PETITIONER, *Allah v Milling*, No. 17-8654 (2018), at 10-24.

Similarly, the Cato Institute, a libertarian think-tank, expressed concern about "the deleterious effect that qualified immunity has on the power of citizens to vindicate their constitutional rights, and the erosion of accountability that the doctrine encourages." BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONER, *Allah v Milling*, No. 17-8654 (2018) (Cato's Brief), at 1. Cato argues that the circuits are split as to how much factual similarity is required for an issue to have been "clearly established." The Second Circuit went beyond the Supreme Court's instructions and required that the particular practice employed by the defendants to have been declared unlawful. And the common law at the time 42 U.S.C. § 1983 was enacted "provided limited defenses to certain torts, not general immunity for public officials." Cato Brief, at 7-22.

The Supreme Court did not reach the merits in *Milling*, because the case was dismissed by request and agreement of the parties under the Court's Rule 46. *Allah v Milling*, No. 17-8654 (9/4/2018). However, the amici will continue to look for an opportunity to urge the limitation or abolishment of the qualified immunity defense. For additional materials on the subject, see, e.g., Panel Discussion, *Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability*, Cato Institute (Mar. 1, 2018); Symposium, *Federal Courts Practice & Procedure: The Future of Qualified Immunity*, 93 Notre Dame L. Rev. 1793 (2018).

PRACTICE TIP: Of course, no one on the defense side wants or expects the Supreme Court to abolish the qualified immunity defense. But the Court's jurisprudence presents problems for the police and for the practitioner:

(1) The Supreme Court has criticized the circuits, more particularly the Ninth, for "defin[ing] clearly established law at a high level of generality." See, e.g., *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018). But a fair criticism of the Court is that it is requiring too high a level of specificity. "The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' . . . This requires a high 'degree of specificity.'" *District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018) (citations omitted).

(2) The Court has sanctioned bypassing the underlying question of whether the conduct at issue was unconstitutional to address whether the official is entitled to qualified immunity. *Pearson v. Callahan*, 129 S.Ct. 808, 818-822 (2009). Yet decisions will continue to say the conduct did not violate clearly established law until the relevant law is clearly established through decisions that address the merits.

(3) Although the Court requires a "robust consensus of cases persuasive authority," the Court has not defined that phrase. "We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity[,]" *Wesby*, 138 S.Ct. at 591, n 8, citing *Reichle v. Howards*, 566 U. S. 658, 665-666 (2012).

(4) These decisions do not help resolve the practical problems with the qualified immunity defense. A police officer will be faced with a man armed with a knife or a vehicle heading in his/her direction. The idea that a line officer will survey the circuits for "robust consensus of cases persuasive authority" to determine whether his/her decision whether to shoot comports with the Constitution constitutes a complete fiction. Frankly, if the Supreme Court hasn't decided where to look for controlling authority, how is an officer supposed to know? At best, an officer will follow his/her training and operating procedures. Those responsible for training and operating procedures will be the ones, if any, to keep up with legal developments.

(5) A defense motion for summary judgment raising qualified immunity is virtually obligatory. As that juncture, the district court should know whether the law is clearly established. If it is not clearly established, that should end the case; the officer is entitled to qualified immunity. But most cases survive summary judgment, not because the law is not clearly established, but because the facts are not; they are in dispute.

(6) But here comes another conundrum. In *Hunter v. Bryant*, 502 U.S. 224 (1991), the Supreme Court questioned the court of appeals' statement that "[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact." 502 U.S. at 228. Rather than "routinely plac[ing] the question of immunity in the hands of the jury[,] [i]mmunity ordinarily should be decided by the court long before trial." 502 U.S. at 228. *Hunter* thus discouraged, but did not prohibit the jury's playing a role in the qualified immunity determination.

(7) The Seventh Amendment guarantees parties the right to a jury trial in civil cases, in particular fact finding by juries. And the Court in its Fourth Amendment jurisprudence says "[t]he operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.'" *County of Los Angeles v. Mendez*, 137 S.Ct. 1539, 1546 (2017), quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). But despite the right to a jury trial and despite the need to consider that "totality of the circumstances," many courts will have the jury answer special interrogatories under Fed. R. Civ. P. 49, and depending on those answers, will grant or deny qualities immunity. Although that process may meet *Hunter's* directive that the trial judge decide the question of qualified immunity, it deprives the parties of a jury determination of the underlying liability question, makes the outcome dependent on a number of isolated facts rather than the "totality of the circumstances," and leads to inconsistent verdicts. To avoid or at least mitigate those problems, the author has previously argued that if the law is clear but the facts are not, the jury can be given a detailed instruction of what is clearly established law and then asked the single question, "Under the facts in this case as you find them, did the officer violate clearly established law as I have instructed you?" If the answer is no, the court awards qualified immunity. See "Practitioner's Guide," Chapter 28: Jury Instructions and Verdict Forms, II. Qualified Immunity: the Role of the Judge and Jury.

Municipal Liability

Effect of Officer Hiring and Retention Crisis

According to the Washington, D.C. think tank, the Police Executive Research Forum (PERF), law enforcement agencies are facing a triple threat – "fewer applicants, more resignations, and a looming retirement bubble."

PERF says:

> Fewer people are applying to become police officers, and more people are leaving the profession, often after only a few years on the job. These trends are occurring even as many police and sheriffs' offices are already short-staffed and facing challenges in developing a diverse workforce
>
> . . . .
>
> There are ominous signs that the workforce crisis in policing may be getting worse. Traditional sources of job applicants—the military and family members of current officers—are diminishing. A robust economy and strong job growth are creating more options for people entering the labor market, so police agencies are facing more competition in hiring. And the often-rigid, quasi-military organizational structure of most police agencies does not align with the preferences of many of today's job applicants.

PERF, "The Workforce Crisis, and What Police Agencies Are Doing About it," available at https://www.policeforum.org/assets/WorkforceCrisis.pdf (hereafter "Workforce Crisis") at 7.

PERF's survey found that "the number of applicants for police officer positions had decreased, either significantly (36%) or slightly (27%), over the past five years"[;] officers left to accept a job at another local law enforcement agency or secondarily to pursue a career outside of law enforcement; and "about 8.5 percent of current officers are eligible for retirement, and 15.5 percent will become eligible within five years." Workforce Crisis at 8.

> A new kind of officer is needed for a new kind of mission.
>
> [T]he work of policing itself is changing. The work of police officers is becoming more challenging. Criminal offenders are committing new types of cyber-crime, and are using computers to commit old types of crime in new ways, so officers must understand and be comfortable with new technologies. Furthermore, today's police officers increasingly are being asked to deal with social problems, such as untreated mental illness, substance abuse, and homelessness. As a result, the skills, temperament, and life experiences needed to succeed as an officer are becoming more complex.

Workforce Crisis, at 7.

To increase their applicant pools to attract officers with computer and language proficiency in other than English, and more minorities, agencies are offering college tuition reimbursement, health club memberships, signing bonuses and more flexible hours. In addition, agencies have relaxed standards for prior drug use, DUIs, and traffic violations; revised tattoo and facial hair policies; reduced educational requirements; relaxed physical standards; and reduced standards on financial debt and credit history. Workforce Crisis, at 34-35.

PRACTICE TIP: The question, of course, for the practitioner, is whether these problems in recruitment and retention have an effect on the civil liability cases. Defects in a municipality's hiring, training, supervision and discipline can be the basis for liability. *Board of County Commissioners v. Brown*, 117 S. Ct. 1382 (1997); *City of Canton v. Harris*, 489 U.S. 378 (1989). Although the policy or custom does not itself have to be unconstitutional, it must lead to

unconstitutional consequences. The city, town, or county must be aware of the problem; it must be "deliberately indifferent" to its solution; and the defect must be causally related to the violation. Causation requires more than cause-in-fact; it requires legal cause, a close connection between the problem and the violation. See "Practitioner's Guide," Chapter 13, Individual, Supervisory, and Municipal Liability, IV. Municipal Liability, F. Liability Based on Deliberate Indifference to Hiring, Training, Supervision and Discipline, 3. Hiring. Plaintiffs should do discovery on when an officer was hired, whether the department relaxed its recruitment standards to fill vacancies, and whether the officer has had disciplinary problems that went uncorrected because of the need to retain even unsatisfactory officers.

De-escalation and Crisis Intervention and Failure to Train

De-escalation and crisis intervention remain front burner topics in law enforcement. Theories on municipal liability are discussed in the "Practitioner's Guide," Chapter 13: Individual, Supervisory, and Municipal Liability, IV. Municipal Liability, F. Liability Based on Deliberate Indifference to Hiring, Training, Supervision and Discipline. The 2018 Supplement emphasized the Failure to Train on De-Escalation and Crisis Intervention. See Deadly Force and Emotionally Disturbed Persons (EDPs), National Consensus Policy, PERF's Guiding Principles, and Principle of De-Escalation, and Failure to Train on De-Escalation and Crisis Intervention. Establishing liability presents under this theory presents challenges for the plaintiff's side, e.g., showing a municipal policy of "deliberate indifference"; making out a causal relationship between the policy and the injury; and overcoming caselaw that says a police officer does not have to choose the best of alternatives in a "tense, uncertain" situation. Accordingly, the cases often employ a secondary Americans with Disabilities Act (ADA) theory under which the police should have reasonably accommodated the plaintiff's mental state. See "Practitioner's Guide," Chapter 8: Fourth Amendment: Deadly Force, IV. Recurring Fourth Amendment Situations, B. Subject Armed with Edged Weapon; Police Interaction with Mentally Ill, and 2018 Supplement, Deadly Force and Emotionally Disturbed Persons (EDPs), ADA and Exigent Circumstances Exception. And finally, a state law negligence claim should be explored, as it would have a lower liability threshold. See generally "Practitioner's Guide," Chapter 18: Common Law Claims and Defenses.

Roell v. Hamilton County, OH, 870 F.3d 471 (6th Cir. 2017), is an illustrative case. Officers encountered a man who was mentally unstable and unarmed. The question raised was whether officers were required to take his diminished capacity into account when they approached him and tried to take him into custody. The subject suffered from chronic, severe mental illness, including schizoaffective disorder and delusional disorder, and when he went off his medication he could become unpredictable, dangerous, and violent. At 2:30 a.m., his neighbor woke up to a loud noise and found the subject standing at her window wearing only a t-shirt, nude from the waist down. She called 911 and said that her neighbor was "acting crazy." When the officers arrived on the scene, they wrestled with the subject and tased him multiple times before eventually subduing him and handcuffing him with two sets of handcuffs and shackles. The subject stopped breathing while he was shackled, and never regained consciousness. The deputy coroner determined that the cause of death was "excited delirium due to schizoaffective disorder."

The estate's case was before the Sixth Circuit on appeal from the District Court's grant of summary judgment for the defendants. In affirming the district court, the panel majority ruled:

(1) The estate's § 1983 excessive force claim was that the individual deputy defendants "foreseeably caused any resistance or escalated the encounter by failing to use verbal and tactical

de-escalation[,]" and cited state peace officer training materials that required verbal de-escalation techniques before attempting to physically restrain a subject exhibiting signs of excited delirium. But "[e]ven assuming that law-enforcement officers must 'adjust the application of force downward' when confronted with a conspicuously mentally unstable arrestee, no precedent establishes that the level of force used by the deputies in this case was excessive or that the deputies were required to use only verbal de-escalation techniques." 870 F.3d at 482-87 (citation omitted).

(2) The estate's § 1983 claim against the county included a failure to train on "officer interactions with individuals suffering from mental illness and excited delirium." But the Circuit majority found that "the deputies received training on topics that included the use of force and tasers, crisis intervention techniques, interacting with the special-needs population and mentally ill suspects, and recognizing the symptoms of excited delirium." 870 F.3d at 487-88.

(3) The estate had an ADA claim under which the county "had a duty to accommodate [the subject's] disability by 'having its officers take steps to calm the situation, converse with [the subject] in a non-threatening manner, pause to gather information from [the neighbor], refrain from the application of force, and summon EMS to the scene at the earliest moment possible." Although several other circuits had ruled that the ADA applies to arrests, neither the Sixth Circuit nor the Supreme Court had decided that issue. It need not be decided in this case, because the estate's proposed accommodations were unreasonable in the light of exigent circumstances and "overriding public safety concerns." 870 F.3d at 489-90 (citation and internal quotation marks omitted).

In *Haberle on Behalf of Her Two Minor Children*, 885 F.3d 170 (3d Cir. 2018), a man with mental health problems was having a serious mental episode, told the woman he had children with that he was suicidal, and broke into a friend's home and stole a handgun. The woman contacted police, who obtained an arrest warrant. Local police officers responded to the man's location. Some officers wanted to set up a perimeter and ask the state police to send crisis negotiators. Others suggested asking the woman to help communicate with the man. The lead officer rebuffed those suggestions, calling the other officers "a bunch of f[—]ing pussies." He intended to immediately go to the apartment, stating "[t]his is how we do things in [my department]." He knocked on the door of the apartment, and identified himself as a police officer. The man then went into one of the bedrooms of the apartment and shot himself with the stolen gun.

On appeal, the Third Circuit panel ruled: (1) The Fourth Amendment did not apply because the man had not been seized. 885 F.3d at 176. (2) A Fourteenth Amendment state-created-danger theory was not viable. Even though there was disagreement on how to manage the risk, the shooting officer was not deliberately indifferent to it. 885 F.3d at 177-78. (3) As to the ADA claim, although the courts are split, the panel concluded that arrests by police officers are "services, programs, or activities of a public entity" requiring a reasonable accommodation for one's disability. But the Circuit decided the issue under whether the man had been subjected to discrimination based on his disability. Here, the panel imposed a questionable *Monell* requirement: the plaintiff had to show a pattern of violations, or deliberate indifference, e.g., to the risk of harm without policies or training on interacting with mentally disturbed individuals:

> [The Plaintiff] also complains that "a set of policies and procedures had been drafted by the Department" which should have guided "interact[ion] with mentally disturbed individuals, and those in crisis situations[,]" but that "the said policies and procedures were not adopted by the Borough Council, nor were they

> implemented by the Mayor or Police Department." . . . At most, she claims that the Borough's conduct falls "beneath the nationally recognized standards for police department operations" with regard to those with mental illness. But, assuming that is true, falling below national standards does not, in and of itself, make the risk of an ADA violation in such circumstances "so patently obvious that a [municipality] could be held liable" without "a pre-existing pattern of violations."

885 F.3d at 182 (record and case citations omitted).

The Circuit remanded to allow the plaintiff to amend her ADA claim.

Estate of Ceballos v. Husk, 919 F.3d 1204 (10th Cir. 2019), was discussed earlier in connection with the Tenth Circuit's test of reckless or deliberate police conduct that precipitates the need to use lethal force. A man's wife reported that her husband, who was drunk and probably on drugs, was armed with baseball bats and acting crazy. She had left the residence with her 17-month-old daughter. A responding officer went back to his patrol car to get his beanbag shotgun. Without waiting for that officer to return, as the decedent emerged from his garage with the baseball bat in hand, one officer drew a firearm and the other a taser. Both shouted commands as the man approached them. The officer with the taser shot and the officer with the gun shot and killed the man.

The city offered a 40-hour Crisis Intervention Training (CIT) course, designed to train officers to deal with persons in crisis:

> by using techniques such as maintaining safety by using time and distance; taking steps to calm the situation by using quiet voices; avoiding getting too close, too fast; not rushing into the situation; assessing the need for backup; making a plan with fellow officers for the best course of action; gathering information from those on the scene; avoiding escalating the situation; communicating in a calm, non-threatening manner; not having multiple people giving commands at the same time; and containing the subject by establishing a perimeter.

919 F.3d at 1211.

The course was not mandatory and the officer who shot his gun had not been CIT trained. Plaintiff's proposed expert witness would have testified that the failure to employ CIT strategies was "not consistent with well-established modern police standards." Citing Tenth Circuit authority, the panel majority affirmed the district court's denial of qualified immunity for the officer. "[T]he responding officers knew [the man's] capacity to reason was diminished, whatever the underlying reason might have been—mental health problems, emotional distress, drunkenness, or drugs." "[T]he Tenth Circuit decision in *Allen* [*v. Muskogee*, 119 F.3d 837, 839-41 (10th Cir. 1997)] would have put a reasonable officer on notice that the reckless manner in which [the shooting officer] approached [the man] and his precipitous resort to lethal force violated clearly established Fourth Amendment law." 919 F.3d at 1217, 1220. Because the case was on interlocutory appeal on the entitlement of the individual officer to qualified immunity, the Circuit did not consider the § 1983 failure to train claim against the city or the state law wrongful death claim against the shooting officer.

See also Joseph v. Doe, Civil Action No. 17-5051 (E.D. La. 1/3/2019) (police responded to calls that plaintiffs' decedent was experiencing mental health crisis; unarmed, he retreated

behind counter at convenience store and was already laying down when first responding officer drew his gun and put his 300 pound weight on him; fourteen responding officers either participated in tasing, punching man in head, kicking him in groin or standing by and watching; man, who had not committed crime, was placed in handcuffs and shackles and placed face down in patrol car where he became unresponsive and later died; saying, "[t]he New Orleans Police Department requires that 'when feasible based on the circumstances, officers will use de-escalation techniques, disengagement; area containment; surveillance; waiting out a suspect; summoning reinforcements; and/or calling in specialized units such as mental health and crisis resources, in order to reduce the need for force, and increase officer and civilian safety.' Many other police agencies, including the New York, Seattle, and Dallas police departments, have implemented deescalation training[;]" but granting summary judgment on Fourteenth Amendment claim based on positional asphyxia.);

Felix v. City of New York, 344 F. Supp.3d 644. 659-61, 664-66 (S.D. N.Y. 2018) (officers accessed apartment of paranoid schizophrenic man in facility housing individuals with mental illness without warrant, exigent circumstances or knocking and announcing, precipitating physical altercation and shooting; denying motion to dismiss where plaintiff relied on inspector general report criticizing police department's lack of an emotionally disturbed persons policy and failure to properly train police officers on handling emotionally disturbed persons beyond offering only a 'one-day training' involving 'a short, basic lecture on mental illnesses' and four role-playing scenarios; also denying motion to dismiss ADA claim where plaintiff alleged failure to train officers about treatment of individuals with mental illness, including implementing Crisis Intervention Training (CIT), backup calls, and similar policies.);

Cambre v. Smith, Civil Action No. 18-6509 (E.D. La. 12/10/2018) (dispatched to plaintiff's residence for welfare check, officers allegedly began yelling and cursing at him, tased him, and jumped on top of him before taking him to hospital handcuffed and on stretcher; dismissing plaintiff's amended complaint which cited to a press release indicating that defendant sheriff had "assembled a crisis intervention team trained in de-escalation techniques for situations involving individuals in crisis. [Plaintiff] alleges that the crisis intervention team was limited to four deputies and that [parish sheriff's office's] policies were defective because none of the four deputies were deployed to the scene of the alleged January 2018 incident involving [Plaintiff]. . . . [T]he press release states that the crisis intervention team was tasked with, among other things, 'training other departmental personnel in crisis intervention techniques.' . . . Regardless of whether the four trained deputies were deployed to the scene, [Plaintiff] has not pled facts sufficient to allege that [the sheriff] acted with deliberate indifference. . . . [T]he press release demonstrates, if anything, that [the sheriff] was aware of the problems posed by behavioral health-related dispatch calls and that he was actively working to address such problems, which simply cannot constitute deliberate indifference.").

Remirez v. Escajeda, No. EP-17-CV-00193-DCG (W.D. Tex. 1/11/2018) (plaintiffs' complaint stated that their son was threatening to hang himself and needed help; when officer arrived son was hanging from basketball net but grabbing rope with both hands and touching ground with his tiptoes to save his own life; for unstated reasons, officer tased him and then removed him from the noose, but resuscitation efforts failed; denying defense motion to dismiss failure to train claim: "Plaintiffs make numerous factual allegations as to why the City of El Paso's training was inadequate, including pointing out the City's failure to train officers on how to respond to crisis intervention calls, the City's failure to train officers on how to de-escalate potential confrontations with mentally ill persons in crisis, and the City's failure to train officers

on the steps needed to minimize deadly or intermediate force when confronted with a mentally ill person in crisis.");

Sanchez v. Gomez, 283 F. Supp. 524, 545 (W.D. Tex. 2017) (police were at plaintiff parents' residence to investigate complaint involving son who had been acting strange and exhibiting signs of mental illness, when they entered home without consent and without warrant, attempted to subdue their son with taser, and fired five rounds that proved fatal; denying dismissal of plaintiffs' complaint based on allegations that police department "failed to train its officers on how to (1) make first contact with a mentally unstable individual; (2) de-escalate mental health crises rather than escalate the confrontation; (3) take steps to minimize the use of deadly or intermediate force when dealing with such a person; and (4) respond to crisis intervention calls or use verbal de-escalation tactics.");

Tenorio v. Pitzer, Civ. No. 12-01295 MCA/KBM, Consolidated with Civ. No. 13-00574 MCA/KBM (D.N.M. 9/25/2017) (earlier finding that "the tactics employed by [defendant officer] and his fellow APD [Albuquerque Police Department] officers unreasonably created the circumstances precipitating [defendant officer's] resort to deadly force. Causation in this context requires the factfinder to decide whether [defendant officer's] allegedly unreasonable use of deadly force would have been avoided had the responding officers been trained and supervised under a 'program that was not deficient in [the] identified respect[s][;]'" and in this decision denying summary judgment allowing Department of Justice (DOJ) "findings that (1) APD officers use deadly force in circumstances where there is no imminent threat of death or serious bodily harm to officers or others; (2) APD officers use deadly force against people who pose a threat only to themselves; (3) APD officers use deadly force in situations where their own conduct creates the need to resort to deadly force; (4) APD officers are not adequately trained to deal with people in emotional crisis; (5) APD officers do not utilize CIT officers to de-escalate encounters; and (6) APD training over-emphasizes the use of force, especially weapons, to resolve stressful encounters.");

Clark v. Colbert, Case No. 16-CV-115-JHP (E.D. Okla. 7/18/2017) (plaintiff was schizophrenic patient who was off his medications and cut his brother with knife; after local police took tactical command from deputy sheriffs, officers tried verbal persuasion, pepperballs, Taser, and eventually firearms when plaintiff charged group at about ten feet; granting summary judgment in favor of county board under ADA; even if ADA applied to exigent circumstances, deputies had CLEET (Council on Law Enforcement Education and Training) certifications and defendant deputy who was major "was taught about how to recognize the signs of mental illness, to use de-escalation techniques when dealing with the mentally ill, to use soft words and non-threatening language when dealing with the mentally ill, and about the prevalence of mental illness in society. . . . Plaintiff has also failed to show any causal link between the alleged failure to implement such policies and training and his injuries;" additionally, local police department not county board was responsible for disarming plaintiff and taking him into custody, but, to extent that state negligence claim was based on that plan, county board had discretionary immunity).

PRACTICE TIP: For additional resources issued since publication of the "Practitioner's Guide," and the 2018 supplement, see U.S. Department of Justice's Office of Community Oriented Policing Services (COPS Office), "Law Enforcement Best Practices: Lessons Learned from the Field," https://cops.usdoj.gov/RIC/ric.php?page=detail&id=COPS-W0875, and the Police Executive Research Forum (PERF) (2020) "Refining the Role of Less-Lethal Technologies:

Critical Thinking, Communications, and Tactics Are Essential in Defusing Critical Incidents," available at https://www.policeforum.org/assets/LessLethal.pdf

Motions Practice

Use of Video Evidence on Summary Judgment

The prevalence of dashcam, body worn camera, surveillance, and sometimes even cell phone video gives a source of reliable documentary evidence; sometimes enough to overcome disputed testimonial evidence to grant summary judgment. When reviewing summary judgment decisions, a court generally construes all purported facts in the light most favorable to the non-movant. See, e.g., *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011). However, when there is a videotape that discredits the non-movant's description of facts, the court will consider "the facts in the light depicted by the videotape*." Scott v. Harris*, 550 U.S. 372, 381 (2007). See "Practitioner's Guide," Chapter 9, Fourteenth Amendment Due Process and Fourth Amendment: Pursuits, III. The Fourth Amendment, A. Supreme Court; Unreasonable Seizure Analysis (discussing *Harris*). See also "Practitioner's Guide," Chapter 12: First, Fifth, Sixth, Eighth Amendments, and Laws, II. First Amendment, C. Police-Citizen Encounters, 3. Body-Worn Cameras and 2018 Supplement, Police Body Worn Cameras (BWCs).

Shepherd v. City of Shreveport, 920 F.3d 278 (5th 2019) is an illustrative case. A man armed with a knife disregarded a series of instructions, and moved quickly toward a police corporal who continued to back up, until he fatally shot the man using his shotgun. In affirming summary judgment for the defendants, the Circuit panel relied on the corporal's dashcam video to overcome the plaintiff's attempts to create a fact dispute:

(1) "Though the videotape is far from the paragon of clarity, it shows that the distance at the time of the shot was much closer to ten feet than to thirty feet. So, viewing this alleged factual dispute 'in the light depicted by the videotape[,]' *Scott*, 550 U.S. at 381, 127 S.Ct. 1769, we hold that there is no material issue of fact as to the distance between [the man] and [the corporal at the time of the shot." 920 F.3d at 284.

(2) "The videotape clearly shows that [the corporal] did not command [the man] to leave the garage in the moments before he was shot; to the contrary, the videotape shows that [the corporal] instead ordered him to 'get back.' In addition, the videotape also shows that [the man] was advancing down the driveway at a relatively quick speed in the final moments before being shot—in a motion that looks much more like directed running than errant stumbling. Thus, once again viewing this alleged factual dispute 'in the light depicted by the videotape[,]' *Scott*, 550 U.S. at 381, 127 S.Ct. 1769, we hold that there is no genuine issue of material fact on this issue either." 920 F.3d at 284.

(3) "The videotape does not clearly show how [the man] was holding the knife in the moments leading up to the shot. However, we agree with the district court that this dispute is not material to the outcome of the case. Under the totality of circumstances present in this case, even if we were to accept that [the man] still had the knife at his side at the moment when he was shot, there is ample reason to conclude that he posed a real threat of serious bodily harm to the officer. As such, we hold that [the corporal's] use of deadly force was reasonable." 920 F.3d at 284.

In short, "all of the alleged disputes raised by [the plaintiff] in this appeal are either immaterial or discredited by the videotape[.]" 920 F.3d at 284-85.

Another example is *Davenport v. Borough of Homestead*, 870 F. 3d 273 (3d. Cir 2017). Officers fired to end the flight of a vehicle as it entered a high pedestrian traffic area, striking the passenger who was the driver's mother. Under the "totality of circumstances," three of four officers did not violate the Fourth Amendment and were entitled to qualified immunity. The Third Circuit panel relied on video evidence to negate the plaintiff's claim of a fact dispute:

> Based on [the plaintiff's] version of facts, the District Court concluded that a reasonable jury could find that the officers intentionally shot at [the plaintiff] and that the pursuit posed no serious threat of immediate harm to others. This was error, as these assertions are "blatantly contradicted by the record." *Scott* [*v. Harris*], 550 U.S. [372 (2007) at 380. First, video evidence indisputably shows a heavy pedestrian presence during the course of the pursuit. And second, throughout the pursuit [the driver] continuously swerved between inbound and out-bound lanes, which ultimately led to his colliding with three other vehicles. Considering the serious threat of immediate harm to others, no reasonable jury could conclude that the officers fired at the vehicle for any reason other than to eliminate that threat.

870 F. 3d at 280.

But with regard to a fourth officer, the cab's dashcam video was inconclusive.

> [T]he pursuit ended when [the driver] collided with a taxicab. At or around the same time, [the fourth officer] fired two shots directly into the driver compartment of the vehicle. The parties dispute whether [the fourth officer] fired before or after the final collision. The taxicab's dash-camera footage shows [fourth officer's] conduct, but it is not clear from the video when he actually discharged his firearm.

870 F. 3d at 277.

Because the pretrial record established a genuine issue of disputed fact as to that officer, the Circuit did not have jurisdiction to consider the interlocutory appeal. 870 F. 3d at 278.

In *Shaw v. City of Selma*, 884 F.3d 1093 (11th Cir. 2018), the subject was armed with a hatchet and had ignored more than two dozen orders to drop it. At the time he was shot, he was advancing toward the officer with the hatchet still in hand. He closed the gap to within a few feet and was yelling at the officer to "Shoot it!" Most of the events were captured on the officer's body worn camera. Citing *Harris*, the Circuit panel noted:

> Because this is an appeal from summary judgment, we review the evidence in the light most favorable to the estate as the non-moving party, and draw all justifiable inferences in its favor. *Tolan v. Cotton*, 572 U.S. ___, 134 S.Ct. 1861, 1863, 188 L.Ed.2d 895 (2014). We will, however, accept facts clearly depicted in a video recording even if there would otherwise be a genuine issue about the existence of those facts. See *Scott v. Harris*, 550 U.S. 372, 380-81, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007). But where the recording does not clearly depict an event or action, and there is evidence going both ways on it, we take the estate's version of what happened.

884 F.3d at 1097, n 1.

Whether the subject was raising the hatchet when he was shot is not clear from the video, so the Circuit panel assumed he did not raise it. Even so,

> [The subject] could have raised the hatchet in another second or two and struck [the officer] with it. Whether the hatchet was at [the subject's] side, behind his back, or above his head doesn't change that fact. Given those circumstances, a reasonable officer could have believed that [the subject] posed a threat of serious physical injury or death at that moment. A reasonable officer could have also concluded, as [the officer] apparently did, that the law did not require him to wait until the hatchet was being swung toward him before firing in self-defense.

884 F.3d at 1100.

Accordingly, the Circuit panel affirmed summary judgment for the defendants.

For additional authorities, see, e.g., *Garza v. Briones*, No. 18-40982 (5th Cir. 11/25/2019) (just before shooting, [decedent] was behaving erratically, refusing to comply with police orders, and waving around what officers presumed to be deadly weapon, although it was later determined to be BB gun; "We need not accept a plaintiff's version of the facts for purposes of qualified immunity when it is blatantly contradicted and utterly discredited by video recordings. . . . The video evidence from the dashcams of two patrol vehicles confirms that, just before defendants fired, [decedent] raised the gun above the tabletop, pointed the barrel in [shooting officer's] direction, and lowered his eyeline seemingly to aim the firearm. It was then that [shooting officer] fired his weapon[.] . . . . [A witness's] statements that [decedent] 'did not at any time point the gun to cops' and that 'the gun was pointing down when he picked up his hand and the first shot was fired' cannot alter what's on the videos[;]" affirming summary judgment for defendants.);

Lane v. District of Columbia, 887 F.3d 480, 487 (D.C. Cir. 2018) (officers were part of gun recovery unit and encountered subject in apartment parking lot; when officer asked subject if he was carrying gun, he fled, with two officers pursuing on foot and two in police vehicle; portion of chase was captured on police department video camera; officer testified that he saw subject's right hand moving toward his waistband, causing officer to fear that he was reaching for gun; subject repeatedly looked over his left shoulder, toward pursuing officers, and turned toward police vehicle, pointing what appeared to officer to be gun; "[t]he jury was shown the video and was able to make their own determination regarding the credibility of the officers' testimony and whether [subject] appeared to have in his hand a cell phone, a shadow, or a gun. The district court did not abuse its discretion in denying [plaintiff's] motion for a new trial and we affirm.");

Frederick v. Motsinger, 873 F.3d 641, 647 (8th Cir. 2017) (woman entered convenience store with four-inch folding knife and told store clerk to call 911; when she refused to drop knife, officer with taser deployed it, but it did not take effect; at that point, she charged officer with taser, and another officer fired three shots; store surveillance video confirmed that woman charged with knife in stabbing position; "[w]hile [the woman] did not lunge at the officers prior to being tased, [officers] reasonably perceived she was ready to use her knife against them or others. As in *Scott v. Harris*, 'it is clear from the videotape that [the woman] posed an actual and imminent threat' of harm to the officers and others in the store. 550 U.S. 372, 384, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).");

Dooley v. Tharp, 856 F.3d 1177, 1183 (8th Cir. 2017) (man in army uniform walking along side of highway, carrying rifle, and "flipping off" passing cars; frame-by-frame review of deputy's

dashboard camera showed that man was apparently attempting to comply with shooting deputy's order to drop gun; but, affirming district court's grant of summary judgment because "[v]iewing the dash-cam video at regular speed and considering the facts of this case . . . , we conclude that [officer's] mistaken perception that [man] posed a threat of serious physical harm to [officer] was objectively reasonable.").

PRACTICE TIP: Video evidence may be helpful to the defense when it is used defensively, in support of a defense motion for summary judgment to defeat a plaintiff's attempt to create a fact dispute. But the offensive use of that evidence may not be as useful to a plaintiff in support of a plaintiff's dispositive motion. The reason is that an officer's perception of the incident, particularly in terms of the time and distance involved, may differ from the video evidence. And the defense is entitled to argue that the incident should be viewed from the perception of a reasonable officer on the scene.

Evidence

Consensus Policies and National Standards

This section updates prior discussions on the admissibility of Model Policies issued by the International Association of Chiefs of Police (IACP) through expert testimony that those policies have received general acceptance in the law enforcement community. A jury can then evaluate the reasonableness of the police conduct at issue by comparing it to those national standards. The courts continue to exclude testimony that is based on local rather than national standards, is expressed as the expert's personal opinion alone, or purports to instruct the jury on the law. See "Practitioner's Guide," Chapter 23: Evidence and Exhibits, II. The Federal Rules of Evidence and Specific Applications, B. Specific Applications; the Alphabetical List, 16. Directives, General Orders, Standard Operating Procedures; Chapter 24: Motions Practice, VI. Pre-Trial Motions, B. Motions in Limine, 7. Directives, General Orders, Standard Operating Procedures, and 2018 Supplement, Admissibility of Consensus Policies as Evidence of "Reasonableness." See also "Practitioner's Guide," Chapter 22: Police Practices Experts, IV. Admissibility of Expert Testimony.

Sloan v. Long, 4:16 CV 86 (JMB) (E.D. Mo. 03/09/2018), provides a helpful analysis and cites numerous cases on the standards for admission and exclusion of expert testimony. *Sloan* was a Taser case in which a burglary suspect allegedly became uncooperative and was Tasered when she attempted to strike another deputy sheriff while she was being handcuffed. At issue was the admissibility of the testimony of the plaintiff's police practices expert. The expert was a college professor and former police instructor who had been certified by Taser International to be a Taser instructor. His qualifications were not challenged but the defendant deputy moved to exclude the expert's testimony "because he expresses a legal conclusion; he makes credibility determinations and speculates about facts; and his opinion regarding the handcuffing of plaintiff is not relevant."

The district court reviewed the "gatekeeping" function of the court. "Certain categories of expert testimony are not admissible. For example, it is the judge's job to instruct the jury on the applicable law and, thus, expert testimony on matters of law is not admissible." However, "expert testimony on industry practice or standards is admissible." Accordingly, the court would not allow opinion testimony that the Taser use was "unnecessary," "unreasonable," or "punitive," and served no "objectively reasonable purpose." But the court would allow testimony regarding police practices and standards and "whether defendant's conduct departed from normal policing

standards" under "hypothetical situations that mirror the varying versions of the events giving rise to this action."

> Thus, the Court will not bar [the expert] from testifying that nationally accepted police procedures, such as those promulgated by the IACP, embrace the "objectively reasonable" standard. In addition, he can testify generally about Taser International's training guidelines regarding the proper use of a Taser. Because the Court will instruct the jury on the legal standards governing excessive force claims, [the expert] may not testify that deviation from the IACP standards and Taser guidelines establishes that plaintiff's constitutional rights were violated.

The court would also not allow testimony that made credibility determinations or drew factual conclusions. "It is settled law that 'an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert.'" (citation omitted) There was evidence in the case that the plaintiff attempted to strike another deputy when only one hand had been cuffed. The court would allow the expert to testify "on the proper methods for securing a suspect," but he would "not be allowed to testify that plaintiff would not have been Tased if she were handcuffed before [the deputy who cuffed only one hand] left the residence." In sum. the expert was

> qualified to offer testimony regarding national standards for police conduct, the use-of-force continuum, and deployment of a Taser. He may not offer opinions regarding the credibility of the witnesses or which version of events is more probable. He may not opine as to any ultimate conclusions regarding whether defendant [deputy] acted reasonably.

Irish v. Fowler, No. 1:15-cv-00503-JAW (D. Maine 3/13/2019), was a failure to protect case. A former boyfriend entered the plaintiff's house, shot and killed her new boyfriend, shot and wounded her mother, and abducted her. The woman, her mother and the former boyfriend's estate alleged that the state, state police and a number of officers failed to protect them, specifically that, despite warnings from the woman, the defendants had increased the danger to her because they informed the former boyfriend that the woman had gone to the police to complain that he had sexually assaulted her.

The case was on remand from First Circuit for discovery on whether the individual defendants violated "accepted norms of police procedure" and whether they acted "despite foreseeing the harm" to the plaintiffs. *Irish v. Maine*, 849 F.3d 521, 528 (1st Cir. 2017) ("[V]iolation of protocol and training is relevant both to the substantive due process and qualified immunity standards. . . . If discovery reveals that the officers' actions violated accepted norms of police procedure or that they acted despite foreseeing harm to [the woman], it may strengthen the plaintiffs' argument that the officers exacerbated the danger that [the former boyfriend] posed."). The district court reviewed the standards for admissibility for expert testimony (i.e., qualifications, relevance and reliability), and directed that discovery should proceed, subject to subsequent challenges to the testimony's admissibility:

> The Court views the Defendants' objections to the details of [the plaintiff's expert] testimony — whether and how he may refer to IACP model standards, whether his reference to the [state policy regarding response to and investigation of domestic

> violence incidents] is sufficiently concrete, whether the general standards for domestic violence investigations apply to the specific circumstances in the [instant] case — as potential grounds for a motion in limine, objection at trial, or cross-examination, but insufficient to rule [the expert's] testimony inadmissible.

In *Sherrod v. McHugh*, 334 F.Supp.3d 219 (D.C.D.C. 2018), one woman claimed that a second woman threatened her with a handgun following a traffic accident. A D.C. police investigation led to the search of the second woman, her car and her home, and ultimately to her arrest. The woman filed claims against the police under § 1983 and state law alleging among other things a negligent investigation. On the negligence counts, the D.C. defendants challenged one of the expert's

> reliance on (1) the International Association of Chiefs of Police ("IACP") Concepts and Issues Papers; (2) certain IACP model policies; and (3) MPD policies, including its General Orders. . . . Defendants argue that none of these sources are sufficient to establish a standard of care against which [a defendant detective's] actions may be compared.

334 F.Supp.3d at 259.

In response, the woman and her husband (also a plaintiff) argued that "'[g]iven the numerous concrete bases for his expert testimony, under District of Columbia law, [the plaintiffs' expert's] analysis of the policies of police departments nationwide and the model policies of the IACP is sufficient to establish the national standard of care.'" 334 F.Supp.3d at 259 (citation omitted). However, the district court concluded:

> Rather than relying on this experience in the abstract to proffer a national standard of care, [the expert] set forth concrete bases for his expert testimony: his review of the [D.C.] MPD's General Orders, his consultation with personnel from hundreds of law enforcement agencies, and his assessment of the principles of police practices, policies, and procedures as thoroughly discussed by several national law enforcement organizations, including: The IACP, Federal Bureau of Investigation[,] the Force Science Research Center, the National Officer Tactical Association, the Commission on Accreditation for Law Enforcement Agencies, Inc., the Institute for the Prevention of In-Custody Deaths, Inc. and Americans for Effective Law Enforcement. . . . [The expert's] report and declaration make clear that [the expert] concluded that the model policies were substantially similar to policies adopted by a number of law enforcement agencies throughout the United States. . . . District Defendants cite one case with respect to the IACP policies, and that case supports the proposition that such policies may be used to establish a standard of care. . . . District of Defendants' sufficiency challenge fails.

334 F. Supp.3d at 259-60.

ZJ Ex Rel. Jones v. Kansas City, Missouri Board of Police Commissioners, Case No. 4:15-CV-00621-FJG (9/29/2017), involved the use of a Defense Technology Multi-Port-Plus Diversionary Device ("MPPDD") (also called a "Flash Bang Grenade" or "FBG") during the execution of a search warrant. A MPPDD

> is four times louder than a 12 gauge shotgun, 107 times brighter than a car's high beam headlight and burns at twice the temperature of molten steel. Due to the inclusion of magnesium powder in the FBG's, some of the light generated is in the ultraviolet range. This is known to cause damage to the human retina. The hazards of FBGs include injury to sight and hearing with the possibility of psychological injury. FBGs can break glass, windows, cause items to ignite and blow holes in walls.

However, the defendant board of police commissioners had no official policy on the use of FBGs; state search warrant procedures were silent on the use of FBGs during the execution of search warrants and did not require that officers consider and account for the safety or constitutional rights of innocent persons occupying a home being searched; and the board offered no evidence that tactical officers received specific training or certification on FBGs or when it was appropriate to use them. The district court concluded that a reasonable jury could find that the board had notice that its lack of policy or training regarding the use of FBGs was likely to result in a constitutional violation.

The court permitted the plaintiff's expert to express his opinion as to whether the defendants' use of force comported with accepted police practices and training, particularly,

> With regard to the IACP model policies, the Court also finds that these policies are reliable and relevant and appropriate for [the expert] to cite in his opinions. Plaintiff explains that because the [police department] was lacking in policies of their own in certain areas, it was appropriate for [the expert] to look to the IACP for model police regarding the use of FBGs.

Avila v. California, No. 1:15-cv-00996-LJO-EPG (2/13/2018), involved arrests following an incident in a casino. The plaintiffs filed 17 motions in limine and the defendants filed six. Only those pertaining to the plaintiff's police practices expert are pertinent to this discussion. State defendants sought to exclude plaintiff's expert from testifying on:

> (1) standards of the International Association of Chiefs of Police; (2) standards of National Law Enforcement Policy Center Model Polices; (3) [State] Highway Patrol policies; and (4) . . . state law regarding false arrest and false imprisonment. . . . They seek to preclude his testimony on those topics because [the expert] did not review any [highway patrol] policies, did not review any [state] law, and admitted that the International Association of Chiefs of Police standards and National Law Enforcement Policy Center Model Police standards have not been adopted by any law enforcement agency or polity and thus are irrelevant material that would serve only to confuse the jury.

The state defendants responded that it was not necessary for the expert to be familiar with state highway patrol policies or state law to render an opinion on whether there was authority to detain or arrest the plaintiffs. The court ruled that legal opinions were not the proper subject of expert testimony, but it would allow the expert to testify about "what he or a reasonable officer would have done and why, or what best practices call for, based on his review of video, reports, statements, and best practices available."

The county defendants also moved

> to preclude [p]laintiffs' police practices expert . . . from referencing "non-governing standards of police officer conduct," including standards from the International Association of Chiefs of Police ("IACP"), the President's Task Force on 21st Century Policing, the National Consensus Policy on Use of Force, and the Police Executive Research Forum. . . . They also seek to preclude use of . . . model rules and policies from the IACP. . . . [The expert's] report contains references to these organizations, which [d]efendants contend have not been adopted by any law enforcement agency involved with this case and are not governing law in [the state]. Therefore, they argue that the standards are irrelevant and potentially confusing to the jury.

The plaintiffs argued that "because false arrest/imprisonment claims and § 1983 claims for false arrest rest on whether officers had probable cause under the Fourth Amendment of the U.S. Constitution, and because the consensus standards referenced in [the expert's] report 'communicat[e] to law enforcement personnel what the constitutional standards require,' they are relevant to determining the facts at issue in this case." The court granted the defense motion in limine:

> Plaintiffs have not provided background, foundation, qualifications, or relevance for this expert to so testify. The motion is GRANTED. [The expert] may properly testify about what he believes a reasonable officer would have done and why, or what best practices call for, based on his review of video, reports, statements, and best practices available. Legal conclusions, however, are not the proper subject of his opinion testimony, and he will not be permitted to testify about whether [d]efendants' actions were lawful or constitutional.

PRACTICE TIP: The plaintiffs erred in seeking to establish the law though an expert's reliance on national standards. Those standards merely establish best practices. An expert can articulate those practices and whether they were followed. That gives the jury guidance about whether the conduct at issue was reasonable. It is then up to the jury to determine whether the conduct complied with the law and the constitution. Consequently, the court was correct that an expert cannot state legal conclusions based on whether the defendants followed generally accepted procedure. But the defendants were wrong in another argument they made and which was accepted by the court, i.e., that national standards are irrelevant if they have not been adopted by the police agency defendant. It is well established that whether conduct is constitutional does not depend on adherence to a department's individual guidelines. Those may be more or less stringent than the constitution requires. National standards fall into a different category; whether they were followed assists the jury determine the reasonableness of officer conduct, and, in turn, compliance with the Fourth Amendment.

See also Peroza-Benitez v. Smith, Civil Action 17-3980 (E.D. Pa. 08/05/2019) (Defendants contended that their expert's proffered testimony would not invade the province of the jury because he would opine that '"Defendants[']actions were consistent with recognized police policies and procedures and with case law regarding police officers' use of force'; his testimony regarding [the] Police Department's policies and procedures and national standards as to the use of force continuum is probative of [the jury's] inquiry of whether the Defendants[']conduct was

reasonable'; and he does not give conclusions or opinions as to the weight of the evidence or credibility of the witnesses"[;] ruling the testimony inadmissible, "Defendants are, however, mistaken. A careful review of the report shows that throughout, [the defense expert] repeatedly opines that [d]efendants' conduct was reasonable and/or did not constitute excessive force, i.e., the ultimate issue before the jury.");

Fulton v. Dulin, 1:16 CV 010 (N.D. Ind. 05/29/2018) (taser case alleging excessive force; denying summary judgment based on disputed facts, with plaintiff's expert opining that it was unreasonable for defendant officer to deploy taser and contrary to model Use of Force Continuum and Electronic Control Weapons Model Policy);

Rascon v. Brookins, CV-14-00749-PHX-JJT (D. Ariz. 02/08/2018) (unreported) (in custody death case involving use of taser to decedent's chest; pressure to his neck, airway, and carotid artery, "hogtying" and handcuffing him while he was lying face-down; granting summary judgment for city on plaintiff's failure to train theory: "The City further points to the report of its police procedures expert . . . who opined that both Operations Order 1.5-which governs the use of force by PPD [Phoenix] officers-and the City's training regimen, meets or exceeds national standards and practice.");

Rand v. Lavoie, Case No. 14-cv-570-PB (D.N.H. 9/5/2017) (disputed facts prevented granting qualified immunity to officer who shot decedent at end of pursuit; concluding that trooper could have safely stepped outside path of decedent's vehicle, plaintiff's expert quoted "2006 Model Policy of the International Association of Chiefs of Police [IACP], which provides that officers should step outside the path of moving vehicles and only use firearms where 'a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle.'");

McDaniels v. City of Philadelphia, Civil Action 15-2803 (E.D. Pa. 02/13/2017) (fatal police-involved shooting; denying summary judgment for defense; court admitted Department of Justice (DOJ) report entitled "An Assessment of Deadly Force in the Philadelphia Police Department," conducted by Police Executive Research Forum, identifying deficiencies in department's use-of-force policies, training programs, and investigative procedures, and relied on by plaintiff's police practices expert);

Estate of Robinson ex rel. Personal Representative Irwin v. City of Madison, 15-cv-502-jdp (W.D. Wis. 02/13/2017) (fatal police shooting in which district judge ruled on admissibility of testimony of multiple experts; allowing defense expert to "opine that [defendant officer's] decisions were consistent with his training and national standards regarding the use of force. But he may not opine that the totality of the circumstances justified the use of force. At trial, [defense expert] may discuss applicable professional standards and identify compliance with or departures from those standards, but he may not offer legal conclusions.").

PRACTICE TIP: While no one organization sets "national standards" on police policies and procedures, several organizations issue policy and position papers that reflect generally accepted practices and current trends. The § 1983 practitioner should consult with those resources when he/she has a case. The IACP Police Center resources are available to members at https://www.theiacp.org/policycenter. Updated documents have been released on these three topics Firearms: Officer Carry, Training, and Safety; Strip and Body Cavity Searches; and Voluntary Contacts, Investigatory Detentions, Pat-Downs, and Arrests. The Police Executive

Research Forum (PERF) website lists dozens of publications useful to the practitioner. https://www.policeforum.org/publications. The United States Department of Justice is another good resource, especially the COPS office, whose publications are available at https://cops.usdoj.gov/resources.

Damages in Death Cases

Settlements in Highly Publicized Cases

Some very large settlements in highly-publicized cases raise the issue of how § 1983 death cases should be valued. Should adverse publicity and political pressure set the number or should the cases be valued under applicable federal and state law? Some of these large settlements are:

- *Justine Ruszczyk Damond – Minneapolis Settlement $20 million*. The woman had called 911 believing she had heard a sexual assault or rape in an alley next to her house. The responding officer mistook her as a threat. He was convicted of murder. NBC News, "Justine Damond's family agrees to $20 million settlement with Minneapolis over police shooting death," available at https://www.nbcnews.com/news/us-news/justine-damond-s-family-agrees-20-million-settlement-minneapolis-over-n1001716
- *Bettie Jones – Chicago Settlement $16 million*. The woman was an innocent bystander killed when a Chicago police officer was responding to a violent disturbance by her neighbor. USA Today, "Chicago agrees to pay $16 million to family of innocent bystander fatally shot by cop," available at https://www.usatoday.com/story/news/2018/06/11/chicago-agrees-pay-16-m-innocent-bystander-gunned-down-cops/692955002/
- *Walter Scott - North Charleston, S.C. Settlement: $6.5 million*. The man was shot in the back after running from a motor vehicle stop. The officer was convicted of second-degree murder and sentenced to 20 years in prison. CNN, "North Charleston reaches $6.5 million settlement with family of Walter Scott," available at https://www.cnn.com/2015/10/08/us/walter-scott-north-charleston-settlement/index.html
- *Freddie Gray – Baltimore, Md. Settlement: $6.4 million*. The 25-year-old man suffered a spinal injury while in police custody. Six officers were either found not guilty or charges against them were dropped. The U.S. Department of Justice declined to bring federal civil rights charges. USA Today, "Freddie Gray settlement 'obscene,' police union chief says," available at https://www.usatoday.com/story/news/nation/2015/09/09/baltimore-panel-approves-freddie-gray-settlement/71928226/
- *Tamir Rice – Cleveland Settlement: $6 million*. The 12-year-old boy, who was playing with a toy gun, was shot by a Cleveland police officer almost immediate as he arrived on the scene. "Tamir Rice settlement: How Cleveland's $6 million payout compares with similar cases in US," available at https://www.cleveland.com/metro/2016/04/how_the_tamir_rice_settlement.html
- *Eric Garner – New York City $5.9 million*. Eric Garner died from positional asphyxia as he was being taken into custody for selling untaxed cigarettes. Huffington Post, "Largest Legal Settlements Against Police," available at https://www.huffpost.com/entry/largest-legal-settlements_b_8122202
- *Laquan McDonald – Chicago Settlement: $5 million*. The 17-year-old with a knife was shown walking away from police when he was fatally shot. The officer is serving a nearly seven-year sentence for second degree murder and aggravated battery. Chicago Sun-Times, "$1 million per shot — how Laquan McDonald settlement unfolded after that initial

demand," available at https://chicago.suntimes.com/2016/6/24/18465327/1-million-per-shot-how-laquan-mcdonald-settlement-unfolded-after-that-initial-demand

- *Michael Brown – Ferguson, Mo. Settlement: $1.5 million*. The shooting of Michael Brown led to months of protests. The involved officer was not charged. NBC News, "Michael Brown's Family Received $1.5 Million Settlement with Ferguson," available at https://www.nbcnews.com/storyline/michael-brown-shooting/michael-brown-s-family-received-1-5-million-settlement-ferguson-n775936

Law Applicable to Death Cases under § 1983

Section 1983 and the Supreme Court have not specified the damages recoverable when a constitutional violation results in death. Instead, 42 U.S.C. § 1988 authorizes federal courts to use a three-step process. The district court must: (1) look to federal law if such laws are suitable to carry the statute into effect; (2) in the absence of such a federal law, the court must consider borrowing the law of the forum state; and (3) the court must reject any state law that is "inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988. Since there is no universal specification of damages under federal law, some federal courts will apply the survival and wrongful death damages available under the statutory law of the forum state. Others, will find those remedies inconsistent with the compensation and deterrence goals of federal law and therefore fashion a federal remedy. This discussion updates "Practitioner's Guide," Chapter 17: Damages and Other Relief, IV. Survival, Wrongful Death, Interference with Family Relationships.

It is important to understand the distinction between survival and wrongful death statutes. Most state survival statutes will permit recovery for the decedent's medical bills and funeral expenses, conscious pain and suffering before death, and the economic loss to the estate. A generally accepted method for determining the pecuniary loss is to determine lifetime earnings, less personal consumption, increased for inflation, and then discounted to present value. Some statutory schemes provide that economic losses be considered under the wrongful death provisions. Some state survival statutes will permit recovery for the non-economic value of the decedent's life, i.e., the loss of the pleasure of living ("hedonic damages"). As used in these sections, "wrongful death" applies to a new cause of action for damages that arises on behalf of heirs and other statutorily designated beneficiaries for losses they sustained as a result of the decedent's death. Some of those losses can be reduced to an economic value, such as loss of support or household services. Others, depending on the state's wrongful death statute, may include loss of society, companionship and consortium. While there is some overlap between the "survival" and "wrongful death" statutes, they should be read as to avoid a double recovery.

Sharbaugh v. Beaudry, 267 F. Supp.3d 1326 (N.D. Fla. 2017), is illustrative. The decedent was beaten, raped, and murdered by his cellmate while serving state prison sentence. The decision provides an excellent survey of the law in this area. It then concludes that Florida's Wrongful Death Act (FWDA) "fills the survival gap in § 1983 . . . by providing a wrongful death claim through a comprehensive statutory scheme that compensates pre-death and post-death financial losses but does not allow a decedent's pain and suffering claim to survive." 267 F. Supp.3d at 1335. This comprehensive statutory scheme "compensates the decedent's estate as well as living survivors, who otherwise would bear the loss from the decedent's death" but notably does not allow for non-economic losses, such as the decedent's pre-death conscious pain and suffering, or the loss of enjoyment of life, so-called "hedonic damages." The district court goes to considerable length to explain why it is bound by the FWDA and why it meets the compensation and deterrence

goals of § 1983. 267 F. Supp.3d at 1335-37. It then surveys and distinguishes cases from other jurisdictions which rejected following state statutory schemes in favor of fashioning a federal remedy for death damages under § 1983. 267 F. Supp.3d at 133.

Cases Predominantly Applying State Law to § 1983 Claims

In *Merritt-Ruth v. Frey-Latta*, Case No. 14-12858 (E.D. Mich. 11/7/2017), the district court found that the Michigan wrongful death statute provided a remedy that met the compensation and deterrence purposes of § 1983. The decedent died from acute peritonitis caused by a ruptured appendix while he was in a correctional facility. The district court applied Sixth Circuit precedent from *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 603 (6th Cir. 2006), which said that district courts "should not disturb a state remedy unless it is clear that such remedy is wholly inconsistent with the Constitution and the goals of section 1983." In *Blaty*, the court found that "Michigan's wrongful death act is consistent with the compensatory purpose of section 1983 identified by the Supreme Court." The court said that Michigan's wrongful death statute "authorizes an award of damages for survivors' losses of support, society, and companionship," which it found was consistent with the deterrent purpose of § 1983. 454 F.3d at 901. Accordingly, the district court in *Merritt-Ruth* concluded that the estate could recover the full extent of damages available under Michigan's wrongful death statute. *See also Becker v. Carbon County*, 177 F. Supp.3d 841, 848, 853-54 (M.D. Pa. 2016) (following decedent's arrest on drug charges, his condition deteriorated and he died at county correctional facility; after noting split in circuits on whether state "wrongful death law measure of damages can be applied consistently with federal law to provide suitable remedies for the violation of federal civil rights[,]" district court could not say as matter of law that plaintiff was not entitled to pursue claim under Pennsylvania's wrong death statute; at early stage of proceeding, ruling that discovery on plaintiff's claim could proceed).

But in other jurisdictions, the district court will adopt the state survival statute but not the law on wrongful death on the basis that recovery under § 1983 is limited to the victim. In *Gunn v. City of Montgomery*, Case No. 2:16-CV-557-WKW (M.D. Ala. 4/11/2018), an officer on patrol confronted the decedent who was walking home from a card game at a neighbor's house. The officer initiated a "stop and frisk" without reasonable suspicion. The decedent fled on foot. The officer deployed his Taser at least three times, stuck the man with an expandable baton, and then shot the unarmed man five times as he was steps away from his mother's house. Applying the Alabama survival statute, the estate could recover for pre-death injuries, such as physical pain and suffering and emotional distress. But "neither § 1983 nor Alabama law is required to provide for Plaintiff to recover compensation for her own injuries, such as loss of consortium and loss of financial support, that she incurred because her familial relationship with her son was forever interrupted by his death.").

Cases Predominantly Applying Federal Law to § 1983 Claims

In other cases, the district court may say that state statutory law on survival and wrongful death does not in some respect fulfill the compensation and deterrence purposes of § 1983 and should be supplemented or replaced with a federal remedy; or in other examples, federal law provides a survival remedy for the estate, but that the heirs must look to a separate state law claim for recover damages under the state wrongful death act. *See, e.g., Estate of Strong v. Schlenker*, Civil Action No. 17-cv-1276-WJM-SKC (D. Colo. 7/24/2019) (decedent shot at his home during execution of no-knock warrant; ordering parties to address whether estate could recover for decedent's pain and suffering before death, which defendant argued could not be recovered under

Colorado wrongful death statute; however, district court cited to Tenth Circuit precedent, *Berry v. City of Muskogee*, 900 F.2d 1489, 1507 (10th Cir. 1990), which allowed court to fashion federal remedy in § 1983 cases that included medical and burial expenses, pain and suffering before death, loss of earnings based on probable duration of victim's life, victim's loss of consortium, and other damages recognized in common law tort actions).

See also Franklin v. Franklin County, No. 2:17-CV-2016 (W.D. Ark. 4/19/2019) (while at a county detention center, the decedent died of "methamphetamine intoxication, exertion, struggle, restraint, and multiple electro muscular disruption device applications[;]" citing Eighth Circuit precedent, *Andrews v. Neer*, 253 F.3d 1052 (8th Cir. 2001), district court could fashion federal remedy to be applied to § 1983 death case, including damages decedent suffered, pain and suffering, funeral expenses, loss of life and lost wages; but plaintiff would have to rely on Arkansas wrongful death statute on state law claim to recover losses to individuals other than decedent);

Walker v. Corizon Health, Inc., 370 F. Supp.3d 1271, 1282-84 (D. Kan. 2/28/2019) (decedent died of debilitating neurological condition while in custody of department of corrections; holding that federal § 1983 remedy under Kansas law is survival action brought by personal representative of estate of victim, not victim's heirs; and ruling that heirs at law had standing to bring Kansas state law claim for wrongful death, but not under § 1983);

Estate of Blodgett v. Correct Care Solutions, LLC, Civil Action No. 17-cv-2690-WJM-NRN (D. Colo. 12/12/2018) (plaintiff alleged that decedent received constitutionally deficient medical care while in pretrial detention, resulting in him taking his own life; citing Tenth Circuit precedent, *Berry v. City of Muskogee, Okla*., 900 F.2d 1489, 1506-07 (10th Cir. 1990), plaintiff could bring § 1983 survival action, but would have to recover damages for others than the decedent under wrongful death action under Colorado state law);

Thomas v. Cannon, Nos. 3:15-05346 BJR, 3:16-cv-05392 (W.D. Wash. 7/10/2017) (decedent shot and killed by county SWAT team member; estate sought non-economic loss of life damages; ruling that Washington state survival statute limiting recovery to economic damages did not meet compensation and deterrence goals of § 1983, so court granted estate's request for "loss of life" damages jury instruction);

Cusack v. Idaho Department of Corrections, Case No. 1:11-cv-00303-REB (D. Idaho 2/15/2012) (decedent committed suicide while in department of corrections custody; concluding that "Idaho's lack of a survivor statute is inconsistent with the strong policy embodied in § 1983 to provide a remedy for constitutional violations and to deter such conduct[,]" and not limiting damages to economic losses, citing *Van Orden v. Caribou County, et al*., No. 4:10-CV385-BLW (D. Idaho 3/4/2011)).

PRACTICE TIP: Practitioners should understand that compensation for death damages under § 1983 is not determined by the Supreme Court or even Circuit law. It is determined by the district court of the forum state. That means that the practitioner must know the survival and wrongful death statutes of the forum state and the extent to which they have been applied by the district court. That said, plaintiffs' and defense lawyers are likely to take different positions.

For the defense, conscious pain and suffering, medical bills and funeral expenses, the decedent's life-time earnings reduced to present value, and the potential for punitive damages would meet the compensation and deterrence purposes for § 1983 under applicable survival law. Likewise, for the loss of household services under wrongful death statutes; or, because federal

civil rights claims are usually paired with state law claims, the combination of damages under federal and state law will adequately compensate the victim's estate and his/her survivors. The loss of life, per se, is not separately compensable. *See Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 310 (1986) (plaintiff may not recover compensatory damages based upon the abstract value or importance of constitutional rights).

For the plaintiff, the argument goes that economic losses alone are not enough. Where the forum state does not allow for "hedonic damages" for the victim's loss of life, or grief for next of kin, plaintiff's counsel may argue that the federal court should fashion a remedy that awards those damages in the case at hand.

Interference with Family Relationship

As distinct from a wrongful death claim under § 1983, a surviving parent or child may claim the victim's death interfered with the survivor's Fourteenth Amendment right to family association. Although most circuits do not recognize a cause of action for the loss of companionship of an adult child, *e.g., Kellom v. Quinn*, Case No. 17-11084 (E.D. Mich. 8/29/2018) ("although some other courts have done so, the Sixth Circuit has not yet recognized a § 1983 claim for loss of the right to familial association when a child is killed by a state agent"), the Ninth Circuit does. *Muniz v. Pfeiffer*, No. 1:19-cv-0233-LJO-JLT (E.D. Cal. 9/23/2019), citing *Chaudhry v. City of Los Angeles*, Apa751 F.3d 1096, 1106 (9th Cir. 2014). Unlike a social worker's removal of a child from a home, most of these claims fail because the son or daughter is an adult who is living independently from the parent and because the severance of the relationship is an incidental rather the intended consequence of law enforcement action. *See, e.g*., *Jones v. Las Vegas Metropolitan Police Dept*., 873 F.3d 1123 (9th Cir. 2017) ("Plaintiff cannot recover in her individual capacity for injuries she personally incurred as a result of the death of her adult child. Plaintiff's individual capacity claims against [Defendant] are due to be dismissed because Plaintiff has not shown that effectuating the purpose of the civil rights laws requires (or, if borrowing from state law, permits) recovery for damages personal to her, such as loss of consortium, incident to the death of her adult son — particularly where, as here, the unconstitutional deprivation of her son's rights was not specifically targeted at the parent-child relationship[,]" citing *Robertson v. Hecksel*, 420 F.3d 1254, 1262 (11th Cir. 2005)).

See also Albert v. City of New York, No. 17-cv-3957-ARR-SMG (E.D. N.Y. 8/13/2019) ("Though plaintiffs allege, in a conclusory fashion, that the defendant officers 'intentionally interfere[d] with [plaintiffs'] right of familial association with [decedent],' their complaint is devoid of facts that would plausibly suggest that interference with the family relationship was anything other than an incidental consequence of defendants' actions") (internal quotation marks and citation omitted);

Gunn v. City of Montgomery, Case No. 2:16-CV-557-WKW (M.D. Ala. 4/11/2018) ("Plaintiff's individual capacity claims against [defendant] are due to be dismissed because [p]laintiff has not shown that effectuating the purpose of the civil rights laws requires (or, if borrowing from state law, permits) recovery for damages personal to her, such as loss of consortium, incident to the death of her adult son — particularly where, as here, the unconstitutional deprivation of her son's rights was not specifically targeted at the parent-child relationship.");

Douglas v. DePhillips, Civil Action No. 17-2305 (E.D. La. 10/13/2017) ("[T]he circuits vary widely in how they define parents' constitutional right to recover damages for a child's death. As such, the contours of a parent's putative Fourteenth Amendment right to familial association with an adult child—and ability to bring a § 1983 claims for damages where a state actor infringes on the right—are not sufficiently clear to label the right clearly established on the basis of persuasive authority[;]" granting qualified immunity for defendant deputies on Fourteenth Amendment claims) (internal quotation marks and citations omitted).

SUPPLEMENT

Police Misconduct: A Practitioner's Guide to Section 1983
Important Developments in 2018

Supreme Court

Supplemental Jurisdiction

Under 28 U.S.C. § 1367, federal courts have "supplemental jurisdiction" over state law claims that are analogous to the pending federal claims, such as false arrest or assault and battery, which are counterparts to the federal unreasonable seizure claims under the Fourth Amendment. See "Practitioner's Guide," Chapter 1: History and Elements of 42 U.S.C. § 1983, Jurisdiction, and Parties who May Sue and be Sued, II. Jurisdiction and Related Issues, E. Supplemental Jurisdiction. Section 1367(d) provides that state law claims "shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed [from federal court] unless State law provides for a longer tolling period." In *Artis v. District of Columbia*, 138 S.Ct. 594 (2018), the district court dismissed the plaintiff's federal claims in an employment case and declined to retain jurisdiction over her remaining state law claims. Assuming her state law claims had been stayed while the case was pending in federal court, she re-filed her District of Columbia claims in superior court after the 30-day grace period under § 1367(d), but before the District's statute of limitations had run. The Supreme Court majority ruled that the tolling provision, § 1367(d), operated to suspend or "stop-the-clock" on supplemental state court claims while the federal suit was pending, plus 30 days thereafter. 138 S.Ct. at 608. Accordingly, the plaintiff's suit was timely.

Qualified Immunity

The Supreme Court continued to issue rulings favorable to law enforcement officers, but also has failed to clarify what precedents, other than its own, qualify as "clearly established law." See "Practitioner's Guide," Chapter 14: Absolute and Qualified Immunity, III. Qualified Immunity; Substance, C. Determination of Clearly Established Law.

The District of Columbia v. Wesby, 138 S.Ct. 577 (2018), was one of two qualified immunity cases decided in the Supreme Court's 2017-18 term. At issue was whether arrests of partygoers in a supposedly vacant house violated the Fourth Amendment; and, even if so, whether officers were entitled to qualified immunity. District of Columbia Metropolitan Police Department (MPD) officers responding to an early morning complaint found that a vacant house was being operated as a strip club. The owner, when reached, said he had not authorized anyone to be at the house. MPD officers made arrests for unlawful entry (trespassing). The plaintiffs claimed they had been invited. The district court denied the officers' defense of qualified immunity. After trial, 16 plaintiff partygoers won awards totaling nearly $700,000, plus attorneys' fees. The D.C. Circuit affirmed, *Wesby v. District of Columbia*, 765 F.3d 13 (D.C. Cir. 2014), and the D.C. Circuit denied rehearing en banc over the dissent of four judges. *Wesby v. District of Columbia*, 816 F.3d 96 (D.C. Cir. 2016).

The Supreme Court reversed the D.C. Circuit. The officer defendants had probable cause to arrest for unlawful entry. Probable cause for arrest requires a "substantial chance of criminal activity" based on the "totality of the circumstances." Officers could disregard the innocent explanations offered by the arrestees. 138 S.Ct. at 588-89. The officers were entitled to qualified immunity. Existing caselaw did not put the officers on notice that they could not arrest for unlawful entry under the circumstances. Although the Supreme Court emphasized that existing precedent must place the lawfulness of a particular arrest (or other Fourth Amendment issue) "beyond debate," the Court stated, "[w]e have not yet decided what

precedents—other than our own—qualify as controlling authority for purposes of qualified immunity[,]" 138 S.Ct. at 591, n. 8, citing *Reichle v. Howards*, 566 U. S. 658, 665-666 (2012) ("reserving the question whether court of appeals decisions can be 'a dispositive source of clearly established law'").

The second case on qualified immunity is *Kisela v. Hughes*, 138 S.Ct. 1148 (2018). In *Hughes v. Kisela*, 841 F.3d 1081 (9th Cir. 2016), officers responded to a "welfare check" call regarding a woman reportedly hacking at a tree with a large knife and acting erratically. The woman emerged from her house carrying a large kitchen knife. Another woman was standing outside the house in the driveway. As the plaintiff approached the other woman, officers drew their guns and commanded the plaintiff to drop the knife. A chain link fence prevented the officers from getting any closer. When the plaintiff did not drop the knife, an officer fired four shots through the fence, injuring the plaintiff. The other woman, with whom she lived, said later that the plaintiff was bipolar but that she did not fear her at the time of the incident. In *Hughes v. Kisela*, the Ninth Circuit reversed summary judgment for the officer who shot the woman with knife who was approaching the other woman. The Circuit denied rehearing en banc. *Hughes v. Kisela*, 862 F.3d 775 (9th Cir. 2016).

In *Kisela v. Hughes*, 138 S.Ct. 1148 (2018), the Supreme Court granted cert., and, without briefing or argument, issued a per curiam decision granting summary judgment for the officer based on qualified immunity. It bypassed whether there was an underlying Fourth Amendment violation, and, after reviewing its recent qualified immunity jurisprudence, wrote that existing caselaw did not provide "fair notice" to the officer that his conduct would violate clearly established law under the facts. The plaintiff "was armed with a large knife; was within striking distance of [the other woman]; ignored the officers' orders to drop the weapon; and the situation unfolded in less than a minute." 138 S.Ct. at 1154. The majority did not give weight to the plaintiff's mental illness. Justices Sotomayor and Ginsburg dissented. "Because, taking the facts in the light most favorable to [the plaintiff], it is 'beyond debate' that [the officer's] use of deadly force was objectively unreasonable, he was not entitled to summary judgment on the basis of qualified immunity." 138 S.Ct. at 1161.

Retaliatory Arrest

In *Hartman v. Moore*, 547 U.S. 250 (2005), the Supreme Court held that probable cause defeats a First Amendment retaliatory-prosecution claim as a matter of law. See "Practitioner's Guide," Chapter 12: First, Fifth, Sixth, Eighth Amendments, and Laws, II. First Amendment, C. Police-Citizen Encounters, 1. Verbal Protests. *Lozman v. City of Riviera Beach*, 138 S.Ct. 1945 (2018), was expected to extend that rule to retaliatory arrests.

The plaintiff in *Lozman* lived on a floating home in a marina. He was an outspoken opponent of a plan to use eminent domain to redevelop the marina and had filed a lawsuit challenging it. The city council held a closed door meeting to discuss the lawsuit and at that meeting a council member recommended that the members "intimidate" the plaintiff. Subsequently, during the public comment period of a city council meeting, the plaintiff was granted permission to speak. But when he began to discuss the arrest of allegedly corrupt public officials, the same council member who said he should be "intimidated" interjected and told the plaintiff that he was out of order. She called for an officer who was working security to "carry him out." The officer told him he should walk outside or be arrested. When he did not leave, the officer arrested him. The plaintiff was charged with disorderly conduct and resisting arrest without violence. The state's attorney dismissed the charges. The plaintiff's § 1983 action alleged that his arrest was in retaliation for his protected speech. In *Lozman v. City of Riviera Beach*, No. 15-10550 (11th Cir. 2/28/2017), the Eleventh Circuit ruled that, even if the district court erred in instructing the jury that the officer (as distinct from the council) had to have retaliatory animus, the error was harmless, because there was probable cause for the plaintiff's arrest.

On appeal to the Supreme Court, the city asked the Court to apply *Hartman*. However, the plaintiff argued that the Court should apply *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), an employment case involving speech-based retaliation. Under *Mt. Healy*, a plaintiff has to demonstrate that the defendants would not have taken the challenged action but for their retaliatory motive. The Court noted that in a retaliatory prosecution causation is less evident because a prosecutor is expected to express independent judgment. But *Lozman* was not a garden variety retaliatory arrest case. Because it was brought against the city rather than the arresting officer, the plaintiff would have to establish that retaliation against the plaintiff was official city policy. In addition, the plaintiff's arrest arguably was based on retaliation for his prior lawsuit and on-going complaints, not just his conduct at the council meeting at which he was arrested. On remand, rather than establish that he was arrested without probable cause, the plaintiff would have to show that he was arrested based on a city policy of retaliation against him, and that, absent that policy, he would not have been arrested. See 138 S.Ct. at 1955. In dissent, Justice Thomas wrote that probable cause should defeat a retaliatory arrest claim. 138 S.Ct. at 1958-59.

The *Lozman* decision is limited to its facts. The Supreme Court has accepted cert. in *Nieves v. Bartlett*, 17-1174 (June 28, 2018) on the question left unresolved in *Lozman*: Does probable cause defeat a First Amendment retaliatory-arrest claim under § 1983?

Searches under the Fourth Amendment

Two criminal cases from the last term are particularly relevant to § 1983 practice. First, criminal convictions generally bar civil cases alleging false arrest. See *Heck v. Humphrey*, 512 U.S. 477 (1994); *Allen v. McCurry*, 449 U.S. 90 (1980). "Practitioner's Guide," Chapter 16: Non-Merits, Procedural Defenses, II. Accrual, C. *Heck v. Humphrey*, E. Arrests; *Wallace v. Kato*; V. Collateral Estoppel, F. Conviction on Probable Cause. Second, criminal cases involving Fourth Amendment searches and seizures provide the decisional law for § 1983 cases with those issues. See generally "Practitioner's Guide," Chapter 2: Fourth Amendment: Searches of Premises; Chapter 3: Fourth Amendment: Searches of Persons.

Collins v. Virginia, 138 S.Ct. 1663 (2018), considered whether the Fourth Amendment's automobile exception permitted a police officer without a warrant to enter private property in order to search a vehicle parked a few feet from the house. A motorcyclist had eluded police by driving at high speeds. Using social media, the police located the motorcycle parked in the driveway of a residence. An officer lifted its cover. From the license plate and vehicle identification number, the officer learned that the motorcycle was stolen. The Virginia Supreme Court upheld the criminal defendant's conviction under the "automobile exception," which allows police to search a vehicle without a warrant if the vehicle is "readily mobile" and they have probable cause to believe it contains evidence of a crime. But the Supreme Court concluded that the driveway where the motorcycle was parked was part of the curtilage protected by the Fourth Amendment. The automobile exception did not apply to a resident's privacy interest in the home. 138 S.Ct. at 1670-74.

In *Carpenter v. United States*, No. 16-402 (June 22, 2018), the Supreme Court considered whether tracking someone's whereabouts through the location of his/her cell phone violates the Fourth Amendment. From a co-defendant, the FBI learned the criminal defendant's cell phone number. Using the Stored Communications Act, 18 U.S.C. 2703(d), the FBI obtained court orders for "cell site" information that showed the location of the criminal defendant's cell phone at the time of the robberies. The trial court denied his motion to suppress this evidence, resulting in convictions that included aiding and abetting robbery that affected interstate commerce.

In a lengthy decision, Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, wrote that the case involved potentially conflicting authorities of the Court. The first involved the

expectation of privacy in the digital age. See "Practitioner's Guide," Chapter 2: Fourth Amendment: Searches of Premises, VII. Special Situations, A. Searches Involving Technology and Electronic Databases, 1. Supreme Court; Chapter 3: Fourth Amendment: Searches of Persons, B. Searches Incident to Arrest, 1. Supreme Court. The other line of authority was the "third-party doctrine," which does not protect records or information that someone voluntarily shares with someone or something else, here the telephone companies. The majority concluded that the search required a warrant. Rejecting application of the "third party doctrine," the majority wrote that people would not expect police to track their every movement over long periods of time, but that is what cell-cite records do. The majority stated that the ruling was a "narrow one," applying only to the issue at hand, historical sell-site location records. In various dissents, Justices Kennedy, Alito, Thomas, and Gorsuch wrote that a criminal defendant should not have an expectation of privacy in records he/she did not own or control. Rather, the test should be whether the defendant retains a property interest in the items to be searched.

Supreme Court's Rejection of Provocation Rule

As discussed in the "Practitioner's Guide," the Circuits have disagreed on when Fourth Amendment reasonableness review should begin in a self-defense police shooting: the entire sequence of events leading up to it, or just those immediately before and the shooting itself? In *County of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017), the Supreme Court rejected the Ninth Circuit's "provocation theory" under which a Fourth Amendment warrantless entry could have turned an otherwise reasonable use of deadly force into Fourth Amendment unreasonable seizure. Chapter 8: Fourth Amendment: Deadly Force, V. Recurring Fourth Amendment Issues, H. Conduct Preceding Shooting. As an important supplement to that discussion, a footnote in the Supreme Court's decision provides:

> Respondents do not attempt to defend the provocation rule. Instead, they argue that the judgment below should be affirmed under *Graham* [*v. Connor*, 490 U.S. 386 (1989)] itself. *Graham* commands that an officer's use of force be assessed for reasonableness under the "totality of the circumstances." 490 U.S., at 396, 109 S.Ct. 1865 (internal quotation marks omitted). On respondents' view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. . . . We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here. . . . All we hold today is that *once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation. Any argument regarding the District Court's application of *Graham* in this case should be addressed to the Ninth Circuit on remand

137 S.Ct. at 1549 (citations omitted; emphasis in original).

On remand, the Ninth Circuit found that the unlawful entry was the proximate cause of the shooting. *Mendez v. County of Los Angeles*, 897 F.3d 1067, 1076 (9th Cir. 2018) ("[W]e hold that the officer's unlawful entry proximately caused the [plaintiffs'] injuries.").

PRACTICE TIP: Although the issue remains undecided, it appears that the Supreme Court would side with the First, Third, Seventh (applying qualified immunity), and Eleventh Circuits, which consider "all the surrounding circumstances" and "actions leading up to" the use of force. Under that analysis, an officer could be held liable for unreasonably creating the circumstances that required the use of deadly force.

Tasers and Electronic Control Weapons (ECWs)

Tasers and electronic control weapons (ECWs) are discussed in "Practitioner's Guide" in Chapter 7: Fourth Amendment: Non-Deadly Force, E. Tasers and Electronic Control Weapons (ECWs). The practitioner handling a Taser case should be familiar with the Reuters investigation entitled "Shock Tactics: Inside the Taser, the Weapon that Transformed Policing." The six-part series (Part 1: "The Toll"; Part 2: "The Warnings"; Part 3: "The Experts"; Part 4: "The Science"; Part 5: "The X26"; Part 6: "The Prisoners") is available at https://www.reuters.com/investigates/section/usa-taser/. Reuters documented 1,005 incidents in the United States in which people died after police stunned them with Tasers. In 153 of the 712 autopsies that Reuters obtained, the Taser was cited as a cause or contributing factor in the death, along with heart and medical conditions, drug use and various forms of trauma. Since Taser began warning against firing Tasers at the chest in 2009, 44 of 199 wrongful death lawsuits filed against police included allegations that an officer's Taser shot hit that part of the body. Introduced in 2003, Taser's X26 model quickly became its "gold standard." Opponents allege that it was taken off the market because it unsafely discharged too much electricity (measured in microcoulombs), about twice the amount of models that replaced it.

PRACTICE TIP: Practitioners litigating Taser cases should consider whether the discontinued X26 or some other model was used, along with other factors discussed in the "Practitioner's Guide": the setting in which the Taser was used; the age, sex, physical condition of subject; whether the subject was actively and aggressively resisting; the number and duration of deployments (which the Taser itself records); and the part(s) of the subject's body struck.

Deadly Force and Emotionally Disturbed Persons (EDPs)

National Consensus Policy, PERF's Guiding Principles, and Principle of De-Escalation

This section supplements the discussion in the "Practitioner's Guide," Chapter 8: Fourth Amendment: Deadly Force, IV. Recurring Fourth Amendment Situations, B. Subject Armed with Edged Weapon; Police Interaction with Mentally Ill. Statistics maintained by the Washington Post in its interactive database show that mental illness plays a role in about a quarter of more than 900 fatal police shootings that occur annually in the U.S. See https://www.washingtonpost.com/graphics/national/police-shootings-2017/.

As discussed in the "Practitioner's Guide," Chapter 7: Fourth Amendment: Non-Deadly Force, II. Concepts and Issues, D. Use of Force Models, "The National Consensus Policy on Use of Force," developed by the International Association of Chiefs of Police (IACP), and ten other police agencies and labor organizations, and promulgated on January 17, 2017, requires that deadly force "not be used against persons whose actions are a threat only to themselves or property"; that "an officer . . . use de-escalation techniques and other alternatives to higher levels of force . . . whenever possible"; and that "an officer shall allow an individual time and opportunity to submit to verbal commands before force is used." National Consensus Policy on Use of Force, available at http://www.theiacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf.

Similarly, in its "Critical Issues in Policing" series, the Police Executive Research Forum (PERF), a national think-tank, issued its initial monograph, "Guiding Principles on Use of Force," available at http://www.policeforum.org/assets/guidingprinciples1.pdf. PERF lists 30 guiding principles on the use of force. The guiding principles identify core values ("police ethics, agency values, the concept of proportionality, and the sanctity of human life"), and propose a decision making model that has five elements: "collect information; assess situation, threats and risks; consider police powers and agency policy; identify options and determine best course of action; and act, review, and re-assess." "Guiding Principles" at 81. The critical decision-making model is best adapted to situations in which there is time

to consider options, disengage, and de-escalate. PERF focused on "two types of police encounters: 1. With subjects who have a mental illness, a developmental disability, a condition such as autism, a drug addiction, or another condition that can cause them to behave erratically or threateningly; and 2. With subjects who either are unarmed, or are armed with a knife, a baseball bat, rocks, or other weapons, but not a firearm." "Guiding Principles" at 5. It was those "situations—not incidents involving criminal offenders brandishing guns—where [PERF] saw significant potential for reducing use of force, while also increasing officer safety." "Guiding Principles" at 5. PERF prefers that decision-making model over the traditional "Use of Force Continuum," which often depicts a staircase with ascending levels of force, but no provision for backing down. See PERF's second monograph in the series, "Re-Engineering Training on Police Use of Force," available at http://www.policeforum.org/assets/reengineeringtraining1.pdf, at 9-10.

PRACTICE TIP: This is not to suggest that the constitutional standard is changing; it remains "objectively reasonable" force. But the concept of "objectively reasonable" force is evolving. Although police officers don't necessarily have to choose the best alternative, the "objective reasonableness" analysis may increasingly consider missed opportunities for de-escalation, warnings, verbal persuasion, and tactical repositioning. Where the facts suggest that involved officers escalated a situation they could have calmed down, they may lose qualified immunity.

Use of Force in Medical Emergencies

The *Graham* factors -- "[1] severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he or she is actively resisting arrest or attempting to evade arrest by flight" – are not well-suited to taking individuals into custody for mental health evaluations or medical treatment. They have not committed crimes; some may not be a safety threat; they are not evading "arrest" because they are not under arrest; and they may not be capable of forming criminal intent or rational decision-making. Should there be a separate test for the physically or mentally ill, or is considering their inability to reason just part of reasonableness calculus?

The Sixth Circuit is alone in fashioning a distinct test. In *Estate of Corey Hill v. Miracle*, No. 16-1818 (6th Cir. 4/4/2017), the plaintiff suffered a diabetic emergency in his home due to his low blood-sugar level. Completely disoriented, the plaintiff swung a fist towards a paramedic and ripped a catheter from his arm, causing blood to spray from the open vein. The deputy deployed his taser in drive-stun mode directly to the plaintiff's right thigh. A Sixth Circuit panel concluded that the *Graham* factors – suited to resisting arrest for a crime – did not fit a medical emergency. Modifying the factors, a court should consider: (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others? (2) Was some degree of force reasonably necessary to ameliorate the immediate threat? (3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)? Answering "yes" to the first two questions and "no" to the third, the Sixth Circuit panel determined that there was no Fourth Amendment excessive force violation and/or the deputy was entitled to qualified immunity. *See also Roth v. Viviano*, No. 16-1781 (6th Cir. 8/22/2017) (applying *Hill* test to combative woman having seizures and grating qualified immunity to officer).

Other circuits have not adopted a separate test, but may require officers to consider less intrusive means on the mentally ill. *See, e.g., Hughes v. Kisela*, 841 F.3d 1081, 1086 (9th Cir. 2016) (refusing '"to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals[,]'" quoting *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010)), overruled in *Kisela*, *supra*, at 1154 (not giving weight to plaintiff's mental illness and granting qualified immunity for defendant officer); *see also Harris v. University of Arizona Police Department*, No. CV-14-02453-TUC-LCK (D. Az. 8/14/2017) (applying *Graham*, "the Court must consider the totality of circumstances . . . [T]he fact that the officers

were investigating a potentially 'emotionally disturbed' individual rather than the commission of a serious crime diminishes the government's interest in using force.").

Failure to Train on De-Escalation and Crisis Intervention

If individual officers can be held liable for failing to de-escalate, it follows that their employer municipality can be held liable for a policy of not de-escalating when feasible or "deliberate indifference" to the need for training on de-escalation and crisis intervention. *Monell v. Department of Social Servs*., 436 U.S. 658 (1978) (ruling that municipality can be liable where policy or custom causes deprivation of plaintiff's civil rights); *City of Canton v. Harris*, 489 U.S. 378 (1989) (municipal liability where policy or custom of "deliberate indifference" to training causes violation). Theories on municipal liability are discussed in the "Practitioner's Guide," Chapter 13: Individual, Supervisory, and Municipal Liability, F. Liability Based on Deliberate Indifference to Hiring, Training, Supervision and Discipline.

In "Re-Engineering Training on Police Use of Force," PERF's survey of police agencies "revealed that we give officers many hours of training in how to shoot a gun. But we spend much less time discussing the importance of de-escalation tactics and Crisis Intervention strategies for dealing with mentally ill persons, homeless persons, and other challenging situations." "Re-Engineering Training" at 4. For instance, of 280 responding agencies, recruits spent a median of 58 hours on firearms, but only 8 hours on de-escalation and 8 hours on crisis intervention. Of police agencies that had in-service training, only 69 per cent offered in-service training on crisis intervention and 65 per cent on de-escalation skills. Those were only a small portion of in-service training, with 9 per cent devoted to crisis intervention and 5 per cent on de-escalation. "Re-Engineering Training" at 11-12. PERF also questioned the police culture of "Never back down. Move in and take charge," which was antithetical to "concepts of slowing a situation down, calling for a supervisor to respond to the scene, bringing in additional resources, de-escalating, and disengaging tactically." "Re-Engineering Training" at 5. In addition, PERF questioned the utility of the "21-foot rule." The "so-called 21-foot rule was created in a 1983 magazine article to describe the distance an officer must keep from a suspect armed with a knife, in order to give the officer enough time to draw and fire his gun if the suspect suddenly charges him with the knife. The 21-foot rule was later incorporated in a training video for police produced by an organization called Calibre Press." However, "the 21-foot rule has sometimes been used wrongly to suggest that if a suspect moves to close the distance between himself and the officer, the officer can shoot the suspect and cite the 21-foot rule to justify the use of deadly force." "Re-Engineering Training" at 5, 15.

A third monograph in PERF's "Critical Issues in Policing Series" is designed to put its principles in practice for patrol officers. The training is summarized in six modules in "Integrating Communications, Assessment, and Tactics (ICAT)." The monograph is available at: http://www.policeforum.org/assets/icat trainingguide.pdf and PERF's guide to ICAT training is available at www.policeforum.org/TrainingGuide. Specifically, PERF found that "training [was] lacking in many departments for frontline patrol officers about how to respond to a particular set of circumstances, namely: a person is behaving erratically and perhaps dangerously; the person's behavior is often the result of mental illness, drug or alcohol abuse, post-traumatic stress disorder, intellectual disabilities, developmental disabilities, or conditions such as autism that may limit the person's ability to understand or respond rationally to a police officer's orders; and the person either is unarmed or has a weapon other than a firearm, such as a knife, baseball bat, or rocks. ICAT at 6. "In these types of incidents, officers should be trained in a wider array of options, including opportunities to 'slow the situation down' in order to avoid the need for use of force." ICAT at 6. Among the specific goals is to "[p]rovide patrol officers with realistic and challenging scenario-based training which focuses on recognition of persons in crisis, tactical communication, and safe tactics as part of an overall, integrated de-escalation strategy." "ICAT Training" at 13.

De-escalation and crisis intervention training figured in the following cases. On remand from the Circuit's decision in *Tenorio*, *supra*, the district court's use of DOJ findings would serve as an excellent

template for plaintiffs on the issue of municipal liability. *Tenorio v. Pitzer*, Civ. No. 12-01295 MCA/KBM, Consolidated with Civ. No. 13-00574 MCA/KBM (D.N.M. 9/25/2017) ("Causation in this context requires the factfinder to decide whether [Defendant Officer's] allegedly unreasonable use of deadly force would have been avoided had the responding officers been trained and supervised under a 'program that was not deficient in [the] identified respect[s],' [citing *City of Canton*, *Ohio v.*] *Harris*, 489 U.S. [378] (1989)] at 392."). *See also McDaniels v. City of Philadelphia*, Civil Action No. 15-2803 (E.D. Pa. 2/13/2017) (noting that DOJ concluded that officers lacked de-escalation training "which can reduce the likelihood that officers will resort to deadly force"); *McHenry v. City of Ottawa, Kansas*, No. 16-2736-DDC-JPO (D. Kan. 9/26/2017) (denying motion to dismiss; "plaintiff asserts that [the county] and the [city] violated [the subject's] constitutional rights because their official policies failed to train their officers how to use the Crisis Intervention Technique ('CIT')"); *Jones v. Jordan*, Civil Action No. GLR-16-2662 (D. Md. 9/18/2017) (denying motion to dismiss; "[t]he plaintiff's deliberate indifference to training claim relied on a U.S. Department of Justice report specifically pointing to lack of 'proper[] train[ing]' on 'use of force,' 'de-escalation,' 'stops, searches, and arrests,' and 'how to supervise and investigate misconduct.'"); *Estate of Jones v. City of Spokane*, No. 2:16-CV-00325-JLQ (E.D. Wash. 2/1/2017) (denying motion for judgment on the pleadings, in part because plaintiffs alleged "the City had a policy which did not adequately provide for de-escalation of force and too quickly resorted to lethal force, particularly when the officers encountered mentally disturbed individuals."). *But see Roell v. Hamilton County*, No. 16-4045 (6th Cir. 9/5/2017) (holding that "the deputies received training on topics that included the use of force and tasers, crisis intervention techniques, interacting with the special-needs population and mentally ill suspects, and recognizing the symptoms of excited delirium."); *Humphrey v. Town of Spencer*, Civil Action No. 4:14-40127-TSH (D. Mass. 3/6/2017) (ruling that "Plaintiff has failed to establish that that failure to instruct on de-escalation of force caused the alleged excessive force.").

PRACTICE TIP: Under a "deliberate indifference to training" theory, the plaintiff will present proof that:

- Municipalities can be held liable if they consciously disregard a known risk (i.e., are deliberately indifferent) and it causes harm.
- Cities, towns, and counties know that their officers encounter emotionally disturbed persons (EDPs).
- They know or should know that there is a risk of harm to officers and EDPs if officers aren't trained in de-escalation and crisis intervention techniques.
- A conscious choice of not to train in those areas constitutes "deliberate indifference" and leads to municipal liability.
- Therefore, there should be substantial training at the academy, in-service, and roll call, including simulated situations and role playing.

On the defense side, a department can probably defeat the claim by showing that it has adopted ICAT or similar training.

ADA and Exigent Circumstances Exception

An Americans with Disabilities Act (ADA) claim may be a useful adjunct to a plaintiff's § 1983 claim, since it gives a plaintiff a second chance to argue in favor of de-escalation. It is well-settled that ADA protections apply when (1) police confuse a disability with criminal activity (e.g., diabetic reaction for intoxication); or (2) a legally arrested person requires an accommodation (e.g., a sign interpreter for the hearing impaired, or wheelchair for someone with mobility issues). *City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015), raised but did not resolve whether a mentally ill person who is armed with a weapon and presents an immediate threat is entitled to an accommodation, such as attempted de-escalation, in the manner in which he/she is taken into custody. 135 S.Ct. at 1774. "Practitioner's Guide,"

Chapter 8: Fourth Amendment: Deadly Force, IV. Recurring Fourth Amendment Issues, B. Subject Armed with Edged Weapon; Police Interaction with Mentally Ill, 1. The ADA and the Supreme Court.

The ADA does not require reasonable accommodation if the person is "a direct threat to health or safety of others" "that cannot be eliminated by a modification of policies, practices or procedures, or by the provisions of auxiliary aids or services." 28 C.F.R. §§ 35.104, 35.139(a). This is the "exigent circumstances" exception, with some courts finding that there was no duty to accommodate for the plaintiff's mental illness, and others that, if the duty existed, accommodations were made. *See, e.g., Roell v. Hamilton County*, No. 16-4045 (6th Cir. 9/5/2017) ("[The Plaintiff's] proposed accommodations—that the deputies use verbal de-escalation techniques, gather information from the witnesses, and call EMS services before engaging with [the decedent]—were therefore 'unreasonable . . . in light of the overriding public safety concerns.'") (citation omitted); *Roberts v. City of Omaha*, 723 F.3d 966, 973-74 (8th Cir. 2013) (nothing in law clearly established that ADA and Rehabilitation Act, 29 U.S.C. § 794 (prohibiting discrimination on basis of disability in programs that receive federal financial assistance), applied to case; no reasonable officer could have known ADA and Rehabilitation Act imposed duty on officers to accommodate plaintiff's disability while officers were attempting to secure him and take him into custody for his own safety and safety of officers and plaintiff's family); *see also McHenry v. City of Ottawa, Kansas*, No. 16-2736-DDC-JPO (D. Kan. 9/26/2017) (holding that decedent did not present imminent threat to himself or others). *But see Kaur v. City of Lodi*, No. 2:14-cv-00828-TLN-AC (E.D. Cal. 6/29/2017) (rejecting officer defendants' argument that time did not allow them to appropriately consider less lethal force).

Finally, there are open issues about individual and municipal liability and whether an ADA failure to train claim is actionable. Some courts have ruled that "[i]ndividual liability is precluded under ADA Title II." *Kaur, supra*, quoting *Roundtree v. Adams*, No. 1:01-cv-06502-OWW-JLO, 2005 WL 3284405, at *8 (E.D. Cal. Dec. 1, 2005). If so, that of course means that qualified immunity would be inapplicable to violations of Title II of the ADA. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It also means that a defendant municipality would be vicariously liable for the ADA violations of its officers. The courts have not established whether a failure to train claim is separately actionable. *Roberts*, *supra*, observed that the city, like the officers, lacked notice that the officers' actions might violate an individual's rights under the ADA and Rehabilitation Act. Accordingly, the city could not be held liable for failure to train because of a risk that had not been established. 723 F.3d at 975.

Other cases have assumed without deciding that the ADA applied, and proceed to whether ADA training was adequate. In *Adle v. Maine State Police Department*, No. 1:15-cv-458-NT (D. Maine 8/18/2017), the district court said "[a] stand-alone failure to train claim under the ADA is not well established; the First Circuit has assumed without deciding that Title II imposes a duty to 'draft policies and train officers on the needs of the mentally ill public[,]'" citing *Buchanan v. Maine*, 469 F.3d 158, 177 (1st Cir. 2006). Under the facts in *Adle*, the district court found "undisputed and ample evidence of training in mental illness for the officers involved in this confrontation, including the initial negotiator, the crisis negotiation team, and the tactical team." In *Sacchetti v. Gallaudet University*, Civil Action No. 15-455 (RBW) (D.D.C. 4/20/2016), the district court applied the "deliberate indifference" standard for § 1983 municipal liability. "[E]ven assuming a cause of action for failure to train exists under the ADA, . . . the Complaint here fails to plausibly allege that the District [of Columbia] acted with deliberate indifference[,]" citing *Roberts*, *supra*, 723 F.3d at 976, as authority.

PRACTICE TIP: In an EPD with a knife (or similar weapon) case, the plaintiff's argument should be that the exigent circumstances exception to the ADA does not apply when officers on the scene have time to assess and de-escalate. On the other hand, from a defense perspective, every EDP with a knife is still a man or a woman with a knife who presents an exigent circumstance; and the ADA does not apply until the subject is safely in custody. Unlike § 1983, there is no need to prove a municipal policy or custom to establish municipal liability; in an ADA claim, the municipality appears to be the real party

defendant. Without an underlying ADA violation, a training claim would fail. And with an underlying ADA violation, a training claim would be duplicative. The plaintiff can only recover in damages once. Accordingly, it would seem that an ADA failure to train count would be subject to dismissal.

Admissibility of "Consensus" Policies as Evidence of "Reasonableness"

As discussed in the "Practitioner's Guide," the district court will exclude introduction of individual police department directives, general orders, and standard operating procedures as exhibits and to limit testimony referencing them. Departments are free to set their standards higher than the Constitution requires (for example to require use of "minimal" rather than "reasonable" force and to "exhaust all other alternatives" before using deadly force). The violation of a departmental order or internal operating procedure may subject an officer to discipline within the department, but it does not establish a constitutional duty of conduct toward the public; put another way, adherence to a department directive does not render the conduct constitutional, and conversely the failure to follow a department protocol does not establish a constitutional violation. See Chapter 23: Evidence and Exhibits, II. The Federal Rules of Evidence and Specific Applications, B. Specific Applications; the Alphabetical List, 16. Directives, General Orders, Standard Operating Procedures; Chapter 24: Motions Practice, VI. Pre-Trial Motions, B. Motions in Limine, 7. Directives, General Orders, Standard Operating Procedures.

But when a police practice has achieved "general acceptance" in the field, it is admissible through expert testimony. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S.579, 588 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); Fed. R. Evid. 702. Chapter 22: Police Practices Experts, IV. Admissibility of Expert Testimony, B. Generally Accepted Practices and Procedures, not Just Personal Opinion; Chapter 23: Evidence and Exhibits, II. The Federal Rules of Evidence and Specific Applications, B. Specific Applications; the Alphabetical List, 36. Model Policies. Where multiple police organizations, the U.S. Department of Justice, police unions, think tanks, and manufacturers agree, a "consensus" policy effectively becomes a national standard; and its contents should be admissible through expert testimony on the issue of the "reasonableness" of force. Those "consensus" policies now include de-escalation and crisis intervention in dealing with suicidal and emotionally disturbed subjects and not shooting at vehicles when all an officer needs to do is to move out of its path.

PRACTICE TIP: A police practices expert will be able to testify as to the national, i.e., "consensus" standards on the use of force pertinent to the case; and whether, given an assumed set of facts, the defendant officers' conduct complied with those standards. The jury, thus informed, can then make the ultimate decision on the "objective reasonableness" of the use of force under the circumstances.

Police Body Worn Cameras (BWCs)

Issues arising from implementation of body worn camera programs are discussed in the "Practitioner's Guide," Chapter 12: First, Fifth, Sixth, Eighth Amendments, and Laws, II. First Amendment, C. Police-Citizen Encounters, 3. Body-Worn Cameras. The BWCs help to increase accountability and transparency, reduce escalation in the use of force, and eliminate meritless complaints against officers. The Americans for Effective Law Enforcement (AELE) has compiled model policies, reports and studies, litigation, privacy, Freedom of Information (FOIA), training issues and the like, available at http://www.aele.org/bwc-info.html.

An issue that has sparked the most debate and may be the most pertinent to litigators is whether officers involved in critical incidents should review their BWC video before or after they give a statement or write a report. After polling police executives, PERF favors allowing officers to review their BWC footage prior to making a statement as providing the best evidence of what actually took place. http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20bo

dy-worn%20camera%20program.pdf, at 29, 45. The DOJ Bureau of Justice Assistance says, "The decision to allow officers to review footage (or not) before making statements should be made locally based on discussion between the agency leaders, union representatives, and other relevant stakeholders such as prosecutors and independent law enforcement review boards, if applicable." https://www.bja.gov/bwc/pdfs/BWC_FAQs.pdf, at 23-24. As an organization supporting the rights of criminal defendants, the American Civil Liberties Union (ACLU) opposes allowing officers to review their BWC video prior to making statements. "A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement," available at http://www.aele.org./ACLUBWCAct.pdf. In *United States v. City of Seattle*, Case No. C12-1282JLR (W.D. Wash. 5/3/2017), the district court, in implementing a consent decree with the United States DOJ, allowed officers to review their video for minor but not major incidents involving the use of force.

PRACTICE TIP: An officer engaged in a critical incident may have perceived the time and distance as less than is shown on his/her BWC footage. The practitioner should be alert to the potential for cross-examination regardless of the timing of an officer's review. If he/she reviews the tape before giving a statement, that invites a question about whether the review altered the officer's initial perception. If an officer gives a statement and then supplements, or worse, alters it after reviewing the tape, that raises credibility issues about whether the officer changed his/her testimony.